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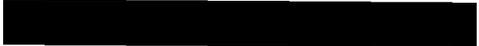


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**

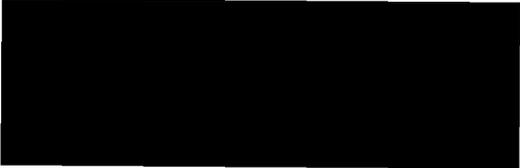


H6

Date: FEB 27 2012 Office: SAN FRANCISCO FILE: 

IN RE: Applicant: 

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


for Perry Rhew
Chief, Administrative Appeals Office

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

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 one year or more and seeking readmission within 10 years of his last departure. The applicant is also inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and children.

The field office director denied the Form I-601 application for a waiver, finding that no purpose would be served in waiving the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act due to his inadmissibility under section 212(a)(9)(A) of the Act. *Decision of the Field Office Director*, dated July 30, 2009.

On appeal, counsel for the applicant asserts that the field office director erred in denying the application solely on the basis of inadmissibility under section 212(a)(9)(A) of the Act. *Brief from Counsel*, dated August 28, 2009. Counsel contends that the applicant has shown that his wife will suffer extreme hardship should the present waiver application be denied, and that the applicant warrants a favorable exercise of discretion. *Id.*

The record contains, but is not limited to: a brief from counsel; statements from the applicant, as well as the applicant's wife and other relatives; documentation in connection with the applicant's son's academic activities and individualized education program; medical records for the applicant's son; documentation relating to the applicant's family's income, assets, and expenses; medical documentation for the applicant; documentation on conditions in El Salvador; and documentation in connection with the applicant's criminal convictions. The entire record was reviewed and considered in rendering this decision.

As a preliminary matter, counsel indicates on Form I-290B that the present appeal is from denials of the applicant's Forms I-601 and I-212 applications. However, the applicant may only appeal one application with a single Form I-290B and filing fee. As counsel discusses the extreme hardship standard of section 212(a)(9)(B)(v) of the Act on appeal, it is evident that the applicant wishes for the merits of his Form I-601 waiver application to be addressed. Thus, the AAO treats the appeal as a request for review of the denial of the applicant's Form I-601 application for a waiver.

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.

The record shows that the applicant entered the United States on or about December 15, 1990. He was placed into removal proceedings and granted voluntary departure, yet he exhausted his appellate remedies as of the decisions of the Ninth Circuit to dismiss his appeal for lack of jurisdiction on February 25, 1997, and to dismiss his motion for reconsideration on June 16, 1997. The applicant began accruing unlawful presence as of April 1, 1997, the date the unlawful presence provisions of the Act took effect. On or about August 11, 2001, he was granted temporary protected status (TPS). Pursuant to his TPS status, the applicant obtained advance authorization for parole into the United States, and he departed on November 9, 2008. He was paroled back into the United States on November 16, 2008. He now seeks to adjust his status to lawful permanent resident pursuant to a Form I-485 application. He was deemed inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant does not contest his inadmissibility on appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements)

did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The record shows that the applicant was convicted of an offense under California Vehicle Code § 20002(a) for his conduct on or about October 23, 1997. The AAO finds that this section of law lacks a requirement of scienter that renders the proscribed offenses crimes involving moral turpitude. The record also shows that the applicant has been charged with multiple theft offenses which resulted in the equivalent of convictions for immigration purposes. These include a conviction under California Penal Code § 484 for his conduct on August 30, 1995. In an interview in connection with the applicant's Form I-485 application to adjust his status to lawful permanent resident, he reported that on or about June 13, 1995 he was given pretrial diversion and he paid a fine for an offense of petty theft. There is ample support that these theft offenses constitute crimes involving moral turpitude, rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. As these offenses occurred over 15 years ago, the applicant may be considered for a waiver of his inadmissibility under the section pursuant to section 212(h)(1)(A) of the Act. The applicant may also be considered for a waiver of inadmissibility under section 212(h)(1)(B) of the Act.

The applicant requires waivers of inadmissibility under both sections 212(a)(9)(B)(v) and 212(h) of the Act. Section 212(a)(9)(B)(v) of the Act requires that the applicant to show extreme hardship to a qualifying relative and to establish that he warrants a favorable exercise of discretion. If the applicant is statutorily eligible for a waiver under section 212(a)(9)(B)(v) of the Act, he also qualifies statutorily for a waiver under section 212(h)(1)(B) of the Act. Accordingly, the AAO will first assess whether the applicant meets the requirements of section 212(a)(9)(B)(v) of the Act.

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 his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife is the only qualifying relative under section 212(a)(9)(B)(v) of the Act. 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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

The record shows that the applicant's wife and two children are U.S. citizens. His children are ages seven and 10. The applicant provides documentation to show that his 10-year-old son has experienced developmental delays that have required an individualized education plan and a speech program. In a statement dated May 7, 2009, the applicant explains that he and his wife have had a relationship since 1992, for approximately 20 years. The record supports that he earns substantial income with an employer for whom he has worked since 1995, and that his family depends on his financial support, in part to make payments on their substantial mortgage. He noted that his family is close and they would suffer difficulty should they be separated. The applicant discussed poor conditions in El Salvador, including poverty, poor medical care and academic options, a lack of employment, and problems with gangs and crime. He provided that he does not wish for his wife or children to join him there should he return.

In a statement dated May 7, 2009, the applicant's wife described her family history and relationship with the applicant. She explained that she is from El Salvador, but she has only returned for one six-day visit in 2004 to attend her grandmother's funeral since her arrival in the United States in 1992. She stated that a neighbor was murdered outside her sister's home during her visit and she decided never to return to the country. She expresses fear of dangerous conditions in El Salvador, particularly for U.S. citizens who are targeted for crime. She emphasized the importance of the applicant's presence in their household for financial and emotional support for her and their children.

Upon review, the applicant has shown that his wife will suffer extreme hardship should the present waiver application be denied. The record contains extensive documentation of the applicant's son's speech impediment and learning disability, and the special services he receives in the United States as a result. It is evident that his special needs create an unusual emotional burden on the applicant's wife, and would exacerbate her challenges should she remain in the United States and act as a single parent for two young children. She would also suffer emotional hardship should their son no longer be able to continue the special services he receives in the United States due to relocating to El Salvador.

The applicant has provided sufficient documentation to support the assertion that his family depends on his income to meet their financial needs, and his wife would suffer substantial economic difficulty should she remain in the United States to care for their two children alone. The AAO acknowledges that

the applicant and his wife have shared a lengthy and close relationship, and that family separation would create substantial emotional hardship for them.

Reports on conditions in El Salvador support the applicant's and his wife's concern for their welfare should they reside there. The U.S. Department of State has designated El Salvador as a critical crime threat country, as it has one of the highest homicide rates in the world and prevalent petty crimes throughout the country. *El Salvador, Country Specific Information*, U.S. Department of State, dated December 2, 2011. The AAO finds the applicant's wife's personal experience with violent crime in El Salvador, including hearing a murder outside her sister's home, to contribute to the emotional hardship she would face should she and her children relocate there with the applicant.

The applicant's wife would face other elements of hardship should she relocate to El Salvador, including the loss of her employment, loss of her medical insurance, the inability to reside in the home that they own, difficulty due to sharing in her young children's challenges in adapting to an unfamiliar culture, and separation from her family members in the United States.

Based on the foregoing, the applicant has shown that his wife will suffer extreme hardship, whether she relocates to El Salvador or remains in the United States without him, as required for a waiver under section 212(a)(9)(B)(v) of the Act.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factors in this case consist of the following:

The applicant has been convicted of crimes involving moral turpitude. The applicant accrued unlawful presence in the United States.

The positive factors in this case include:

The record does not reflect that the applicant has been convicted of a crime involving moral turpitude in approximately 16 years, and his last conviction occurred approximately 14 years ago. The applicant's U.S. citizen wife would experience extreme hardship if he is prohibited from residing in the United States, and his two U.S. citizen children will face significant hardship should he reside outside the United States. The applicant has shown a propensity to work and pay taxes, and to support his wife and children. The record supports that the applicant has provided meaningful emotional support to his wife and children, and he has cultivated a close family unit.

The applicant's criminal activity and unlawful presence cannot be condoned. However, he has shown that he has conducted himself well since his convictions, and he has expressed remorse for his transgressions. The AAO acknowledges the applicant's indication that his criminal activity occurred

during a brief period at a young age, and finds that he has shown rehabilitation. The applicant's continued employment with the same employer since 1995 supports that he has created a stable environment for himself and his family in the United States. In balancing all factors, the positive factors in this case outweigh the negative factors such that the applicant warrants a favorable exercise of discretion.

Based on the foregoing, the applicant has shown that he merits a waiver under section 212(a)(9)(B)(v) of the Act. As noted above, this conclusion also shows that he merits a waiver under section 212(h) of the Act. In proceedings regarding a waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(h) 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, and he has shown that he warrants a favorable exercise of discretion. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.