



U.S. Citizenship
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[REDACTED]

IDAHO FALLS, ID 83401

FILE: [REDACTED] Office: MEXICO CITY (PANAMA) Date: SEP 09 2010

IN RE: Applicant: [REDACTED]

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

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Thank you,

Perry Rhew
for
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Mexico City. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Panama who was found to be inadmissible to the United States 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 section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), as an alien unlawfully present after a previous immigration violation. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside with his wife and child in the United States.

The acting district director found that the applicant failed to establish extreme hardship to his spouse and denied the waiver application accordingly. *Decision of the Acting District Director*, dated January 24, 2008.

On appeal, counsel contends that the applicant is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act. Counsel further contends that the applicant established the requisite extreme hardship.

The record contains, *inter alia*: a marriage certificate of the applicant and his wife, [REDACTED] indicating they were married on September 22, 2005; an affidavit and three letters from [REDACTED] an affidavit from [REDACTED] sister; letters from health care professionals; a psychological evaluation for [REDACTED] letters of support; pictures of the applicant and his family; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(9) of the Act states in pertinent part:

....

(C) Aliens unlawfully present after previous immigration violations. -

(i) In general. - Any alien who -

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception. - Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver. - The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between--

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

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

(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 this case, the acting district director found that the applicant departed the United States in August 1999 after an eight month visit during which he had attended free adult education classes in English for five months. The director stated that the applicant attempted to re-enter the United States in September 1999 using a B1/B2 visitor visa, but was denied admission because he admitted he was

returning to take another six months of free classes and was, therefore, a student without the proper visa. The director stated that the applicant was charged with violating section 212(a)(7)(B)(i)(II) of the Act as a nonimmigrant not in possession of a valid immigrant visa at the time of application for admission. In addition, the director found that the applicant entered the United States without inspection in March 2000 and remained until his departure in February 2, 2007.

The applicant accrued unlawful presence from March 2000 until his departure from the United States in February 2007. Therefore, the applicant accrued unlawful presence of almost seven years. He now seeks admission within ten years of his February 2007 departure. Accordingly, he is 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 one year or more and seeking admission to the United States within ten years of his last departure.

With respect to whether or not the applicant is also inadmissible to the United States under section 212(a)(9)(C)(i)(I) of the Act as an alien unlawfully present after a previous immigration violation, counsel contends that the applicant should not have been denied reentry into the United States because his primary purpose was not to attend classes and he should not have been found to be a "student" at the time of his attempted reentry. In support of this contention, the applicant submits an affidavit from his sister, [REDACTED] [REDACTED] states that when her brother visited the United States in 1999, she was working as a teacher's aide in a junior high school. She states that because her brother was bored at home while she was at work and most of the students were the children of migrant workers from Mexico who showed an interest in learning about Panama, she obtained permission from the school principal for her brother to visit the classroom. [REDACTED] states that her brother was not a "student" in the class, but rather, "simply a visitor and observer" who sat in the back of the room or in a corner, did not participate in class discussions, never used any of the school's materials or books, and never completed any assignments or took any tests. According to [REDACTED] her brother visited her classroom a total of five or six times. *Affidavit of [REDACTED]* dated February 20, 2008.

The AAO agrees with counsel that the applicant is not inadmissible to the United States under section 212(a)(9)(C)(i)(I) of the Act, albeit for different reasons. As stated above, section 212(a)(9)(C)(i)(I) of the Act makes an alien who "has been unlawfully present in the United States for an aggregate period of more than 1 year," and who subsequently reenters the United States without being admitted, inadmissible. In the instant case, the record does not show that *prior* to his entry without inspection, the applicant was unlawfully present for an aggregate period of more than one year. Therefore, regardless of whether or not the applicant was a student at the time of his entry without inspection in March 2000, the AAO finds that section 212(a)(9)(C)(i)(I) of the Act is inapplicable. *See generally USCIS Interoffice Memorandum Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009 ("To be permanently inadmissible under section 212(a)(9)(C)(i)(I) of the Act, an alien must have accrued more than one (1) year of unlawful presence in the aggregate, must have left the United States thereafter, and must then have entered or attempted to reenter the United

States without being admitted.”). Therefore, the applicant is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act as an alien unlawfully present after a previous immigration violation.

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 his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant’s wife 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 Mexico, 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.

In this case, the applicant’s wife, [REDACTED], states that her husband has not had the opportunity to meet their newborn daughter who was born in March 2008. She states that she is currently unemployed and lives with her mother, but contends that she cannot keep living with her mother because there is not enough room. She states her mother works at a grocery store and is unable to financially support her. [REDACTED] states her father gives her about a hundred dollars each month. In addition, [REDACTED] contends she cannot move to Panama to be with her husband because she has a condition called insulin resistance and will be unable to obtain the medication she needs in Panama. Furthermore, [REDACTED] states that the last time she was in Panama, she became very ill after contracting a parasite. She states

she has lived her entire life in Idaho and that all of her family lives nearby. She contends does not speak Spanish and has only a high school education. *Letters from* [REDACTED] dated June 13, 2008, September 11, 2007, and March 29, 2007; *Affidavit of* [REDACTED], dated February 27, 2008

A letter from a nurse practitioner states that [REDACTED] has been diagnosed with insulin resistance, dysmetabolic syndrome, hypoglycemia, and a history of dysfunctional uterine bleeding. The nurse states that [REDACTED] has been prescribed Metformin and Byetta. According to the nurse, Byetta is unavailable in Panama. *Letters from* [REDACTED] dated March 13, 2008, and September 9, 2007. The applicant has submitted other documentation supporting the unavailability of Byetta in Panama. *See, e.g., 'Byetta' – New Diabetes Injection by Eli Lilly*, dated November 21, 2007 (stating that Byetta is available in the United States, the United Kingdom, Germany, and India).

Another letter from a nurse practitioner states that [REDACTED] acquired a parasitic infection while in Panama which caused her persistent, bloody diarrhea, and abdominal pain. The nurse states that [REDACTED] had a “complicated course” of infection and that it was severe enough to require her to return to the United States. According to the nurse, “[r]eturning to Panama, will likely lead to repeat exposure to the pathogen and could lead to recurrence of the infection.” [REDACTED] was continuing to be treated for several conditions related to her infection, including: anal/rectal pain, constipation, external hemorrhoids, blood in stool, diarrhea, and generalized abdominal pain. *Letter from* [REDACTED] dated September 6, 2007.

A diagnostic evaluation in the record states that [REDACTED] is experiencing sleep disturbance, fearfulness, and sadness. The social worker diagnosed [REDACTED] with Adjustment Disorder with Mixed Anxiety and Depression. In addition, the social worker states that [REDACTED] symptoms will go away when her husband is able to live with her legally in the United States, and contends that if he is unable to return to the country, she will likely develop Major Depressive Disorder. *Diagnostic Evaluation by* [REDACTED] dated September 5, 2007.

After a careful review of the record, it is not evident that the applicant’s wife has suffered or will suffer extreme hardship as a result of the applicant’s waiver being denied.

The AAO finds that if [REDACTED] had to move to Panama to be with her husband, she would experience extreme hardship. The record shows that [REDACTED] has insulin resistance for which she takes Byetta, a drug that is unavailable in Panama. *Letter from* [REDACTED] dated March 13, 2008; *'Byetta' – New Diabetes Injection by* [REDACTED] *supra*. In addition, [REDACTED] would need to adjust to a life in Panama after having lived in the United States her entire life, a difficult situation made even more complicated considering her medical condition, her inability to speak Spanish, and the fact that her entire family lives in the United States. In sum, the hardship [REDACTED] would experience if she had to move to Panama is extreme, going beyond those hardships ordinarily associated with the inadmissibility of a spouse.

Nonetheless, [REDACTED] has the option of staying in the United States and the record does not show that she would suffer extreme hardship if she were to remain in the United States without her husband.

Although the AAO is sympathetic to the family's circumstances, if [REDACTED] decides to stay in the United States, their situation is typical of individuals separated as a result of inadmissibility or exclusion and does not rise to the level of extreme hardship based on the record. The BIA and the Courts of Appeals have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. For example, *Matter of Pilch, supra*, held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *See also Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991) (uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported).

Regarding the diagnostic evaluation, the AAO notes that the evaluation in the record is based on a single interview the social worker conducted with [REDACTED] on September 5, 2007. The record thus fails to reflect an ongoing relationship between a mental health professional and the applicant's wife. In addition, there is no evidence that there is a history of treatment for anxiety and depression. Moreover, the conclusions reached in the submitted evaluation do not reflect the insight and elaboration commensurate with an established relationship with a mental health professional, thereby diminishing the evaluation's value to a determination of extreme hardship.

Regarding the financial hardship claim, the applicant has not submitted any financial or tax documents to support his claim. There is no evidence addressing either the applicant's or [REDACTED] former or current income or wages, and there is no evidence addressing [REDACTED] regular, monthly expenses. Without more detailed information, the AAO is not in the position to attribute any financial difficulties [REDACTED] may be experiencing to the applicant's departure. In any event, even assuming some economic hardship, the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship).

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's wife caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility, 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.