

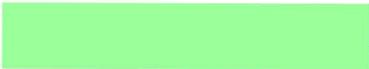


U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **FEB 07 2013** Office: RALEIGH-DURHAM, NC

FILE: 

IN RE: Applicant: 

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 PETITIONER:

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, appearing to read "Ron Rosenberg", with a long horizontal flourish extending to the right.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Raleigh-Durham, North Carolina, and a subsequent appeal before the Administrative Appeals Office (AAO) was remanded back to the field office director. The waiver application was denied again and certified to the AAO for review. The waiver application will be approved.

The applicant is a native and citizen of Mexico. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1182(a)(2)(A)(i)(II), as an alien convicted of a crime involving a controlled substance. The applicant's spouse and three children are U.S. citizens. The applicant seeks a waiver of his inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may live in the United States with his U.S. citizen spouse and children.

The field office director found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated April 11, 2012.

On certification, counsel asserts that the applicant's qualifying relatives would experience extreme hardship if the applicant is denied admission into the United States. *Counsel's Brief*, dated May 7, 2012.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statement, articles on medical care and education in Mexico, educational records for the applicant's three children, financial records, a psychological evaluation, medical records, statements from the applicant's oldest child, and statements from others who know the applicant and his spouse. The entire record was reviewed and considered in rendering a decision on the appeal

Section 212(a)(2)(A)(i)(II) of the Act provides in pertinent part that:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(II) a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

Section 212(h) of the Act, 8 U.S.C. § 1182(h), allows for a waiver of certain section 212(a)(2)(A)(i) offenses. Inadmissibility under section 212(a)(2)(A)(i)(II) of the Act is not covered by the section 212(h) of the Act waiver, except insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if:

(1)(B) [I]n 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 . . . it is established to the satisfaction of the Attorney General 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. . . .

The applicant has been convicted of only one controlled substance related crime - Possession of Marijuana up to ½ ounce, in violation of North Carolina Controlled Substance Act, GS 90-95(d)(4) on July 20, 1999. The applicant's Possession of Marijuana conviction renders him inadmissible under section 212(a)(2)(A)(i)(II) of the Act. However, because the applicant's conviction relates to a single offense of simple possession of 30 grams or less of marijuana, he is eligible to apply for a waiver of inadmissibility under section 212(h) of the Act.

A section 212(h)(1)(B) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, in this case the applicant's spouse and children. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (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 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, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984);

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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 at 1293 (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.

Counsel states that the applicant’s children would lose access to good quality schools; the children would likely experience culture shock and a significant delay in their educational development; and the applicant would not easily find employment in Mexico.

The applicant’s spouse states that she is very close with her mother and sisters who live in the United States; she fears that her family would not be able to receive the medical attention that they need; the weather is harsher and the water quality is poor in Mexico; her children are doing well in school and their educational opportunities will be severed if they have to adjust to the Mexican educational system; her two younger children speak limited Spanish; her younger children are not used to life and violence in Mexico; and she does not feel safe with her children being in Mexico and their life has been built in the United States. The record includes documentation reflecting that the applicant’s spouse was born in Guatemala.

The record includes articles on medical care in Mexico. The record includes educational records for the applicant’s three children. The record includes articles on education in Mexico.

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The record reflects that the applicant's spouse would likely be relocating to Mexico with at least two of her children, although it is not clear if her eldest daughter in college would relocate there. As such, she may be separated from one child. In addition, she would experience hardship due to her children's hardship in Mexico, in particular their loss of educational opportunities, difficulty adjusting to an unfamiliar country, and separation from their country, community, and culture. In addition, the applicant's spouse is originally from Guatemala and does not have ties to Mexico. She also has family ties in the United States. She has supported concerns related to medical and safety issues in Mexico. The record is not clear as to where she would reside in Mexico, however, the AAO notes the general safety issues as discussed in the November 20, 2012 U.S. Department of State Travel Warning, including a high rate of crime and pervasive narco-violence. Considering the hardship factors presented, and the normal results of relocation, the AAO finds that the applicant's spouse would experience extreme hardship upon relocating to Mexico.

Counsel states that the applicant and his spouse have been married for 21 years; they have three children who are emotionally attached to the applicant; his financial and emotional support are crucial for their character development; the applicant's spouse has been diagnosed with depression, has struggled with anxiety and has lost 20 pounds; she will experience hardship based on her children's hardship; the family's livelihood depends on the applicant as he provided for them financially; his family would not be able to afford medical care, housing and every day needs; and the applicant's spouse is able to work part-time and care for the younger children when the applicant is present.

The applicant's spouse states that the applicant was always a great father as he spent his days working to support the family and helping the children with their homework; her doctor told her that stress caused her painful headaches, vomiting and weight loss; she was diagnosed with severe depression; the applicant is the financial provider and emotional support for the family; she would not be able to pay for her daughter's tuition even if she worked two full-time jobs; it pains her to think that her daughter will not be able to finish college; her son is a happy child and he would be affected emotionally and mentally; she grew up with a father and knows how hard it was on her; and the situation is hard on her children and her daughters have regressed in school.

A psychologist who evaluated the applicant's spouse states that she has headaches two to three times a week and constant back pain; she fell recently due to dizziness; she has extreme sleep disturbance; she has low energy and poor concentration; and she has frequent crying spells and constant anxiety. She was diagnosed with Major depression, single episode, severe without psychotic features and Adjustment disorder with anxiety.

The applicant's spouse's mother and sister detail the emotional hardship that the applicant's spouse experiencing. A cousin and a CPA of the applicant detail his financial and emotional support for this family. His 2010 tax return reflects an income of approximately \$49,000.

The applicant's daughter, [REDACTED] states that the applicant has always been a great father; he taught her how to ride a bike and her brother and sister to be confident and strong; she fears for

her mother's health; he provides discipline in the household; and her father leaving could be psychologically traumatizing to the children.

The applicant's spouse's medical records reflect that she presented with five days of nausea, vomiting, dizziness and fatigue; and she noted a lot of stress in her life and was concerned that this was the source of her problems. The record includes numerous bills for the applicant and his spouse.

The record reflects that the applicant's spouse would experience significant emotional and psychological issues without the applicant. She has also experienced medical issues due to her stress. In addition, she would be raising her children without the applicant and would experience hardship due to their hardship. The record reflects that the applicant is the main source of financial support for the family. Considering the hardship factors presented, and the normal results of separation, the AAO finds that the applicant's spouse would experience extreme hardship upon remaining in the United States.

As the AAO has found extreme hardship to the applicant's spouse, it will not address whether his children would experience extreme hardship.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien 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).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). 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 entry without inspection, unauthorized period of stay, unauthorized employment, controlled substance conviction and conviction for simple assault on June 29, 1999.

The favorable factors include the presence of the applicant's U.S. citizen spouse and children, extreme hardship to his spouse, hardship to his children, payment of taxes, lack of criminal activity since 1999, and good character as detailed in several letters of support.

The AAO finds that the criminal and immigration violations committed by the applicant cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the waiver application will be approved.

In proceedings for 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. Here, the applicant has met that burden. Accordingly, the decision of the field office director will be withdrawn and the application will be approved.

ORDER: The decision of the field office director is withdrawn and the waiver application is approved.