

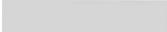


U.S. Citizenship
and Immigration
Services

(b)(6)



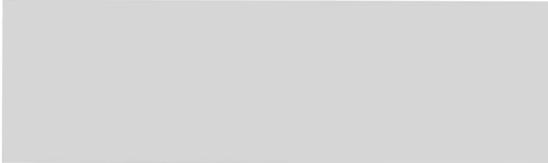
Date: **MAR 31 2015** Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(h)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,


for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Nebraska Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Nicaragua who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year, and seeking readmission within ten years of her removal from the United States. The applicant was further found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) and section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her U.S. lawful permanent resident spouse and her U.S. citizen children.

The Director concluded that although the applicant established that extreme hardship would be imposed on a qualifying relative, she failed to establish that the waiver should be granted as a matter of discretion, and denied the Form I-601, Application for Waiver of Ground of Inadmissibility (Form I-601) accordingly. *Decision of the Service Center Director*, dated June 27, 2014.

On appeal, the applicant asserts that she qualifies for a waiver under section 212(h)(1)(A) for her criminal convictions, and that the denial of the waiver was an abuse of discretion.

The record includes, but is not limited to, the following documentation: statements from the applicant and the applicant's spouse, a psychological evaluation for the applicant's spouse, medical documentation for the applicant's spouse, financial documentation, country-conditions information on Nicaragua, and the applicant's criminal records. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) of the Act provides, in pertinent part, that:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal.

The record indicates that the applicant entered the United States without inspection on [REDACTED] 1986, and was ordered deported by an immigration judge on [REDACTED] 1987. An appeal of this decision was dismissed by the Board of Immigration Appeals (BIA) on [REDACTED] 1990. The applicant remained in the United States until she was removed on [REDACTED] 2011. The applicant was unlawfully present in the United States for a period of more one year and therefore is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for a period of ten years. The applicant does not contest this inadmissibility.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(v) Waiver.-The Attorney General [now Secretary of Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The Director also found the applicant inadmissible under section 212(a)(2)(A)(i)(I) for three convictions for crimes involving moral turpitude between the years 1990 and 1997 and a fourth offense in 1999.¹

Section 212(a)(2)(A) of the Act states, in pertinent part:

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

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The record indicates that the applicant has the following criminal convictions:

- The applicant was convicted on [REDACTED] 1990 for violation of California Penal Code sections 484 and 490, petty theft of merchandise, and sentenced to 24 months probation.
- The applicant was convicted on [REDACTED] 1993 for violation of California Penal Code section 485, theft of personal property, and sentenced to probation.
- The applicant was convicted on [REDACTED], 1997 for violation of California Penal Code section 484 for petty theft and section 666 for theft with a prior theft-related offense, and sentenced to 2 days imprisonment and 24 months probation.

¹ In the brief submitted on appeal dated July 24, 2014, the applicant states that although she was also inadmissible under section 212(a)(2)(A)(i)(I) of the Act based on her three convictions of California Penal Code Section 484, the OF-194 refusal worksheet only mentioned inadmissibility under section 212(a)(9)(B)(i)(II). However, the Form OF-194 in the record states: "And section 212(2)(A)(i) for crime involving moral turpitude. This ineligibility never expires."

- The applicant was convicted on [REDACTED] 1999 for violation of California Penal Code section 242, battery, and sentenced to 20 days in jail and 24 months probation.

Section 212(h) of the Act provides, in pertinent part, that:

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

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that-

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status.

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(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 established to the satisfaction of the [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.

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

On appeal, the applicant does not contest the finding that she is inadmissible under section 212(a)(2)(A)(i)(I) based on her three theft convictions, and notes that these three offenses occurred more than 15 years prior to the date of her application for a visa. In regard to the applicant's conviction in 1999 for battery under California Penal Code section 242, the Director found that while the offense may not be a crime involving moral turpitude, it is a serious offense. The Director stated that the applicant failed to establish that she had been rehabilitated, and denied the waiver as a matter of discretion. The applicant contends that the Director abused his discretion in denying the applicant's application under section 212(h)(1)(A) of the Act, that the characterization of her misdemeanor battery conviction as a serious offense is unreasonable, and that she has been rehabilitated.

The applicant was also found inadmissible under section 212(a)(9)(B)(i)(II) of the Act. A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's lawful permanent resident spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver and U.S. Citizenship and Immigration Services (USCIS) 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 of Immigration Appeals (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); *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 v. INS*, 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.

The Director determined that the applicant established that her spouse would suffer extreme hardship if the waiver application is not granted. See *Decision of the Service Center Director*, dated June 27, 2014.

The record indicates that the applicant's spouse is experiencing medical, psychological, and financial hardships in the absence of the applicant. Medical documentation in the record indicates that he is suffering from respiratory problems and depression. A psychological evaluation included in the record shows that the applicant's spouse has been diagnosed with major depressive disorder. The applicant's spouse states that he earns approximately \$32,000 per year. The record includes documentation that the applicant's spouse sends money to the applicant in Nicaragua. The applicant's spouse states that he is unable to continue to pay for her support in Nicaragua and meet his expenses here in the United States. These hardships, when considered in the aggregate, are beyond the common results of separation and rise to the level of extreme hardship if he remains in the United States without the applicant.

With respect to relocation, the applicant's spouse is a lawful permanent resident of the United States and has resided in the United States since 1996. He is originally from Mexico and has never lived in Nicaragua. The applicant's spouse states that he has two sisters residing in the United States, his parents are deceased, and his other siblings reside in Mexico. He has no family members residing in Nicaragua that could provide support. The applicant's spouse further states that it would be difficult to find employment in Nicaragua due to the poor economy and it would also be difficult to afford health care for his medical conditions. Based on the evidence on the record, the applicant has established that her spouse would suffer extreme hardship if he was to relocate to Nicaragua to reside with her.

The record establishes that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. 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 . . . 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-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). We 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 favorable factors in this matter are:

- The extreme hardships the applicant's lawful permanent resident spouse is experiencing due to his separation from the applicant;
- The extreme hardships that applicant's spouse would experience were he to relocate to Nicaragua to be with her;
- The applicant has two U.S. citizen children in the United States;
- The applicant has two grandchildren in the United States, who were born to her daughter after her removal and whom she has never met;
- The fact that the applicant resided in the United States for more than 25 years before being removed; and
- The apparent lack of any criminal convictions in either the United States or in Nicaragua for more than 15 years.

The unfavorable factors are:

- The applicant's four criminal convictions between the years 1991 and 1999.

- The applicant's immigration violations of entering the United States without inspection and unlawful presence in the United States.

Although the applicant's immigration and criminal violations are serious, the record establishes that the positive factors in this case outweigh the negative factors and a favorable exercise of discretion is warranted. In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.²

ORDER: The appeal is sustained.

² We note that the applicant is also inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) as an alien who departed the United States while an order of removal was outstanding and who seeks admission within 10 years of the date of her last departure. The applicant filed Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) on May 30, 2013, which was the same date as she filed the Form I-601. The Director denied the Form I-212 on June 27, 2014 because the applicant was inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(2)(A)(i)(I) of the Act and her Form I-601 was denied. However, the applicant filed only one Form I-290B, Notice of Appeal or Motion, to appeal the denial of the Form I-601. There is no appeal of the denial of the Form I-212 on the record.