



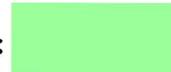
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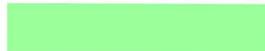
DATE: FEB 01 2013

Office: CHARLOTTE

FILE:



IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Charlotte, North Carolina. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the underlying application is approved.

The applicant is a native and citizen of China who was found to be inadmissible to the United States pursuant to section 212(a)(2)(D)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(D)(i) for having engaged in prostitution. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), to reside in the United States with her U.S. citizen husband. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed on her behalf by her U.S. citizen husband.

In a decision dated June 10, 2009, the Field Office Director concluded that the applicant did not establish that a qualifying relative would suffer extreme hardship and her application for a waiver of inadmissibility was denied accordingly. The applicant appealed that decision and the AAO dismissed the appeal on January 3, 2012, finding that the applicant failed to establish extreme hardship to her U.S. citizen spouse. The applicant filed a motion to reopen the AAO decision.

On motion, counsel for the applicant states that new, previously unavailable evidence illustrates that the qualifying relative would suffer extreme hardship.

The record contains, among other documentation, legal briefs by counsel for the applicant, letters from the applicant's husband, statements from the applicant, medical and psychological records for the applicant's spouse, medical records for the applicant, medical records for the applicant's father-in-law, photographs of the applicant and her family, educational records for the applicant, employment and financial records for the applicant's spouse, letters of support from family and friends, country conditions information for China, documentation of the applicant's criminal conviction.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

The Field Office Director found the applicant inadmissible to the United States under section 212(a)(2)(D)(i) of the Act. On appeal the AAO found that the applicant was not inadmissible under section 212(a)(2)(D)(i) of the Act but was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. On motion, the applicant's attorney does not contest that the applicant's conviction does not qualify as a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act. The applicant's attorney, however, continues to state on motion that the applicant is innocent of the criminal offense for which she was convicted. As noted in the prior appellate decision, in *Matter of Madrigal*, 21 I&N Dec. 323, 327 (BIA 1996), the Board held that collateral attacks on a conviction do not operate to

negate the finality of the conviction unless and until the conviction is overturned. A collateral attack on a judgment of conviction cannot be entertained “unless the judgment is void on its face,” and “it is improper to go behind the judicial record to determine the guilt or innocence...” *Id.* Moreover, the assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

...

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

In this case, the applicant's qualifying relative is her U.S. citizen husband. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and the AAO then assesses whether a favorable exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is “not a definable term of fixed and inflexible content or meaning,” but “necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying

relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d 1292, 1293 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

We will first look to the hardship that the applicant’s spouse would suffer if he were to be separated from the applicant. On motion, counsel for the applicant states that the applicant’s spouse would experience extreme emotional and physical hardship if he were to be separated from the applicant. In regards to the physical hardship, counsel states that the applicant’s spouse was recently diagnosed with Meniere’s disease, which has increased the applicant’s spouse’s reliance on the applicant for support. A letter dated January 22, 2012 from Dr. [REDACTED] M.D., states that the applicant’s spouse has experienced hearing loss and vertigo and his presumed diagnosis is “Meniere’s disease.” Dr. [REDACTED] says that the applicant’s spouse “has been compliant with treatment but his disease appears to be slowly progressive with constant unsteadiness.” He goes on to say that “the disease is chronic and often results in an inability to drive and live alone.” The applicant’s spouse states that he has at times been incapacitated by the illness and that he is grateful that his wife has been by his side during those times. The applicant’s spouse also says that he fears that his disease could affect his job and role as the primary

breadwinner of the family. The record indicates that the applicant's spouse works as a professional commercial contractor/ironworker on high-rise buildings, a position that relies on his balance and his ability to continue his job would be affected if his condition worsens. If that is the case, he says that he will need to rely on the applicant for financial support, as well as for the emotional and physical support she provides. The applicant's spouse states that the applicant contributes to the family income at present working as a nail technician, however, there was no documentary evidence submitted of her income on motion.

The applicant's spouse also states that he has suffered from emotional hardship as a result of loss of hope regarding the applicant's immigration process. He states that he fears that he would relapse into the suicidal depression that he felt at the end of his last marriage if he were to be separated from the applicant. The record evidences that the applicant's spouse suffered from major depression in 2000 after his separation from his previous wife and that he had suicidal ideations at that time. The record also indicates that the applicant's spouse consulted with a psychiatrist in January 2012 after learning that the applicant's appeal had been dismissed. The documentation concerning the applicant's spouse's most recent psychiatric consultation, which is largely illegible, does indicate that the applicant's spouse was prescribed medication and advised to go AA. The applicant's spouse states that applicant helps him to deal with his anxiety and that she brought hope back into his life. He also states that the couple has tried to have children, and the record demonstrates their fertility treatments, but they have been unable to conceive. As a result, the applicant's spouse states that he relies on his spouse to assist him now and in the future, and that the couple does not count on having adult children to support them. Having reviewed the evidence, the AAO finds it to establish that the applicant's spouse would experience extreme hardship if he were to be separated from the applicant. In reaching this conclusion, we note the applicant's spouse's prior history of depression and suicidal ideations upon separation from his previous wife as well as the applicant's worsening medical condition. Documentary evidence and statements from family and medical professionals establish that the emotional hardship in this case, coupled with the physical hardship, would be beyond that normally experienced by individuals as the result of separation due to immigration inadmissibility. The AAO concludes that, considering the evidence in the aggregate, the applicant's spouse would experience extreme hardship upon separation from the applicant.

The AAO also finds the record to establish that the applicant's spouse would experience extreme hardship if he were to relocate to China to reside with the applicant. The applicant's spouse is a native of the United States who is not familiar with the language or culture in China. The record demonstrates that the applicant's spouse, the primary breadwinner for the family, has had long term employment in the United States in the same geographic area and would face difficulties finding employment in China. The record also demonstrates that the applicant's spouse is suffering from Meniere's disease, which he states leaves him with less hope for finding employment abroad. Although, the record does not establish that treatment for the applicant's spouse's illness would be unavailable abroad, the record does establish that he is under the care of a doctor in the United States for his condition. The record also establishes that the applicant's spouse has extensive family ties in his local community in the United States, as well as property

ties. Counsel for the applicant submitted a projected budget for the applicant and her spouse in China, which suggests that the family would have difficulty making ends meet on the applicant's income alone. The AAO concludes that, considering the evidence in the aggregate, the applicant's spouse would experience extreme hardship should he relocate to China to reside with the applicant. When the specific hardship factors noted above and the hardships routinely created by the separation of families are considered in the aggregate, the AAO finds that the applicant has established that her spouse would face extreme hardship if the applicant's waiver request is denied. The applicant has established statutory eligibility for a waiver of her inadmissibility under section 212(h) of the Act.

In that the applicant has established that the bar to her admission would result in extreme hardship to her qualifying relative, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Morales*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives)...

Id. at 301. The AAO must then, "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's violation of the terms of her visa, periods of unauthorized presence and employment and her criminal conviction, for which she now seeks a waiver. The mitigating factors include the hardship to the applicant's spouse, the numerous letters in the record documenting the applicant's good moral character, and the length of time since the applicant's criminal conviction.

The AAO finds that the immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, when taken together, the mitigating factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. After a careful review of the record, the AAO finds that in the present motion, the applicant has met her burden.

ORDER: The motion is granted and the underlying application is approved.