

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

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



**U.S. Citizenship
and Immigration
Services**

H6

[REDACTED]

DATE: OCT 31 2011

Office: CHICAGO, IL

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

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

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,

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of El Salvador 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 admission within ten years of his last departure from the United States. The applicant is married to a United States citizen and is the beneficiary of an approved Form I-130, Petition for Alien Relative. The applicant 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 in the United States.

The Field Office Director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated May 20, 2009.

On appeal, counsel asserts that the applicant's spouse would suffer extreme hardship if the applicant is removed from the United States. *Form I-290B*, dated June 19, 2009; *see also counsel's brief*.

The record includes, but is not limited to, briefs from counsel; statements from the applicant and his spouse; a psychological evaluation of the applicant's spouse; a medical statement and records relating to the applicant's spouse; documentation relating to medications prescribed to the applicant's spouse; letters from the applicant's and his spouse's employers; W-2 Wage and Tax Statements and tax returns; mortgage and home insurance statements; credit card and other bills; notices of delinquent payments; and an Eligibility Determination/Individualized Education Program relating to the applicant's spouse's older son. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9)(B) states 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 applicant indicates that he entered the United States on February 12, 2000 without inspection. On April 12, 2001, the applicant filed a Form I-821, Application for Temporary Protected Status (TPS). The Form I-821 was approved on August 24, 2001. On February 12, 2002, the

applicant departed the United States pursuant to Advance Parole and returned to the United States on February 4, 2002.

Based on this history, the applicant accumulated unlawful presence from February 12, 2000, the date he entered the United States without inspection until April 12, 2001, the date he filed for TPS. The AAO notes that as a matter of policy, an alien is deemed to be in lawful nonimmigrant status for purposes of section 212(a)(9)(B) of the Act from the date a valid TPS application is filed and continues to remain in lawful status for the duration of the grant of TPS. Memorandum from [REDACTED] Acting Associate Director, Domestic Operations Directorate, et al., *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(1) of the Act* (May 6, 2009). The record reflects that the applicant is currently in valid TPS status. The applicant's 2002 departure from the United States triggered the bar to inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. As the applicant accrued unlawful presence of more than one year and is seeking admission within ten years of his 2002 departure, he is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act and must seek a 212(a)(9)(B)(v) waiver of inadmissibility.

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 an applicant or other family members can be considered only insofar as it results in hardship to a qualifying relative. In this case, the applicant's spouse is the only qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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 AAO now turns to the question of whether the applicant in the present case has established that a qualifying relative would experience extreme hardship as a result of his inadmissibility.

On appeal, counsel asserts that the applicant's spouse would suffer extreme hardship if separated from the applicant. Counsel asserts that the applicant's spouse has a past history of emotional and psychological problems due to abandonment by her mother at an early age, sexual abuse by her uncle and emotional abuse by her grandmother and former spouse. Counsel states that the applicant has

provided the emotional support and stability needed by his spouse and that his removal from the United States would result in the deterioration of his spouse's mental health condition. Counsel also states that the applicant has provided financial support to his spouse and her three children and that in his absence, his spouse would have difficulty meeting her financial obligations and providing for her three children.

In her June 15, 2009 statement, the applicant's spouse states that the applicant has been her emotional support through a very difficult period in her life. She indicates that she was abandoned as a child by her mother, sexually abused by an uncle, psychologically abused by her grandmother, and attempted suicide as a result. The applicant's spouse also states that her prior marriage and eventual divorce from her former spouse left her devastated, depressed and anxious. She states that the applicant has helped her deal with her past, and that the possibility that she and the applicant may be separated has stirred up fears of abandonment and resulted in a loss of security, which has exacerbated her depression and anxiety. The applicant's spouse also states that she depends on the applicant's income to help meet the family's financial obligations, which includes a mortgage and taxes, home and health insurance, expenses for the home and credit cards payments. Without the applicant's financial support, she asserts, she would not be able to support herself and her three children, as well as pay their over \$200,000 in debt. The applicant's spouse also indicates that the applicant has taken care of her three children as if they were his own, has been the "father figure" they lacked, and has provided them with love, emotional support and stability. She states that she cannot survive without the applicant. The applicant's spouse claims that her father is very sick, that he is being treated for diabetes, liver problems and Hepatitis B; that he has limited income and requires her financial support. She contends that without the applicant's help, she would not be able to care for her father.

In support of the emotional hardship of separation, the record includes a psychological evaluation of the applicant's spouse prepared by [REDACTED] Board Certified Medical Psychologist, dated February 12, 2009. [REDACTED] reports that the result of a clinical interview and psychometric tests revealed that the applicant's spouse suffers from severe depressive disorder and extreme anxiety. Dr. [REDACTED] observes that the applicant's spouse displays deficits in life coping skills, and that the quality of her daily life has been compromised by frequent severe headaches, loss of sleep, chest pains, and difficulty swallowing. [REDACTED] indicates that the applicant's spouse relies on the applicant for support and to help her cope with her extreme emotions, anxiety and depression. She concludes that the emotional and financial support the applicant's spouse receives from the applicant is necessary for her well-being, and that if the applicant is removed from the United States, her anxiety and depression, as well as financial problems will worsen.

An undated statement from [REDACTED] indicates that the applicant's spouse is under his care for major reactive depression and anxiety disorder, as well as hypertension and obesity. [REDACTED] reports that the applicant's spouse is on antidepressants and anxiolytics medications. He also indicates that he has recommended diet and exercise, and supportive care for her. The record includes copies of patient information forms indicating that the applicant's spouse, as of June 13, 2009, has been prescribed Paroxetine HCL and Alprazolam for her depression and anxiety, and Clonidine for hypertension.

To establish the financial hardship claim by the applicant's spouse, the record contains earnings statements for the applicant's spouse indicating an annual income of \$34,800 for 2008. She provided a detailed list of the family's expenses, which includes a monthly mortgage and tax payment of \$1,826;

\$600 for home insurance; \$400 for health insurance, and \$500 for home bills. She indicates the family's other financial obligations includes \$1,700 for a Best Buy credit card, \$4,000 for a Home Depot credit card and \$2,500 for a JC Penney credit card. The AAO notes that documentation in the record establish that the applicant's spouse has a first mortgage of over \$200,000, a second mortgage with interest totaling more than \$9,000, and credit card debts of more than \$7,400, as well as overdue notices. The AAO further notes that the evidence of record clearly indicates that the family is having difficulties paying their bills, which will be worse with the loss of the applicant's income. Accordingly, the AAO finds that the applicant has established that his spouse would experience extreme financial hardship without his income.

Having reviewed the evidence of record, the AAO finds that when the applicant's spouse's mental health and the financial problems she would experience in the applicant's absence are combined with the hardships and disruptions normally created by the removal or exclusion of a family member, the applicant's spouse would experience extreme hardship if she continues to reside in the United States without the applicant.

Counsel asserts that the applicant's spouse would experience hardship if she relocated to El Salvador to live with the applicant. Counsel asserts that there are limited job opportunities in El Salvador and that the applicant and his spouse would not be able to find jobs that would pay them enough to take care of their family. Counsel also asserts that the applicant's spouse would be unable to obtain treatment for her mental health problems in El Salvador. Counsel also asserts that the applicant's spouse's son, [REDACTED] has a learning disability, that he is currently enrolled in an Individualized Education Program, and that [REDACTED] if relocated to El Salvador, would not be able to obtain the same level of treatment or school accommodation for his disability, thereby causing hardship to his mother.

In her June 15, 2009 statement, the applicant's spouse states that she and her children have never been to El Salvador, that she wants her children to have the resources and educational opportunities available to them in the United States, and that there is a lack of economic stability and safety in El Salvador. The applicant's spouse further asserts that it would be very difficult for the applicant to find a job in El Salvador that would pay him enough to support his family and his mother.

The AAO notes the preceding claims regarding the impacts of relocation on the applicant's spouse. However, the record does not contain documentary evidence, e.g., published materials on the economy, the employment or the health care situation in El Salvador to demonstrate that the applicant and/or his spouse would be unable to obtain employment in El Salvador that would allow them to support their family, or demonstrate that the applicant's spouse's son, [REDACTED] would not be able to obtain adequate medical treatment in El Salvador. We do note, however, the fact that El Salvador is currently designated for Temporary Protected Status a persuasive factor in determining that the applicant's spouse would experience extreme hardship upon relocation. The AAO further notes the presence of other factors, such as the applicant's spouse's lack of family or other ties to El Salvador, the fact that she was born in the United States and has never been to El Salvador, and the presence of family and community ties in the United States. When these factors are examined in the aggregate the record indicates that the applicant's spouse would experience hardships rising to the level of extreme upon relocation, and as such, they establish extreme hardship upon relocation.

As the applicant has established extreme hardship to his spouse as a result of his inadmissibility, he is statutorily eligible for a waiver under section 212(a)(B)(v) of the Act. Accordingly, the AAO now turns to a consideration of the applicant's eligibility for a favorable exercise 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-Morales, 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 this case are the applicant's entry without inspection and his unlawful presence, for which he must now seek a waiver. The mitigating factors include the applicant's United States citizen spouse and step-children; the extreme hardship to her spouse if the waiver application is denied; the absence of a criminal record; his long-term employment in the United States and payment of taxes; and his ownership of property.

The AAO finds the immigration violations committed by the applicant to be serious in nature and does not condone it. Nevertheless, we conclude that taken together, the mitigating 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. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.