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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



H6

FILE:

Office: NEW YORK, NEW YORK

Date: APR 16 2010

IN RE:



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:



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.

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York. 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 Senegal 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 the spouse of a U.S. citizen and she seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated August 7, 2009, the district director found that the applicant's spouse's claims of hardship did not rise to the level of extreme hardship. The district director stated that the medical problems of the applicant's mother-in-law were not relevant to the waiver application, that the applicant's spouse did not submit medical documentation regarding her own medical problems, and that the issues surrounding family planning and the applicant's employment did not constitute extreme hardship. The application was denied accordingly.

In a brief dated September 4, 2009, counsel states that because of the applicant's mother-in-law's severe medical problems she requires constant care from the applicant's spouse, making it impossible for the applicant's spouse to relocate to be with the applicant. Counsel also states that the applicant's spouse relies on the applicant for help with her everyday activities as she suffered a knee injury requiring surgery and rehabilitation for which she still experiences significant pain. Finally, counsel states that the positive equities in the applicant's case outweigh the negative equities.

The AAO notes that the applicant has a criminal record including three convictions for disorderly conduct. On December 12, 2001 the applicant was arrested in New York for Trademark Counterfeiting, Criminal Impersonation, and Criminal Possession of a Forged Instrument. On February 13, 2002 he pled guilty to disorderly conduct under New York Penal Law (NYPL) § 240.20. On November 10, 2004 the applicant was arrested again for Trademark Counterfeiting under NYPL § 165.71 and Failure to Disclose the Origin of a Recording under NYPL § 275.35. On November 11, 2004 he pled guilty to disorderly conduct under NYPL § 240.20. Finally, the applicant was arrested on January 5, 2005 for Trademark Counterfeiting under NYPL § 165.71. On January 7, 2005 he pled guilty to disorderly conduct under NYPL § 240.20. The AAO finds that disorderly conduct generally is not a crime involving moral turpitude where evil intent is not necessarily involved. See *Matter of S-*, 5 I. & N. Dec. 576 (BIA 1953); *Matter of P-*, 2 I. & N. Dec. 117 (BIA 1944); and *Matter of Mueller*, 11 I. & N. Dec. 268 (BIA 1965).

NYPL § 240.20 states:

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

Disorderly conduct is a violation.

The AAO notes that the statute does not include acts involving evil intent. Thus, the applicant's convictions are not for crimes involving moral turpitude.

The record indicates that the applicant entered the United States with a B2 visitor's visa on September 12, 1998. On April 26, 2005 the applicant filed an Application for Status as a Temporary Resident (Form I-687). He also applied for and was granted advanced parole at that time. The applicant remained in the United States until sometime in 2005 and then was paroled into the United States on February 2, 2006. Therefore, the applicant accrued unlawful presence from when his authorized stay under his visitor's visa expired until 2005 when he departed the United States. In applying to adjust his status, the applicant is seeking admission within ten years of his 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. The AAO notes that the applicant submitted an Application to Register Permanent Residence or to Adjust Status on April 3, 2009.

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.

The AAO notes that section 212(a)(9)(B)(v) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relative that qualifies is the applicant's spouse. Hardship to the applicant is not considered under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

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).

The AAO notes that in *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[w]hen the BIA fails to

give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” (Citations omitted). Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes further, however, that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant and in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The record of hardship includes two affidavits from the applicant’s spouse, a note from the applicant’s mother-in-law’s doctor, a medical report for the applicant’s spouse, and a letter from a civil surgeon in New York concerning the applicant’s mother-in-law’s condition.

In an updated hardship affidavit dated August 7, 2009, the applicant’s spouse states that her mother suffers from blindness, kidney failure, lung problems, heart problems, diabetes, and a brain lesion. She states that she relies on the applicant to make sure that her mother is taken care of and that she does not want to have to choose between caring for her mother and being with the applicant. In a hardship affidavit dated April 14, 2009, the applicant’s spouse states that her mother cannot do anything for herself without immense difficulty and that she has been on dialysis since November 2008. She also states that the applicant is employed as a chef which allows her to help with her mother. She states that without the applicant she would have to work and care for her mother and she is not sure that she would be able to handle doing both. The AAO notes that the applicant’s spouse does states that she has a sister who would help with caring for their mother, but her sister lost her job and no longer helps.

The applicant’s spouse states further that she also suffers from physical pain as a result of a severe knee injury. She states that she has had three surgeries on her knee and at times must walk with a cane or crutch. She also states that because of this impairment she does not feel like she can have a full time job. She states that she fears hurting her knee again if she were to go back to work full time. In her statement the applicant’s spouse also states that she and the applicant hope

to have children one day and that she wants to raise her children in the United States. Finally, she states that ever since she found out about the decision regarding her husband's immigration status she has been extremely depressed. She states that she was born in the United States, she has lived here her whole life, and everyone she knows in the United States.

A note from the applicant's mother-in-law's doctor dated July 29, 2009 states that the applicant's mother-in-law is legally blind. In a letter dated September 1, 2009, [REDACTED] a civil surgeon in New York, states that the applicant's spouse has had to reduce her work hours to care for her increasingly debilitated 75-year-old mother. He states that the applicant's mother-in-law has chronic stage III heart failure and aortic valve insufficiency. He also states that the applicant's mother-in-law suffers from hypertension and insulin dependent type II diabetes with progressive renal failure. He states that the applicant's mother-in-law is blind and in need of dialysis. He states that she has also been advised to have hip replacement surgery for chronic pain. [REDACTED] asserts that the applicant's mother-in-law needs daily full-time home assistance in order to meet her daily needs.

The AAO notes that the record indicates that the applicant's spouse is a Licensed Practical Nurse who currently works through a staffing agency and earns \$26.00 per hour. The letter from [REDACTED] states that she is working part-time.

The AAO finds that the record establishes that the applicant's spouse will suffer extreme hardship as a result of the applicant's inadmissibility. The AAO finds that it would be extreme hardship for the applicant's spouse to relocate to Senegal given that she would no longer be able to care for her mother. In addition, the applicant's spouse was born and has lived her entire life in the United States, and she would suffer hardship adjusting to a different culture and language.

The AAO finds further that it would be extreme hardship for the applicant's spouse to be separated from the applicant. The record shows that the applicant's spouse is a Licensed Practical Nurse. The record also shows that she suffers from a significant knee injury, which she states does not allow her to work full time. She also states that the applicant works fulltime, allowing her to work only part time and to care for her mother. If the applicant were removed from the United States, the applicant's spouse would no longer have his economic and emotional support, thus making her ability to care for her mother much more difficult and causing her extreme hardship.

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 are the applicant’s unlawful presence in the United States, his illegal residence in the United States, and his criminal record of three convictions for disorderly conduct.

The favorable factors in the present case are the extreme hardship to the applicant’s U.S. citizen spouse if the applicant were to be denied a waiver of inadmissibility, the emotional and economic support the applicant provides his spouse, and, as indicated in a letter from the applicant’s employer, the applicant’s attributes as an intelligent and motivated individual and entrepreneur.

The AAO finds that the immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, 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 will be sustained.

ORDER: The appeal is sustained.