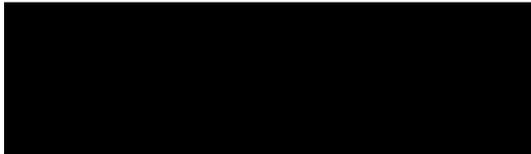


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



H6

DATE: JUL 02 2012 Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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:

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.

Thank you,

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Center Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Haiti. He was found to be 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 one year or more and seeking admission within ten years of his last departure. He is married to a United States citizen and has two U.S. citizen children. 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 Center 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 December 21, 2009.

On appeal, the applicant responds to the Center Director's conclusions and submits additional evidence, asking that United States Citizenship and Immigration Services (USCIS) grant his application for a waiver. *Attachment, Form I-290B*, received on January 22, 2010.

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 on May 21, 2001, without inspection. On March 20, 2002, the applicant applied for asylum. On June 16, 2003, an immigration judge denied the applicant's asylum application and ordered his removal to Haiti. On September 2, 2004, the Board of Immigration Appeals (BIA) affirmed the immigration judge's decision. In January 2007, the applicant departed the United States. Based on this history, the applicant accrued unlawful presence from May 21, 2001, until March 20, 2002, the date he applied for asylum, and from September 3, 2004, the day after the BIA denied his asylum application, until he departed the United States in 2007. As the applicant accrued unlawful presence of more than one year and is now seeking admission within ten years of his 2007 departure, he is inadmissible under section 212(a)(9)(B)(i)(II) 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.

The record contains, but is not limited to, the following evidence: statements from the applicant and his spouse; immigration records from Canada pertaining to the applicant's spouse; tax returns for the applicant and his spouse during his residence in the United States; foreclosure records for a residential property owned by the applicant and his spouse; medical records pertaining to the applicant's spouse; and a copy of the applicant's spouse's naturalization certificate. The entire record was reviewed and all relevant evidence considered in rendering this decision.

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 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 Center Director observed in his decision that the applicant had relocated to Canada temporarily, and had obtained stable employment at twice the salary he earned in the United States. The Center Director also concluded that there was no evidence the applicant and his family would have to relocate to Haiti, and that such evidence would put the applicant’s waiver in a different light.

The applicant responds on appeal that his spouse and family have been denied entry into Canada, and that in order to reside together they would have to relocate to Haiti. *Attachment, Form I-290B*, received January 22, 2010. The submissions on appeal include a summary letter from a Canadian attorney explaining why the applicant’s spouse cannot currently enter Canada, and court records which indicate that the Canadian government has denied entry to the applicant’s spouse.

The Administrative Appeals Office sent the applicant a Request For Evidence seeking additional documentation that the applicant's spouse could not return to Canada. In response, the applicant submitted a denial letter from the Consulate General of Canada denying her authorization to return to Canada.

Based on this evidence the applicant has established that his spouse and family would not be able to join him in Canada, thus it appears that in order to reside together the applicant's spouse and family would have to relocate to Haiti.

The applicant also notes that the reason he is earning more money in Canada is because Canada has allowed him to work, despite his immigration status, and that he was denied several meaningful jobs in the United States because of his immigration status. He also asserts that his current employer, [REDACTED] has offered to relocate him to [REDACTED] where his [REDACTED]. Although the applicant has not submitted any evidence to this effect, the AAO will give some consideration to the fact that the applicant would have gainful employment if his waiver is granted.

The Department of Homeland Security (DHS) Secretary, Janet Napolitano, determined that an 18-month designation of Temporary Protected Status (TPS) for Haiti was warranted because of the devastating earthquake and aftershocks which occurred on January 12, 2010, a period effective through June 11, 2011. On May 17, 2011, DHS Secretary Janet Napolitano announced an extension of Temporary Protected Status for Haitians, effective through January 13, 2013. As a result, Haitians in the United States are unable to return safely to their country. Even prior to the current catastrophe, Haiti was subject to years of political and social turmoil and natural disasters. In a travel warning issued on January 28, 2009 the U.S. Department of State noted the extensive damage to the country after four hurricanes struck in August and September 2008 and the chronic danger of violent crime, in particular kidnapping. *U.S. Department of State, Travel Warning – Haiti, January 28, 2009.* In a travel warning issued on August 8, 2011 the U.S. Department of State noted the critical crime level, renewed cholera outbreak, lack of adequate infrastructure including medical facilities, and limited police protection. *U.S. Department of State, Travel Warning – Haiti, August 8, 2011.* Based on the designation of TPS for Haitians and the disastrous conditions that have compounded an already unstable environment and will affect the country and people of Haiti for years to come, the AAO finds that the applicant's spouse would experience extreme hardship if he were to join the applicant in Haiti.

For the same reasons, the AAO finds that the applicant's spouse would also experience extreme hardship if he were to remain in the United States without the applicant. This finding is based on the extreme emotional harm she will experience due to the emotional stress resulting from the applicant's return to Haiti, a country recently experiencing devastating earthquakes and in a state of national emergency. The emotional stress that would result from a family member having to re-enter a country in Haiti's condition at this time is well beyond the common results of removal or inadmissibility, and therefore constitutes an extreme hardship.

As the record indicates that a qualifying relative will experience extreme hardship upon separation or relocation, the AAO may now consider 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-Moralez, 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 unlawful presence and unauthorized employment. The favorable factors in this case include the presence of the applicant's spouse, the hardship the applicant's spouse would experience due to the applicant's inadmissibility, the applicant's ability to find gainful employment in [REDACTED] and the lack of any criminal record for the applicant while resident in the United States. Although the applicant's unlawful presence and unauthorized employment are serious violations of U.S. immigration law, the favorable factors in this case outweigh the negative factors, therefore favorable discretion will be exercised. The director's decision will be withdrawn and the appeal will be sustained.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. *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.