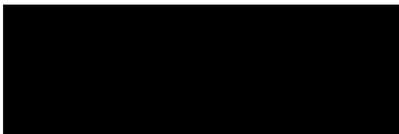


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Avenue, NW, MS 2090
Washington, DC 20529-2090
U.S. Citizenship
and Immigration
Services



H6

DATE:

Office: KENDALL FIELD OFFICE, FL

FILE:



FEB 29 2012

(RELATES: DIGITIZED AFILE)

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:



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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility was denied by the Field Office Director, Kendall, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nicaragua who was admitted into the U.S. on January 15, 1997 with a B2 visitor visa valid through July 14, 1997. The applicant filed an application for temporary protective status (TPS) on March 30, 2000. She has been in valid TPS status since that time. She traveled outside of the U.S. on May 14, 2004, and was paroled back into the country on June 1, 2004. The applicant was found to be inadmissible to the United States under 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 U.S. for more than one year and seeking readmission within 10 years of her departure from the U.S. The applicant is married to a U.S. citizen, and she is the beneficiary of an approved Form I-130, Petition for Alien Relative (Form I-130). She 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 live in the U.S. with her spouse and family.

In a decision dated October 28, 2009, the director concluded the applicant had failed to establish that her husband would experience extreme hardship if she were denied admission into the United States. The waiver application was denied accordingly.

Through counsel, the applicant asserts on appeal that, although she accrued unlawful presence in the U.S., she was not removed from the country, and she traveled outside of the U.S. with advance parole permission. Counsel indicates that the applicant is thus not inadmissible. In the event that the applicant is found to be inadmissible, counsel asserts that her husband would experience extreme hardship if she were denied admission into the U.S. To support these assertions counsel submits affidavits written by the applicant and her husband, and a doctor's letter. The record additionally contains financial evidence, school records for the applicant's children, and photos. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) of the Act provides in pertinent part:

(i) [A]ny 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 its decision, *In re Lemus-Losa*, 24 I. & N. Dec. 373 (BIA 2007), the Board of Immigration Appeals (BIA) held that:

[W]e construe the plain language of section 212(a)(9)(B)(i)(II) of the Act to encompass any "departure" from the United States, regardless of whether it is a

voluntary departure in lieu of removal or under threat of removal, or it is a departure that is made wholly outside the context of a removal proceeding. . . . [T]he use of the term “departure” in that section appears to be designed as a shorthand means of incorporating both types of departure (i.e., voluntary departure and all other departures) that are set forth immediately above in section 212(a)(9)(B)(i)(I)

Id. at 376-77.

In the present matter the record reflects the applicant was unlawfully present in the United States between July 15, 1997, and March 29, 2000, and she departed the country on May 14, 2004. Inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, which is triggered upon departure, remains in force until the alien has been absent from the United States for ten years. Here the applicant was unlawfully present in the U.S. for over one year and she has remained outside of the U.S. for less than ten years. She is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B)(v) of the Act provides in pertinent part:

Waiver.-The Attorney General 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 to the satisfaction of the Attorney General 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 applicant is married to a U.S. citizen. Her spouse is a qualifying relative for section 212(a)(9)(B)(v) of the Act, waiver of inadmissibility purposes.

The record contains references to hardship the applicant’s children would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien’s children as a factor to be considered in assessing extreme hardship under section 212(a)(9)(B)(v) of the Act. The applicant’s spouse is thus the only qualifying relative for the waiver under section 212(a)(9)(B)(v), and hardship to the applicant’s children will be considered only to the extent that it causes hardship to her husband.

Section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *Matter of Mendez*, 21 I&N Dec. 296 (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*, 22 I&N Dec. 560, 565 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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).

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.

The applicant's husband indicates in an affidavit submitted on appeal that he loves his wife and that they have a child together. He states that he is a construction worker and that his work requires him to go to work early, and return home late. He indicates that he depends on the applicant to care for his daughter, and that he has no one to help him raise his daughter if the applicant moves to Nicaragua. The applicant states in an affidavit that she has two daughters, one with her current husband and one from a previous marriage. She indicates that, because they have different fathers, her daughters would be separated if she were did not remain in the U.S. She indicates further that her ex-husband works all of the time, and that he would be unable to care for his daughter. The applicant is the primary caregiver for her children, and she states it would be emotionally difficult for her daughters if they were separated from her or from each other. A letter from the children's doctor states that the applicant brings the children to all of their doctor's appointments. The record also contains 2009 earnings statements reflecting the applicant worked approximately 5 hours a day, earning between \$300 and \$400 a week.

Upon review, the AAO finds that the evidence in the record, when considered in the aggregate, fails to establish the applicant's husband would experience hardship that rises beyond the common results of removal or inadmissibility if the applicant were denied admission into the United States, and her husband remained either in the U.S. separated from the applicant, or he moved to Nicaragua to be with her.

The affidavits in the record contain assertions that the applicant's children will experience emotional hardship if they are separated from their mother. They fail, however, to specify how such hardship would affect the applicant's husband. The statement that it would be difficult to raise his daughter on his own also fails to establish that the applicant's husband would experience extreme emotional or financial hardship if he remains in the U.S., separated from the applicant. The record contains no financial evidence to establish the income of the applicant's husband, or to demonstrate what the family's expenses are, and the applicant's income evidence is insufficient to demonstrate that the applicant's husband would experience financial hardship if he remained in the U.S. without the applicant. The doctor's letter also fails to demonstrate that the applicant's husband or children require medical care that would cause the applicant's husband to experience hardship if he were separated from the applicant. Accordingly, the evidence in the record fails to establish that the applicant's husband will experience emotional, financial or other hardship that rises above that normally experienced upon removal or inadmissibility, if he remains in the U.S.

The applicant also failed to establish that her husband would experience emotional, financial or other hardship that rises above that normally experienced upon removal or inadmissibility, if he moved with his family to Nicaragua. The record contains no legal or other corroborative evidence to indicate the applicant would be unable to bring her daughters to Nicaragua, or that the family would be separated. The financial evidence in the record does not indicate that the applicant's

husband would experience financial hardship if he relocated to Nicaragua with his family, and the doctor's letter does not indicate or demonstrate that the applicant's husband or family require medical care that is unavailable in Nicaragua. Immigration documentation contained in the record reflects further that the applicant's parents reside in Nicaragua and that her husband is originally from Nicaragua, and is thus familiar with the language and culture of the country.

The AAO does not doubt nor minimize the depth of concern and anxiety over the applicant's immigration status. The fact remains, however, that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship" Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(a)(9)(B)(v) of the Act, be above and beyond the normal, expected hardship involved in such cases. In the present matter, the applicant has failed to establish that her husband would experience hardship beyond the type of emotional, physical and financial hardship commonly associated with removal or inadmissibility, if she is denied admission and her husband either remains in the United States or joins her in Nicaragua.

As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for an 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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.