

Administrative Appeals Office
Phoenix, Arizona
June 15, 2012

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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**

[Redacted]

H6

DATE: **JUN 15 2012**

Office: PHOENIX, AZ

[Redacted]

IN RE:

[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:

[Redacted]

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 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 waiver application was denied by the Field Office Director, Phoenix, Arizona. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Netherlands. She 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 her last departure. She is married to a United States citizen. 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).

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on January 29, 2010.

On appeal, counsel for the applicant states that the applicant disagrees with the conclusions of the Field Office Director and submits a brief reiterating the emotional, financial and physical hardships that the applicant's spouse would experience due to the applicant's inadmissibility. *Brief in Support of Appeal, Form I-290B*, received on March 25, 2010.

The record includes, but is not limited to, counsel's briefs; a statement from the applicant, her spouse and her spouse's son; statements of support from friends and associates of the applicant and her spouse; copies of tax returns; copies of residential rental leases; copies of financial documents; an employment letter for the applicant; country conditions information on the Netherlands; a statement from [REDACTED] MA, LPC, dated October 30, 2009, regarding the mental health of the applicant's spouse; a statement from [REDACTED] LCSW, dated February 8, 2010, pertaining to the mental health of the applicant's spouse; and photographs of the applicant and her spouse.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

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.

....

In her waiver application, the applicant indicates that she entered the United States under the Visa Waiver Program in October 1989 and did not depart until April 2001. It also reflects that she returned to the United States under the Visa Waiver Program in May 2001, and remained until September 2007. On October 13, 2007, the applicant entered the United States under the Visa Waiver Program for a third time and has not departed. The maximum period of stay under the Visa Waiver Program is 90 days.

Based on this history, the applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until she departed the United States in April 2001. The applicant again accrued unlawful presence from at least September 2001, when the 90-day authorized stay that followed her May 2001 admission would have ended, until her September 2007 departure from the United States. As the applicant is seeking admission within ten years of her 2007 departure, she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

Beyond the decision of the Field Office Director, the AAO also finds the record to establish that the applicant is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, which states:

- (i) **In general.** Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

The record reflects that the applicant has entered the United States as a nonimmigrant visitor under the Visa Waiver Program on three occasions, mostly recently on October 13, 2007. However, at the time of her 2007 admission, the record demonstrates that the applicant was not a nonimmigrant visitor, but an intending immigrant who was returning to resume her employment and residence in the United States.

The record contains a July 10, 2009 letter from the managing partner at the restaurant where the applicant works indicating that her employment there began on May 18, 2005. The record also contains a 2004 lease agreement signed by the applicant and her spouse for an apartment in Lake Havasu, Arizona. Based on this evidence, the AAO finds that the applicant was residing and working in the United States when she entered the United States under the Visa Waiver Program on October 13, 2007. In that the applicant was an intending immigrant when she sought admission to the United States as a nonimmigrant on October 13, 2007, she is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for having obtained a benefit under the Act through the willful misrepresentation of a material fact.¹

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

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.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

Waivers of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act are dependent on a showing that the bars to admission impose 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 other family members 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, the AAO considers the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

Counsel for the applicant asserts that the applicant's spouse is experiencing emotional hardship due to the applicant's inadmissibility and submits two evaluations of the applicant's spouse, the first prepared by Susan L. Martin, MA, LPC and the second by Murray J. Ireland, LCSW. *Brief in Support of Appeal*, received March 25, 2010. Counsel asserts that the applicant's spouse is

experiencing extreme anxiety and stress, and is suicidal. Counsel also contends that the applicant and his spouse rely on each other emotionally and financially.

An October 30, 2009 statement prepared by [REDACTED] indicates that during their interview, the applicant's spouse reported experiencing anxiety over the potential removal of the applicant. She also states that the applicant's spouse informed her that his anxiety had resulted in the following symptoms: ruminating, chewing fingernails, smoking up to two and one-half packs of cigarettes per day and an inability to sleep. [REDACTED] further indicates that the applicant's spouse reported that he was experiencing financial hardship as a result of reduced hours at work and the money he has spent on the applicant's immigration case. She states that he would benefit from psychotherapy focused on reducing his anxiety so that "his daily functioning is no longer impaired."

In a February 8, 2010 statement by [REDACTED], the applicant's spouse is described as exhibiting "features of agitation and anxiety" and as suffering from a "Major Depression Syndrome." [REDACTED] reports that the applicant's spouse is suffering from a major sleep disturbance, smokes two and one-half packs of cigarettes a day, has become sexually impotent, has lost a significant amount of weight, is unable to concentrate at work and obsesses about being separated from the applicant. He also states that the applicant's spouse has difficulty getting started in the morning because of feelings of apathy and fatigue, and that he has recurring thoughts of suicide. [REDACTED] further indicates that men are much less able to handle the loss of a spouse than are women, that they are also much more desperate over the loss of a mate and that he "does not see [the applicant's spouse] going on with his life without [the applicant]."

While the input of any mental health professional is respected and valuable, the AAO finds the submitted statements from [REDACTED] and [REDACTED] to be of limited use to a determination of extreme hardship. The reports, both of which largely recount the applicant's spouse's testimony, lack detail and analysis in support of the observations they make regarding the applicant's spouse's mental health. Without further evidence, the AAO is unable to determine the extent of the emotional hardship that would be experienced by the applicant's spouse if the applicant is removed from the United States.

Counsel for the applicant also asserts that the applicant's spouse depends on the applicant financially. To establish his spouse's financial situation, the applicant has submitted his and the applicant's 2008 tax returns, which indicate their gross incomes as being \$23,807 and \$26,540 respectively. The applicant has also provided a copy of a residential lease from 2007 that establishes that she and her spouse were then paying \$775 a month in rent, a 2009 auto loan statement that indicates a \$275 monthly car payment; and a 2009 auto insurance statement showing an annual premium of \$818. While the AAO acknowledges that the loss of the applicant's income would have a financial impact on her spouse, the record does not contain sufficient documentation of their financial obligations to determine the extent of that impact.

Based on our review of the record, the AAO does not find sufficient evidence to establish that the applicant's spouse would suffer extreme hardship if the waiver application is denied and he remains in the United States.

Counsel for the applicant asserts that the applicant's spouse would experience extreme physical and emotional hardship upon relocation. Counsel asserts that the applicant's spouse has never been to the Netherlands, does not speak the Dutch, has no family ties to the Netherlands and would not be able to find employment or housing. *Brief in Support of Appeal*, received March 25, 2010. Counsel further contends that the applicant's spouse has responsibility to provide financial and emotional support to his U.S. citizen son who is a diabetic, and who was only recently reunited with his father. *Brief in Support of Form I-601*, dated November 3, 2009.

To establish the conditions that her spouse would face in the Netherlands, the applicant has submitted printouts of online articles concerning the difficulty of finding housing in the Netherlands, the shrinking Dutch economy and the need for foreigners to speak Dutch if they reside in the Netherlands. The record also contains an October 29, 2009 letter from the Chief, Internal Affairs of Terschelling Island, where the applicant was born and where her mother continues to live. The Internal Affairs Chief states that there is a five-year wait for housing and that anyone who wants to rent a house on the island must be a member of the island's housing association.

The record also contains a letter from the applicant's spouse's son who states that he only recently has gotten to know his father. He also asserts that he has diabetes and needs the support of his father and the applicant. An August 2, 1994 divorce decree submitted for the record indicates that at the time of the applicant's spouse's divorce from his first wife, permanent custody of their only child was awarded to the child's mother. However, there is no documentary evidence in the record of the applicant's spouse's financial obligations regarding his son or his son's diabetic condition.

The AAO recognizes that the applicant's spouse has family ties to the United States and has no family ties to the Netherlands, other than the applicant. We also note that the applicant's spouse does not speak Dutch and acknowledge the negative impact that his inability to speak Dutch would have on his ability to obtain employment in the Netherlands and to integrate successfully into Dutch society. Accordingly, we find that the separation of the applicant's spouse from his son, his inability to speak Dutch, the significant negative impact that not being able to speak Dutch would have on his employment prospects and his ability to adapt to life in the Netherlands, and the disruptions and difficulties that are routinely created by moving to an unknown society and culture, when considered in the aggregate, are sufficient to establish that relocation to the Netherlands would result in uncommon hardship for the applicant's spouse.

The AAO can, however, find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate

and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also cf. *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the applicant's spouse in this case.

As the applicant has not established that her spouse would suffer extreme hardship if the waiver application is denied, she has not established eligibility for a waiver under sections 212(a)(9)(B)(v) and 212(i) of the Act. Having found the applicant statutorily ineligible for relief, the AAO finds no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests 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.