

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



U.S. Citizenship
and Immigration
Services



H6

DATE: DEC 24 2012 OFFICE: MONTERREY, MEXICO

FILE:



IN RE:



APPLICATION: Application for Waiver of Grounds 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:

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico who was found 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 admission within ten years of his last departure. The applicant is the spouse and father of U.S. citizens. He seeks a waiver of his inadmissibility under 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 determined that the applicant had failed to establish that the bars to his admissibility would result in extreme hardship for a qualifying relative or that he merited a favorable exercise of discretion. The Field Office Director denied the Form I-601, Application for Waiver of Ground of Excludability, accordingly. *Decision of the Field Office Director*, dated January 31, 2011.

On appeal, the applicant's spouse asserts that the favorable factors in the applicant's case outweigh the negative. *Notice of Appeal or Motion*, dated March 1, 2011.

The evidence of record includes, but is not limited to: statements provided by the applicant's spouse and children; statements of support from two of the applicant's former coworkers; medical records relating to one of the applicant's children; documentation of financial hardship; earnings statements for the applicant from 2001 and 2004; W-2 Wage and Tax Statements for the applicant from 1998 and 2006; tax returns; a Corrective Action Plan issued to the applicant's spouse's by her former employer; a California Employment Development Department notice regarding the applicant's spouse's unemployment insurance claim; and a copy of an Application for Cash Aid, Food Stamps, and/or Medi-Ca submitted to the State of California Health and Human Services Agency. 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-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

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.

The record reflects that the applicant initially entered the United States in 1986 without inspection. On April 8, 1997, he filed a Form I-485, Application to Register Permanent Resident or Adjust Status, in conjunction with the Form I-130, Petition for Alien Relative, filed by his spouse. On or about May 1, 1999, he departed the United States under a grant of advance parole, returning on May 13, 1999 to continue the processing of his application for adjustment of status. On July 24, 2003, United States Citizenship and Immigration Services (USCIS) denied the Form I-485. On December 1, 2009, the applicant departed the United States for a consular interview at the U.S. consulate in Ciudad Juarez, Mexico.

Based on the preceding history, the AAO finds the applicant to have accrued unlawful presence from July 25, 2003, the day after USCIS denied the Form I-485, until his December 1, 2009 departure from the United States. Therefore, he is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act as he accrued more than one year of unlawful presence in the United States and is seeking admission within ten years of his 2009 departure.¹ He does not contest his inadmissibility on appeal.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission would impose extreme hardship on a qualifying relative. A qualifying relative under section 212(a)(9)(B)(v) of the Act is limited to the applicant's U.S. citizen or lawfully resident spouse or parent. Therefore, for the purposes of this proceeding, the applicant's spouse is his only qualifying relative. Accordingly, hardship to the applicant or other family members will be considered only to the extent that it results in hardship to the applicant's spouse. If extreme hardship to the applicant's spouse is established, the applicant is statutorily eligible for a waiver, and USCIS will

¹ The AAO notes that the record indicates that the applicant was arrested on April 22, 1993 and charged with Use/Under the Influence of any Controlled Substance, California Health & Safety Code § 11550(a). Court records from the Municipal Court of California, Santa Clara County Judicial District indicate that the applicant's case was diverted on August 17, 1993, with no admission of guilt entered by the applicant and that, on June 17, 1994, the diversion was reinstated. On October 28, 1994, the court ordered the period of diversion terminated and dismissed the charges against the applicant pursuant to California Penal Code § 1000.3. Accordingly, the applicant is not inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act for a violation of a controlled substance law or regulation.

then assess 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 BIA 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 BIA 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 BIA 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 BIA 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.

On appeal, the applicant's spouse submits a statement in which she lists the hardships that she and her children have experienced since the applicant's 2009 departure from the United States, including their eviction from the home they were renting, the resulting breakup of the family and the impact on her children's school attendance, the loss of her employment and her difficulty in finding a new job, the repossession of the applicant's car, the applicant's middle son's insomnia and asthma, and the need to apply for public assistance, including cash and food stamps. However, she also indicates that she and her children are, once again, living together, that she has quit working so that she can be home with her children and that her two older sons are now responsible for the family's expenses. The applicant's spouse states that she now takes care of the home, her family's clothes and the housework. She also states that she and her children miss the applicant and need him.

The record establishes that the applicant's spouse and family lost the home they were renting at the time of the applicant's 2009 departure for nonpayment of rent; that the applicant's spouse lost her job on May 5, 2010; and that she applied for unemployment benefits on May 9, 2010 and cash aid from the State of California Health and Human Services Agency on May 10, 2010.² However, the statement submitted by the applicant's spouse on appeal, appears to indicate that the family's situation has improved as they are again living together and her two older sons are able to provide for the family's financial needs. While we also note that the applicant's spouse indicates that she had to borrow the money to pay the filing fee for the appeal, the record does not support this claim of financial hardship. The applicant has provided no documentary evidence of the family's financial circumstances at the time of the appeal, including evidence of the incomes earned by the applicant's older sons and the family's continuing eligibility for public assistance.

The record also supports the applicant's spouse's claim that her middle son has been diagnosed with asthma. However, the submitted medical documentation does not establish the severity of this child's condition or indicate how it has affected his mother. Accordingly, the AAO is unable to determine the extent to which the applicant's middle son's medical condition has created hardship for the applicant's spouse, the only qualifying relative in this proceeding.

We note the applicant's spouse's statement regarding the emotional hardship that has been created by the applicant's inadmissibility and acknowledge that hardship. Again, however, the record does not document the nature or extent of the emotional hardship being experienced by the applicant's family, nor identify the specific impacts on the applicant's spouse. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in 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)).

² The application also indicates that the applicant's previously applied for food stamps and healthcare coverage under Medi-Cal.

Based on the record before us, the AAO does not find sufficient evidence of emotional, financial or physical hardship to establish that the applicant's continued inadmissibility would result in extreme hardship for his spouse if she remains in the United States.

The record also fails to establish that the applicant's spouse would experience extreme hardship upon relocation as it does not address what hardships the applicant's spouse would experience if she relocates to Mexico. In the absence of clear assertions from the applicant, the AAO may not speculate as to these hardships.

As the record does not demonstrate that the applicant's inadmissibility would result in extreme hardship for a qualifying relative, he has not established eligibility for a waiver under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, the AAO finds 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 under section 212(i) 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.