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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

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[REDACTED]

FILE:

[REDACTED]

Office: PHILADELPHIA, PENNSYLVANIA

Date:

OCT 28 2010

IN RE:

Applicant:

[REDACTED]

APPLICATION:

Immigrant Application for Waiver of Grounds of Inadmissibility pursuant to 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Tariq Syed
for

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania. 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 [REDACTED] who was found to be inadmissible to the United States under 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 seeking readmission within ten years of his last departure from the United States. The applicant is married to a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse and their child.

The Field Office Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the Field Office Director*, dated June 19, 2008.

On appeal, counsel for the applicant states that the applicant has shown that his qualifying relative would experience extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, a statement from the applicant's spouse; a statement from the applicant's child's school; an employment letter for the applicant; earnings statements for the applicant; tax statements; statements from friends; medical records for the applicant's spouse; a statement from the physical therapist of the applicant's spouse; country conditions reports; bank statements; car insurance statements; an apartment lease statement; a police clearance letter for the applicant; criminal documents for the applicant; a statement from the applicant; and statements from friends. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

In the present case, the record indicates that the applicant entered the United States without inspection on March 31, 1995. *Form I-485, Application to Register Permanent Resident or Adjust Status*. On October 18, 1999 the applicant married a United States citizen. *Marriage certificate*. The applicant's spouse filed a Form I-130, Petition for Alien Relative which was approved on October 11, 2001. *Approval Notice*, dated October 11, 2001. On February 21, 2002, the applicant filed to adjust his status to lawful permanent resident. *Form I-485, Application to Register Permanent Resident or Adjust Status*. According to counsel, the applicant departed the United States on November 13, 2003 and returned to the United States in March 2004 under an order of advance parole. *Attorney's brief; Form I-512, Authorization for Parole of an Alien Into the United States*. The applicant, therefore, accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until he filed to adjust his status on February 21, 2002. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General (now Secretary) as an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See United States Citizenship and Immigration Services Consolidated Guidance on Unlawful Presence*, at 33, dated May 6, 2009. In applying to adjust his status to that of lawful permanent resident, the applicant is seeking admission within ten years of his November 13, 2003 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.¹

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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 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 or children

¹ The AAO notes that on September 18, 1994 the applicant was arrested for Trespassing and the charge was subsequently dropped/abandoned. *FBI printout sheet*. On January 8, 1996 the applicant pled guilty to the offense of Failure to Stop and Give Information in [REDACTED]. *Certificate of Disposition*, [REDACTED], Harris County District Clerk, Houston, Texas. He was sentenced to serve 25 days in jail. *Id.* The AAO finds that the applicant's conviction does not render him inadmissible under section 212(a)(2)(A) of the Act.

can be considered only insofar as it results in hardship to a qualifying relative. The applicant's 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-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. Cf. *Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to [REDACTED] finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly

where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

If the applicant's spouse joins the applicant in [REDACTED], the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in [REDACTED] *Birth certificate*. She notes that due to her health conditions, she cannot work. *Statement from the applicant's spouse*, dated January 25, 2006. Medical documentation included in the record notes that the applicant's spouse has been diagnosed with [REDACTED] and [REDACTED] and has a [REDACTED] *Statement from* [REDACTED] dated November 24, 2000. Her physical therapist notes that her pain is severe enough that she is unable to work, and that she complains of increased pain with activities of daily living including housekeeping and picking up her child. *Statement from* [REDACTED], dated January 30, 2006. The AAO observes that the applicant has worked as a packing inspector and in landscaping in the United States. *Form G-325A, Biographic Information sheet, for the applicant*. The AAO also notes that published country conditions reports included in the record state that the minimum wages in [REDACTED] did not provide a decent standard of living for a worker and family. [REDACTED] *Country Reports on Human Rights Practices – 2004, United States Department of State*, dated February 28, 2005. The AAO also notes that the applicant's child is in full-time elementary school in the United States. *Statement from* [REDACTED] dated January 9, 2006. When looking at the aforementioned factors, particularly the applicant's spouse's lack of cultural ties to [REDACTED] her health conditions as documented by a licensed healthcare professional, the consistent treatment she has been receiving in the United States, her inability to work due to these conditions, and the disruption in school for her child, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in [REDACTED].

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse was born in [REDACTED] *Birth certificate*. She notes that due to her health conditions, she cannot work. *Statement from the applicant's spouse*, dated January 25, 2006. Medical documentation included in the record notes that the applicant's spouse has been [REDACTED] and [REDACTED] has a learning disability. *Statement from* [REDACTED], dated November 24, 2000. The applicant's spouse notes that due to her physical health conditions, she heavily relies on the applicant in raising their child and she simply could not do it on her own. *Statement from the applicant's spouse*, dated January 25, 2006. The physical therapist of the applicant's spouse notes that her pain is severe enough that she is unable to work, and that she complains of increased pain with activities of daily living including housekeeping and picking up her child. *Statement from*

[REDACTED] dated January 30, 2006. The applicant's spouse notes that due to her inability to work, the applicant pays for all of their family's expenses. *Statement from the applicant's spouse*, dated January 25, 2006. The record includes a car insurance statement documenting an expense for the applicant. *Car insurance statement*. While the AAO acknowledges this documented expense, it notes that the record fails to document additional expenses, such as rent/mortgage statements, credit card statements, and utility bills. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Nevertheless, the AAO acknowledges that the applicant's spouse is unable to work and recognizes the difficulties, both financial and physical, in being a single parent with a health condition that affects her daily living. The AAO also acknowledges the statement of the applicant's spouse on the Form I-864, Affidavit of Support, noting that she receives welfare and foodstamps from the State of Pennsylvania. *Form I-864, Affidavit of Support*. The applicant's spouse also notes that she and her child would be devastated if the applicant were not permitted to remain in the United States with them. *Statement from the applicant's spouse*, dated January 25, 2006. When looking at the aforementioned factors, particularly the health conditions of the applicant's spouse as documented by a licensed healthcare professional, her documented inability to work, the financial difficulties, as well as the difficulties of being a single parent with these health conditions, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to remain in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. 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).

The adverse factors in the present case are the applicant's 1995 entry without inspection, his prior unlawful presence for which he now seeks a waiver, his unauthorized employment while in the United States, and his 1996 criminal conviction. The favorable and mitigating factors are his United States citizen spouse, his United States citizen child, his lack of a criminal record since 1996, the extreme hardship to his spouse if he were refused admission and his supportive relationship with his spouse and family, as documented by letters of support submitted into the record.

The AAO finds that, although the immigration violations committed by the applicant are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.