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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals (AAO)
20 Massachusetts Ave., N.W., MS2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

PUBLIC COPY



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DATE: JUL 13 2011 Office: ROME, ITALY FILE:

IN RE: Applicant:

APPLICATION: 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:

SELF-REPRESENTED

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,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Tunisia 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 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.

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 February 3, 2009.

On appeal, the applicant's spouse asserts that she would suffer extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion*.

In support of these assertions the record includes, but is not limited to, employment letters for the applicant's spouse; statements from family members and friends; statements from the applicant's spouse; a referral form from [REDACTED] a statement from a drug and alcohol residential program; treatment completion certificates; criminal records; statements and emails from the applicant; bank statements; utility statements; telephone statements; and apartment leases. 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.

In the present case, the record indicates that the applicant was admitted to the United States at New York, New York on September 26, 1996 with a valid B-2 visa with authorization to remain until March 25, 1997. *Form I-94, Departure Card*. The applicant remained in the United States and on January 24, 2002 an immigration judge granted him voluntary departure until May 24, 2002. *Order of the Immigration Judge*, dated January 24, 2002. On January 31, 2002 the applicant pleaded guilty to driving under the influence. *Criminal records*. The AAO observes that the record includes an airline ticket and boarding pass for the applicant showing a departure date of March 21, 2002.

Airline ticket and boarding pass. It is unclear as to whether the applicant actually departed the United States on that date. On July 2, 2002 the District Director issued the applicant a stay of removal and he was placed under an Order of Supervision. *Decision of the District Director*, dated July 2, 2002; *Forms I-220B, Order of Supervision*. On November 12, 2002 the applicant was issued a subpoena as a witness in a robbery case. *Witness Subpoena, Philadelphia, Pennsylvania*. He remained in the United States under an Order of Supervision until he was removed on July 19, 2004. *Consular Interview Notes, United States Consulate, Tunis, Tunisia*, dated October 8, 2008. The applicant, therefore, accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until the immigration judge granted him voluntary departure on January 24, 2002. 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.

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 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-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. *See Salcido-Salcido*, 138 F.3d at 1293 (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 applicant's spouse was born in the United States and her parents were born and reside in the United States. *See Form G-325A, Biographic Information sheet, for the applicant's spouse*. The AAO notes that on January 13, 2011 the United States Department of State issued a Travel Alert for Tunisia. *Travel Alert, Tunisia, United States Department of State*, dated January 13, 2011. The United States Department of State alerts United States citizens to the intensifying political and social unrest in Tunisia and recommends deferring non-essential travel to Tunisia at this time. *Id.* The unrest has recently spread to Tunis and all major cities, including popular tourist destinations. *Id.* While the AAO acknowledges that this Travel Alert expired on February 12, 2011, it notes that a current Travel Alert is in effect concerning "the potential for ongoing political and social unrest in

Tunisia.” It states, “Unrest has diminished and public order has returned in many areas, including the developed tourist zones; however, spontaneous and unpredictable events, such as work stoppages and demonstrations, have recently occurred,” and warns that the U.S. Department of State continues to advise U.S. citizens currently in Tunisia to defer non-essential travel to the central and western regions of Tunisia.” *Travel Alert, Tunisia, United States Department of State*, dated April 11, 2011. When looking at the aforementioned factors, particularly the lack of familial and cultural ties of the applicant’s spouse to Tunisia and the effect this would have upon her adjustment, as well as the documented country conditions reports, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in Tunisia.

As previously noted, the applicant’s spouse was born in the United States. *Birth certificate*. Her parents were born and reside in the United States. *Form G-325A, Biographic Information sheet, for the applicant’s spouse*. After being separated from the applicant, the applicant’s spouse states she became increasingly unstable and began to abuse alcohol, which led, in a period of months, to job loss, the placement of her two children into foster care and temporary homelessness. *Consular Interview Notes, United States Consulate, Tunis, Tunisia*, dated October 8, 2008. The applicant’s spouse successfully completed an in-patient alcohol treatment program and has now taken a position as a counselor at a halfway house for women. *Id.; Referral form from [REDACTED]* dated June 10, 2005; *Statement from Fresh Start, Drug & Alcohol residential program*, dated November 16, 2005; *Treatment completion certificates for the applicant’s spouse; and employment letters for the applicant’s spouse*. She states that the presence of the applicant is critical to her continued emotional stability, as she continues to maintain sobriety through group therapy and support sessions. *Consular Interview Notes, United States Consulate, Tunis, Tunisia*, dated October 8, 2008; *Statement from the applicant’s spouse*, dated November 26, 2008.

The applicant’s spouse also notes that her employment does not pay much and it is difficult to make ends meet without the financial support of the applicant. *Statement from the applicant’s spouse*, dated November 26, 2008. An employment letter included in the record states that the applicant’s spouse works 40 hours a week at an hourly rate of \$10.00 per hour. *Employment letter for the applicant’s spouse*, dated July 23, 2008. The record also includes documentation of the various expenses of the applicant’s spouse which include utility statements; telephone statements; and apartment leases. When looking at the aforementioned factors, particularly the documented conditions of the applicant’s spouse and the emotional harm their separation has caused, as well as her documented financial difficulties, 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 unlawful presence for which he now seeks a waiver and his criminal record for driving under the influence. The favorable and mitigating factors are his United States citizen spouse, the extreme hardship to his spouse if he were refused admission, and his supportive relationship with his spouse as documented in 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.

The AAO notes that the Field Office Director denied the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal in a separate decision based on the denial of Form I-601. *Decision of the Field Office Director*, dated February 3, 2009. The AAO notes that approval of an application for permission to reapply for admission after removal pursuant to section 212(a)(9)(A)(iii) of the Act, like a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, requires the weighing of negative and positive factors to determine whether a favorable exercise of discretion is warranted. Since the favorable factors have been found to outweigh the negative factors in the present case, the director shall reopen and approve the applicant's Application for Permission to Reapply for Admission to the United States after Deportation or Removal.

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 for the Form I-601 waiver application will be sustained.

ORDER: The appeal is sustained. The Field Office Director shall reopen and approve Form I-212.