U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-C-D-A-

DATE: DEC. 14, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF INADMISSIBILITY

The Applicant, a native and citizen of the Dominican Republic, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(i), 8 U.S.C. § 1182(i), and 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The Director, Nebraska Service Center, denied the application. The matter is now before us on appeal. The appeal will be sustained.

The Applicant was found inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure an immigration benefit by fraud or willful misrepresentation. The Applicant was also found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of 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 again seeking admission within 10 years of his last departure from the United States. 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 October 20, 2014 the Director noted that as the Applicant was also inadmissible under section 212(a)(9)(C)(i) of the Act, 8 U.S.C § 1182(a)(9)(C)(i), for being unlawfully present after previous immigration violations, the Applicant's inadmissibility would continue until he had obtained consent to reapply for admission. The Director further determined that the Applicant did not meet the requirements for consent to reapply because 10 years have not elapsed since the date of his last departure from the United States. The Director consequently denied the Form I-601 as a matter of discretion.

On appeal the Applicant asserts that consent to reapply is not necessary because section 212(a)(9)(C)(i) of the Act is not applicable to him, and that his waiver application should be adjudicated based on its merits. With the appeal the Applicant submits a statement. The entire record was reviewed and considered in rendering this decision.

In a separate decision we determined that the Applicant does not require consent to reapply for admission into the United States as he is not inadmissible under section 212(a)(9)(C)(i) of the Act. Thus the Applicant's Form I-601 waiver application will be adjudicated on its merits. We conduct appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 that:

> The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [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 Attorney General [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 reflects that the Applicant entered the United States without inspection near Puerto Rico, in December 1989, and departed on April 14, 1995 pursuant to a voluntary departure order. The record further reflects that on July 2, 1994, the Applicant attempted to obtain a United States passport by using the name and biographic information of another person. On 1994, the Applicant pled guilty in United States District Court for the District of Puerto Rico of violating Title 18 USC Section 1542, False Statement in Application for Passport and Use of a Passport Fraudulently Obtained. Based on this information the Director determined the Applicant inadmissible for fraud or misrepresentation. The Applicant has not contested this finding of inadmissibility.

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

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

> (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...

The record reflects that the Applicant last entered the United States without inspection in July 2004, and remained in the United States until departing on December 31, 2012, thus accruing unlawful presence of more than one year. The Applicant has not contested this finding of inadmissibility.

Waivers of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act are 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. The Applicant's U.S. citizen 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 USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 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 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. *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.

On appeal the Applicant asserts that his spouse is anxious about choosing between abandoning her home and extended family in the United States or being with the Applicant, and that she was feeling depressed even before the Applicant departed. In her own statement, the Applicant's spouse indicates that the Applicant provides economic and emotional support, that it is difficult for her without him, and that she sometimes feels desperation facing many problems alone.

A psychiatric evaluation of the spouse submitted in support describes the spouse as feeling anxious about being separated from the Applicant and notes that she claims experiencing insomnia, muscle pain, and stomach aches from fear of being alone. The evaluation states that tests show the spouse having adjustment disorder with mixed symptoms, including anxiety and depression, and the evaluator recommends therapy.

The Applicant maintains that he took his spouse to medical appointments and the spouse states that her health is deteriorating. Medical documentation in the record establishes that the spouse has been diagnosed with congestive heart failure, diabetes mellitus type 2, renal insufficiency and anemia, hypercholesterolemia, and status post RT pleural effusion. The medical documentation also

indicates that the spouse has follow-up appointments every three months when in stable condition, that her condition is permanent and progressive and will require medication and follow-up the rest of her life, and that failure to do so may be life threatening. It states that she is limited to mild physical activity, that she is unable to work, and that her prognosis is guarded.

The Applicant also maintains that his spouse's mortgage and a personal loan payment are more than her monthly retired teacher's pension even without considering personal expenses. The Applicant's spouse states that she depends on the Applicant's income from selling produce as he was providing for the majority of her economic needs. The Applicant contends that it is improbable that he can assist his spouse from the Dominican Republic based on the low per capita income.

Having reviewed the preceding evidence, we find it to establish that the Applicant's spouse is experiencing extreme hardship resulting from her separation from the Applicant. Considering the spouse's age, her emotional and medical conditions, and her financial status, we find that the circumstances presented in this application, considered in the aggregate, rise to the level of extreme hardship for the spouse due to separation from the Applicant.

We also find the record to establish that the Applicant's spouse would experience extreme hardship if she were to relocate to the Dominican Republic to reside with the Applicant. The record establishes that the Applicant's spouse was born and raised in the United States and has no ties to the Dominican Republic. In addition, the Applicant states that his spouse needs medications and long-term medical supervision to prevent her conditions from worsening and he cites concern about health care in the Dominican Republic. He states that he is from a small town far from the capital of that his spouse needs her primary doctor and health insurance, that she would not have health coverage in the Dominican Republic, and that she may not have access to brand name drugs. A medical report submitted by the Applicant highlights the importance of proper medication and close monitoring by a physician.

The Applicant further states that his spouse has children and grandchildren who she sees frequently, and three brothers living in the same town, so her close family ties would be disrupted if she were to relocate abroad. The Applicant also asserts that if his spouse were to relocate abroad she would be unable to pay creditors, she would become delinquent, her credit history will be damaged, and she may lose her home.

The record establishes the Applicant's spouse was born and raised in the United States. We find the record reflects that the cumulative effect of the spouse's serious health conditions and resulting concern for adequate medical care in the Dominican Republic, her close family ties in the United States, and the possible loss of her home if she were to relocate abroad, rises to the level of extreme.

A review of the documentation in the record, when considered in its totality, reflects that the Applicant has established that his U.S. citizen spouse would suffer extreme hardship were the Applicant unable to reside in the United States. Accordingly, we find 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 she 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). This office 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 hardship the Applicant's U.S. citizen spouse faces, regardless of whether she accompanies the Applicant or stays in the United States; letters of support for the Applicant; home ownership; the Applicant's lack of a criminal record since his 1994 conviction detailed above, more than 20 years ago; and his timely departure from the United State pursuant to a voluntary departure order. The negative factors are the Applicant's entries to the United States without authorization, fraud or misrepresentation as detailed above, his placement in removal proceedings, and periods of unlawful presence and employment in the United States. 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.

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.

ORDER: The appeal is sustained.

Cite as *Matter of L-C-D-A-*, ID# 12110 (AAO Dec. 14, 2015)