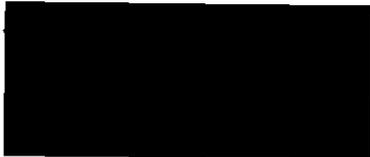


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



HG

DATE: **DEC 14 2012** Office: TEGUCIGALPA, HONDURAS 

IN RE: Applicant: 

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

ON BEHALF OF APPLICANT:



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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with a long horizontal line extending to the right.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Tegucigalpa, Honduras. 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 Honduras. He was found to be inadmissible to the United States pursuant to sections 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(i)(II), for having re-entered the United States without inspection after previously accruing more than one year of unlawful presence, and 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 one year or more and seeking admission within 10 years of his last departure. He is married to a United States citizen. He 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).

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on October 19, 2011.

On appeal, counsel for the applicant asserts that the applicant is not inadmissible under section 212(a)(9)(C) of the Act. *Form I-290B*, received on June 21, 2010. The applicant's spouse also submitted an additional statement and two medical documents on appeal.

The record includes, but is not limited to, a statement from the applicant's spouse; a copy of a medical procedure statement, dated March 5, 2010; copy of a background article on diabetic neuropathy, issued by Fairview Southdale Hospital to the applicant's spouse, dated March 5, 2010; documents related to the applicant's removal proceeding; and financial documents submitted with the applicant's Form I-130, Petition for Immediate Relative. The entire record was reviewed and all relevant evidence considered in rendering this decision.

The Field Office Director found the applicant inadmissible pursuant to section 212(a)(9)(C)(ii) of the Act as an alien having previously accrued over one year of unlawful presence and re-entering the United States without admission. The applicant entered the United States in 1994, and was removed from the United States in 1995. The applicant entered the United States without inspection in August 1999, after the effective date of the unlawful presence provision of the Act, April 1, 1997. The AAO notes that any period of unlawful presence accrued prior to April 1, 1997, does not count for the purposes of determining inadmissibility under section 212(a)(9)(B) or section 212(a)(9)(C). The record indicates that the applicant entered the United States without inspection in 1999, and remained until he was removed in 2009. While the AAO concurs that the applicant is inadmissible under section 212(a)(9)(B) for the period of unlawful presence spanning from 1999 to 2009, and section 212(a)(9)(A) as an alien previously removed pursuant to section 240 of the Act based on his removal in 2009, but based on the fact that the applicant did not accrue over one year of unlawful presence between April 1, 1997, the effective date of the unlawful presence provision of the Act and permanent bar provisions of the Act, and his re-entry into the United States without inspection in 1999, the AAO does not find him to be inadmissible under section 212(a)(9)(C) of the Act.

As such, the AAO will withdraw the Field Office Director's finding with regard to section 212(a)(9)(C) of the Act and examine the record to determine if the applicant is qualified for a waiver under section 212(a)(9)(B)(v) of the Act.

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. . . .

The record indicates that the applicant entered the United States in 1994, and was removed from the United States in 1995. The applicant re-entered the United States without inspection in August 1999, and remained until he was removed in 2009. Therefore, the applicant was unlawfully present from August 1999 to 2009, a period over one year, and is now seeking admission within 10 years of his last departure from the United States. Accordingly, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

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 any 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-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 applicant's spouse has submitted a 15-page statement with 65 paragraphs asserting that she will experience a range of hardship impacts due to the applicant's inadmissibility, both upon relocation and due to separation. *Affidavit of the Applicant's Spouse*, dated August 26, 2010. Despite the length of her statement, there are only two documents which have been submitted to corroborate her assertions. The documents are probative, however, and the AAO finds the record sufficiently documented to show her substantial challenges.

The applicant's spouse explains that she suffers from numerous medical conditions, has had several surgeries and must be monitored routinely by her doctors in the United States. She states that she would be unable to find adequate treatment for her conditions in Honduras, including medications she needs to control her conditions and medical doctors capable of competently monitoring her. She explains that she has Type I Diabetes, developed as a result of gestational diabetes, retinopathy in both eyes and has had six toes amputated due to her diabetes, complicating her ability to ambulate and work to support her family. She further explains that her bones are very brittle due to her condition, and she must be very careful not to suffer any injuries or risk further amputation.

The AAO acknowledges that these medical conditions would impose substantial hardship to anyone relocating abroad. Unfortunately, the record does not include any documentation on her diagnoses for diabetes, prior diabetes related surgeries or any other documentation to corroborate her assertions. Therefore, the AAO must give diminished weight to some of the spouse's alleged medical conditions.

The record does include a detailed statement on a medical procedure to the applicant's spouse's eyes related to her retinopathy. The record also includes a background article on Neural Retinopathy issued to the applicant's spouse by her hospital. This document details the potentially serious consequences of the condition and illustrates the impact it has on patients' lives. Based on these documents, the record establishes that the applicant's spouse currently suffers from a medical condition that would lead to physical and medical hardship upon relocation, and a physical hardship if she were not to have physical assistance due to separation from the applicant.

The applicant's spouse also notes the serious environmental conditions in Honduras, including a failing infrastructure, corruption, crime and victimization of women. She states that she is not familiar with the language and culture of Honduras, and that having to separate from her U.S. family in order to relocate to Honduras would result in extreme physical and medical hardship to her due to the conditions in the country. The AAO agrees. On January 5, 1999, Honduras was designated by the Attorney General for Temporary Protected Status (TPS). The authority to designate TPS now rests with the Secretary of Homeland Security, who may designate a country for TPS due to conditions in the country that prevent persons from returning there safely, in this case due to the damage suffered in Honduras from Hurricane Mitch in 1998. The status has been extended through

July 5, 2013. 76 Fed. Reg. § 68488. These circumstances support that the applicant's spouse would experience uncommon physical hardship due to relocation to Honduras.

The applicant's spouse also asserts the presence of other hardship factors, such as her oldest son experiencing migraine headaches, the inability of her children to receive proper medical care and the availability of educational resources in Honduras. When considered in the aggregate, all of the asserted challenges rise above the common hardships to a degree of extreme hardship.

With regard to hardship upon separation, the applicant's spouse has asserted she will experience physical, medical and financial hardship as a single mother if she remains in the United States. *Statement of the Applicant's Spouse*, dated August 26, 2010. As discussed previously, the applicant's spouse asserts she has a number of medical conditions which have led to several surgeries, including amputations due to diabetes-related complications. While the record does not contain sufficient documentation to support most of these assertions, it does contain two medical documents pertaining to the applicant's spouse's serious eye condition that could lead to substantial loss of vision. The level of specificity included in the applicant's spouse's statement lends some credence to her testimony. Based on this evidence, the AAO can reasonably conclude that the applicant's spouse will experience uncommon physical hardship due to having to care and provide for her children while enduring a serious medical condition.

In addition, as discussed above, the applicant has been removed to Honduras, a country which has been designated for TPS status by the Secretary of Homeland Security. As the applicant is returning to Honduras, a country devastated by Hurricane Mitch in 1998, the AAO finds it reasonable that the applicant's spouse will experience an uncommon emotional impact due to separation based on the fact that the applicant is returning to a country with documented difficult conditions.

Based on the foregoing, the AAO finds that the applicant's spouse would experience uncommon physical and emotional impacts rising to the level of extreme hardship.

As the applicant has established that a qualifying relative will experience extreme hardship both upon relocation and separation, the AAO may now move to examine whether the applicant warrants a waiver 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).

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 "balance 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 AAO finds that the unfavorable factors in this case include the applicant's entry to the United States without inspection and unlawful presence. The favorable factors in this case include the presence of the applicant's spouse and children, the hardship his spouse would experience due to his inadmissibility and the lack of any criminal record while residing in the United States. Although the applicant's violation of immigration law cannot be condoned, the favorable factors in this case outweigh the negative factors, therefore favorable discretion will be exercised. The field office director's decision will be withdrawn and the appeal will be sustained.

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 rests 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.