

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



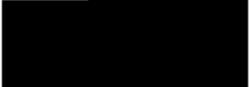
U.S. Citizenship
and Immigration
Services



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), and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico 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 again seeking admission within ten years of his last departure from the United States. The applicant is also inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), because he failed to depart on or before October 13, 1998 pursuant to a voluntary departure order, converting it into a final removal order. He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside with his U.S. citizen spouse and children in the United States.

The Field Office Director concluded that the applicant failed to establish that a bar to his admission to the United States would result in extreme hardship to the qualifying relative and denied the application accordingly. *See Decision of the Field Office Director*, dated September 14, 2011. The Field Office Director concurrently denied the application for permission to reapply for admission into the United States as a matter of discretion. *Id.*

On appeal, the applicant's attorney asserts that the qualifying spouse is suffering extreme hardship above the normal hardship that one would ordinarily suffer under similar circumstances. The applicant's attorney also states that the applicant's positive factors outweigh his negative factors, thereby warranting a grant of his waiver application.

The record contains the Application for Waiver of Grounds of Inadmissibility (Form I-601); a Notice of Appeal or Motion (Form I-290B); a brief and letters from the applicant's attorney; financial documentation; a declaration and letter from the qualifying spouse; a psychological evaluation of the qualifying spouse; letters from doctors regarding the qualifying spouse and their children; documentation regarding complaints against the applicant's prior counsel; a letter offering the applicant employment; certificates regarding the applicant's awards and training; documents establishing identity and relationships for the qualifying spouse, applicant, and their children; letters from their church, children, other family members, friends and the applicant's employers; photographs; pictures drawn by their children; proof of medical insurance; documents submitted with the applicant's applications for cancellation of removal and asylum; documents indicating that the applicant does not have a criminal record and an approved Petition for Alien Relative (Form I-130). In addition, the record also contains several Spanish-language documents. The requisite translations, however, were not provided. 8 C.F.R. § 103.2(b)(3) states:

Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator

has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

As such, this evidence cannot be considered in analyzing this case. The rest of the record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) 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.

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. 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 record indicates that the applicant entered the United States in 1987 without inspection and was removed in December 2008. The applicant accrued unlawful presence between April 1, 1997

and November 3, 1997, when he applied for asylum; his unlawful presence resumed after he withdrew his asylum application in August 1998. The applicant therefore accrued unlawful presence for a period in excess of one year. In applying for an immigrant visa, the applicant is seeking admission within ten years of his departure from the United States. Therefore, as a result of the applicant's unlawful presence, he is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. The applicant has not disputed his inadmissibility.

The AAO finds that the applicant has established that his qualifying spouse is suffering extreme hardship as a consequence of being separated from him. The qualifying spouse states that she is suffering psychologically, physically and financially as a result of her separation from the applicant. She states that she wants "to scream because [her] body aches. [her] head hurts. [her] heart is lost, and [her] sanity is barely holding on." A psychologist confirms that she is suffering from major depressive disorder, anxiety disorder, chronic pain syndrome and primary insomnia. The psychologist notes that the applicant's spouse has a history of psychological issues, including postpartum depression after the birth of their first child. Since the applicant left, the psychologist states that the qualifying spouse "has deteriorated in her overall psychological functioning" and "may become psychiatrically impaired or disabled if she continues on this downward trend." Her condition is further exacerbated by their children's psychological symptoms, including separation anxiety disorder. She takes medication for her psychological conditions; however the psychologist notes that she remains at high risk of further decompensating and is not likely to recover, even with antidepressants. With regard to the qualifying spouse's financial hardships, it appears that, given her income and financial situation, she is having difficulty maintaining her household without contributions from the applicant. The record confirms that the applicant contributed almost four times as much income as the qualifying spouse has been able to earn, and her income does not sufficiently cover her family's expenses. Tax returns demonstrate the decrease in their family income since the applicant's removal. Further, the qualifying spouse states that, in addition to losing the income of the applicant, she now pays for child care because she works. As such, the applicant has sufficiently shown that the cumulative hardships faced by the qualifying spouse due to her separation from him are extreme.

The applicant has also demonstrated that his qualifying spouse would suffer extreme hardship in the event that she relocated to be with the applicant. The qualifying spouse has lived in the United States for twenty years. In addition, the qualifying spouse has two U.S. citizen children and nearly her entire family are U.S. citizens or legal permanent residents, including her parents, five siblings and their children. The applicant also indicates that she owns a home in the United States, where she lives with their children and her elderly parents. She states that she would lose thousands of dollars of equity in her home if she relocated to Mexico, and the record contains proof of her mortgage payments. Similarly, the qualifying spouse indicates in her declaration that the applicant has not been able to find work in the two years since he has returned to Mexico, that she supports him and that she would have no means of support or home for her family if she relocated to Mexico. She also fears that she and her children would be in danger if they relocated to Mexico, because they would be targeted as foreigners and subject to extortion. She states that the applicant has received several extortion calls and has changed his telephone number several times. Although the record contains no current country-conditions documentation, the most recent U.S. Department of State Travel Warning for Mexico indicates that non-essential travel to the state of Michoacán, where the applicant currently

resides, should be deferred. As such, the cumulative effect of the hardships to the qualifying spouse were she to relocate, in light of her family ties to the United States, her length of residence in the United States, her financial ties to the United States and country conditions in Mexico, rises to the level of extreme.

Considered in the aggregate, the applicant has established that his qualifying spouse would face extreme hardship if the applicant's waiver request is denied. Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on her behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the Board stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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).

Id. at 301.

The Board further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant must bring forward to establish that she merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in this matter are the extreme hardships the applicant's U.S. citizen spouse would face if the applicant is not granted this waiver, whether she accompanied the applicant or remained in the United States; his lack of a criminal record; his financial contributions to his

family when he lived in the United States and his good character, as indicated in several letters of support. The unfavorable factors in this matter are the applicant's unlawful entry and accrual of unlawful presence in the United States.

Although the applicant's violation of the immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

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 (Form I-212) in the same decision. The Form I-212 was denied as a matter of discretion. As the AAO has now found the applicant eligible for a waiver of inadmissibility under section 212(a)(9)(B) of the Act, it will withdraw the Field Office Director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

On October 13, 1998, the applicant received a voluntary departure order and failed to depart, thereby converting his order into a removal order from the United States. As such, he is inadmissible under section 212(a)(9)(A) of the Act and must request permission to reapply for admission.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be granted as a matter of discretion.

ORDER: The appeal is sustained.