



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]

Office: MOSCOW, RUSSIA

Date: APR 30 2008

IN RE:

[REDACTED]

APPLICATION:

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

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Moscow, Russia. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Armenia 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 his last departure from the United States. The applicant is married to a U.S. citizen. He seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that the record does not establish that the hardship to the applicant's spouse rises to the level of extreme hardship. The application was denied accordingly. *Decision of the Field Office Director*, dated September 10, 2007.

On appeal, counsel questions the conclusions reached by the field office director and submits new evidence of financial hardship. *Form I-290B*, dated October 10, 2007.

The AAO notes that counsel's brief indicates that the applicant is also appealing the denial of his Application for Permission to Reapply for Admission (Form I-212). The record does not, however, indicate that the Field Office Director has considered the Form I-212 filed by the applicant on June 19, 2007. Neither has counsel submitted the separate fee that would be required to file an appeal of a denied Form I-212. Accordingly, only the applicant's appeal of the Form I-601 is now before the AAO.

In the present application, the record indicates that the applicant entered the United States on November 5, 2001 as a B-2 visitor with an authorized stay until May 4, 2002. On May 7, 2002 the applicant filed an Application for Asylum and Withholding of Removal (Form I-589). On July 1, 2002 the Form I-589 was referred to the immigration court. On August 15, 2002, an immigration judge denied the applicant's Form I-589 and ordered him to be removed from the United States. The applicant was removed from the United States on November 2, 2005. Therefore, the applicant accrued unlawful presence from the date he was ordered removed from the United States on August 15, 2002 until November 2, 2005, the date he departed the United States. In applying for an immigrant visa, the applicant is seeking admission within ten years of his November 2, 2005 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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

(B) Aliens Unlawfully Present.-

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

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission

within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(v) Waiver. – The Attorney General [now the 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 Attorney General [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.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the alien experiences or his children experience due to separation is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's spouse and/or parent.

The concept of extreme hardship to a qualifying relative “is not . . . fixed and inflexible,” and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted). Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that she resides in Armenia or in the event that she resides in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

The AAO notes that the record includes a letter from counsel requesting that the applicant's appeal be expedited. *Counsel's Letter*, dated January 18, 2008. The letter explains that the applicant's spouse is currently residing in Armenia with the applicant, she is pregnant and her brother has recently been charged with murdering a police officer in Maryland. Counsel requests that the applicant's case be expedited and the waiver application be granted. He states that applicant's spouse's parents are both dead and the applicant is the spouse's only means of emotional, physical or financial support. He states further that the applicant's spouse is under a lot of stress because her brother, who is now in prison awaiting trial, suffers from a debilitating life-long physical condition and clinical depression with physically manifested symptoms. The record includes statements from the applicant's spouse's brother, the brother's girlfriend, and a family friend which support these statements and the history of the applicant's spouse supporting her brother. The record also includes medical reports showing that the brother of the applicant's spouse suffers from stomach problems and has been attending psychotherapy sessions. Counsel states that the applicant's spouse feels crippled by not being able to come to the aid of her brother in organizing his legal defense and by not being able to care for her parents' estate. Counsel also notes that the applicant's spouse at the time of writing the letter was nine months pregnant with her second child. *Id.* The record includes a medical note stating that the applicant's spouse was 20-21 weeks pregnant in the first week of October. *Medical Note from Erebouni Medical Center*, dated October 3, 2007. The record also includes a news report showing that the applicant's spouse's brother was arrested on or about January 17, 2008 for killing a police officer. *News Channel 3 Report*, dated January 17, 2008.

In regard to the applicant's spouse's life in Armenia, counsel states that the applicant's spouse has not been able to obtain employment because she cannot speak Armenian and the economy is very poor. She has been taking money from her 401K plan in order to support her brother and make ends meet in Armenia. The record includes a 1099 Tax Form showing that she had a distribution from her 401K Plan of \$11,988.10 in 2005. The record also shows that the applicant is employed at a car dealership in Armenia for 100,000 AMD per month (approximately \$327 per month). *Letter from Employer*, dated October 3, 2007. Counsel states that with the addition of a second child the applicant's spouse's financial situation will become worse. The record includes pictures of electrical work in the applicant and his spouse's apartment building. Counsel states further that the applicant's spouse does not feel safe in Armenia, a country where she does not speak the language and 78 percent of women consider themselves victims of violence or harassment. Counsel submits the State Department Background Note for Armenia, which shows that societal violence against women is a problem and an article from The Network of East-West Women-Polska (NEWW), which states that 78 percent of the women they interviewed said they consider themselves dispirited and a subject of violence and sexual harassment. *NEWW Article*, printed October 10, 2007.

In the event that the applicant's spouse returns to the United States without the applicant, counsel states that she will suffer extreme hardship as a result of this separation. Upon her return, she will be faced with the possibility of losing her home, dealing with her brother's trial for murder and her parents' estate, finding employment and caring for two young children. The applicant's spouse states that she cannot survive emotionally or financially without the applicant. *Spouse's Statement*, dated October 10, 2007. Counsel states that the applicant's spouse cannot support her brother and her two children without the applicant. The record shows that day care in the applicant's spouse's hometown in Virginia is approximately \$10,400 to \$14,300 per year and the applicant's spouse earned approximately \$28,000 per year as a bill collector when she lived

in the United States. The record includes documentation showing tuition costs for three different day cares in Chesapeake, Virginia.

The AAO finds that the applicant's spouse is suffering extreme hardship while she resides in Armenia, a country where she does not speak the language and cannot find employment. The medical and legal problems surrounding the spouse's brother and the fact that the applicant's spouse is his only immediate family member exacerbates her situation and brings it to the level of extreme hardship.

Similarly, the AAO finds that the applicant's spouse would suffer extreme hardship if she returned to the United States without her husband and had to care for her two children on her own while assisting her brother and dealing with her parents' estate. Thus, the AAO finds that the applicant has established that his spouse would suffer extreme hardship as a result of his inadmissibility.

The AAO additionally finds that 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).

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-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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 include the applicant's unlawful employment in the United States, his failure to comply with the immigration judge's order of removal issued on August 15, 2002, his removal from the United States on November 2, 2005 and the shoplifting charges to which he pled guilty on February 21, 2002.¹

¹ The record does not provide sufficient evidence to establish whether the applicant's conviction for shoplifting constitutes a crime involving moral turpitude. The AAO notes, however, that a conviction for a crime involving moral turpitude, which would bar the applicant's admission to the United States under section

The favorable factors in the present case are the applicant's family ties to U.S. citizens, the extreme hardship suffered by his U.S. citizen spouse, the lack of any criminal record since 2002 and his attributes as a supportive father and spouse.

The AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal of the applicant's waiver application will be sustained.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.

212(a)(2)(A)(i)(I) of the Act, is also waivable based on a showing of extreme hardship to a qualifying relative under 212(h) of the Act. In that the designation of qualifying relatives under 212(i) is more restrictive than that provided under 212(h), the AAO does not find it necessary to address the applicant's potential inadmissibility based on his shoplifting conviction. An applicant able to establish eligibility for a waiver under the more restrictive requirements of section 212(i) of the Act has also satisfied the requirements of section 212(h) of the Act.