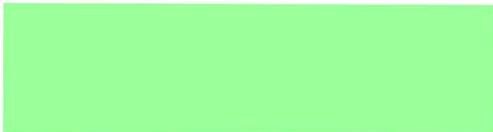




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: AUG 08 2014

Office: KENDALL, FL

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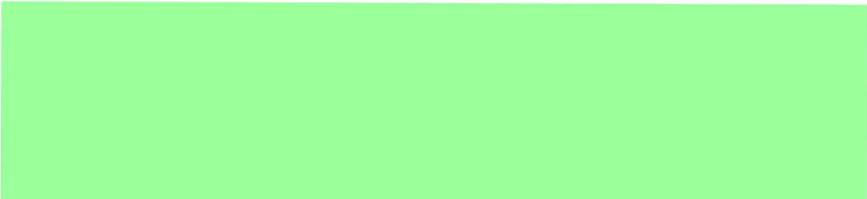


IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v) and Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

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,

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

Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Australia 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 10 years of his last departure from the United States. The applicant was also found inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or a material misrepresentation. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

In a decision, dated November 5, 2013, the field office director found that the applicant had not met his burden of proof in regards to extreme hardship and denied the waiver application accordingly.

On appeal, counsel asserts that the applicant is not inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States because it has now been 10 years since the applicant departed the United States. Counsel states that the applicant is also not inadmissible under section 212(a)(6)(C)(i) of the Act for having procured admission to the United States through fraud or a material misrepresentation. Counsel asserts that the applicant has established his spouse will suffer extreme familial, psychological, social, and financial hardship as a result of the applicant's inadmissibility.

Section 212(a)(9)of the Act provides:

(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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

...

(v) Waiver.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record indicates that the applicant entered the United States on August 11, 1996 as a visitor with an authorized period of stay until February 1997. The applicant did not depart the United States until June or July of 1998. The applicant then reentered the United States on May 6, 1999 and has not departed.

Counsel states that the applicant is no longer inadmissible under section 212(a)(9)(B)(i)(II) of the Act because it has been ten years since his departure from the United States. Counsel states that the 10 year bar continues to run even if the applicant reenters the United States. He cites to two letters to individual attorneys from former USCIS Chief Counsels dated July 14, 2006 and January 26, 2009 to support this assertion. Neither of these letters is an official USCIS policy memo. In any event, neither letter supports counsel's assertion. The July 14, 2006 letter refers to aliens who were paroled into the country pursuant to section 212(d)(5) of the Act. The January 26, 2009 letter refers to aliens paroled into the United States or lawfully admitted as a non-immigrant under section 212(d)(3) of the Act. The January 26, 2009 letter further states that "This interpretation will not aid an alien who returns to or remains in the United States unlawfully...." The applicant was not paroled in, nor was he granted a waiver of his inadmissibility under section 212(d)(3). In addition, the applicant's Form I-94 indicates that he was authorized to remain in the United States from May 6, 1999 until August 5, 1999. There is no indication that he received an extension of stay and, therefore, remained unlawfully in the United States after August 5, 1999.

In the present matter, the applicant was unlawfully present in the United States for over one year, between April 1, 1997, when the unlawful presence provisions of the Act went into effect, until his departure in June or July of 1998. He then remained outside of the country for less than ten years. Counsel has provided no convincing evidence that the applicant's period of inadmissibility continued to run after his reentry into the United States. The Immigration and Nationality Act makes clear that a foreign national must establish admissibility "clearly and beyond doubt." See section 235(b)(2)(A) of the Act; section 240(c)(2)(A) of the Act. The same is true for admissibility in the context of an application for adjustment of status. See *Kirong v. Mukasey*, 529 F.3d 800, 804 (8th Cir. 2008); *Rodriguez v. Mukasey*, 519 F.3d 773, 776 (8th Cir. 2008); *Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008). Accordingly, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act and requires a waiver of his inadmissibility under section 212(a)(9)(B)(v) of the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

(i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides:

(1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The record indicates that the applicant entered the United States on May 6, 1999 at the [redacted] Arizona port of entry with his Australian passport. He entered as a visitor after having a period of over one year of unlawful presence in the United States. The field office director determined, in a decision on the applicant's Application to Register Permanent Residence or Adjust Status, that in 1999, the applicant failed to disclose to the immigration officer at the port of entry that he had previously overstayed his authorized period of stay. However, the Department of State Foreign Affairs Manual (FAM) offers interpretations regarding the statutory reference to misrepresentations under section 212(a)(6)(C) of the Act; stating in part: "... (2) silence or the failure to volunteer information does not in itself constitute a misrepresentation..." The applicant states that he intended to return to Mexico for employment after a temporary stay in the United States and did not make a material misrepresentation to gain entry into the United States. The record contains no evidence of a material misrepresentation made by the applicant during this entry to the United States. The record does indicate that the applicant presented his Australian passport at this entry but does not indicate that the passport presented showed his previous entry into the United States. There is no way to ascertain what was asked of the applicant by the immigration officer at the port of entry or what was shown to the immigration officer beyond the applicant's valid Australian passport which allowed him entry under the visa waiver program. As the applicant has been found inadmissible under section 212(a)(9)(B)(i)(II) of the Act, we find, in this case, that it is unnecessary to reach a determination on his inadmissibility under section 212(a)(6)(C) of the Act.

The applicant requires a waiver of his inadmissibility under section 212(a)(9)(B)(v) of the Act. The applicant's qualifying relative is his U.S. citizen spouse.

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); *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. I.N.S.*, 138 F.3d 1292 (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 record of hardship includes: a statement from the applicant's spouse, statements from the applicant's spouse's family, numerous statements from the applicant's friends, a psychological evaluation for the applicant's spouse, and financial documentation.

The record establishes that the applicant's spouse will suffer extreme hardship as a result of the applicant's inadmissibility. The record indicates that the applicant's spouse will suffer extreme emotional hardship as a result of separation and extreme emotional and financial hardship as a result of relocation. The record establishes that the applicant's spouse suffered a significant and traumatic loss in her life five years ago when her first husband died of lung cancer. The record establishes that after ongoing treatment, the applicant's spouse's first husband died in her arms after collapsing in the Los Angeles airport. The record indicates that the applicant's spouse suffered post-traumatic stress disorder from this experience and went through a prolonged grieving process until meeting the applicant. A psychological evaluation and over twenty letters from family and friends support these assertions. The record indicates that the applicant's spouse's past experience with loss and grief is greatly influencing the way she is coping with the applicant's immigration situation.

In regards to separation, the record indicates that the applicant's spouse will suffer extreme emotional hardship as a result. The record indicates that the applicant's spouse is having a reoccurrence of her post traumatic stress disorder and is re-experiencing the loss of her first husband as she contemplates losing her current husband to removal. The record indicates that she is seeking psychotherapy for these symptoms and for symptoms of depression. Thus, the record indicates that the applicant's spouse will experience emotional hardship reaching the level of extreme as a result of separation.

In regards to relocation, the record indicates that the applicant's spouse has significant ties to the United States. She is 41 years old and has lived in the United States her entire life. Her whole family lives in the United States. She owns a business and a home in the United States. The record also shows, through over twenty letters from family and friends, that she and the applicant have significant ties to the community where they reside in Key West, Florida. In addition, the applicant has not lived in Australia for over 15 years. The record indicates that given the applicant's spouse's mental health problems in the past, she would also suffer as a result of losing her significant ties in the United States. Thus, the record indicates that given the applicant's spouse's experiences with loss in the past combined with her significant ties to the United States, relocating to Australia would cause her extreme hardship.

Considered in the aggregate, the applicant has established that his spouse would face extreme hardship if the applicant's waiver request is denied. Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 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.

Matter of Marin, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, 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 BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The unfavorable factors in the applicant's case include: the applicant's unlawful presence in the United States and his criminal record in the United States, including a misdemeanor theft conviction in 1997, a conviction for driving while under the influence of alcohol in 1998, and being found with a fraudulent social security card and lawful permanent resident card by police in Colorado. The favorable factors in the applicant's case include the extreme hardship the applicant's spouse will face as a result of the applicant's inadmissibility, the lack of any criminal record for 16 years, and, as evidenced by over thirty letters from family and friends, the applicant's positive attributes as a husband, friend, and member of the community.

Although the applicant's immigration 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. The burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.