

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



#6

DATE: **OCT 22 2012** Office: NAIROBI 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)

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Nairobi, Kenya, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Tanzania 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)(H), for having been unlawfully present in the United States for one year or more and seeking readmission within 10 years of his last departure from the United States. The applicant 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 reside in the United States with his U.S. citizen spouse.

On January 31, 2011, the Field Office Director concluded that the applicant did not establish extreme hardship to his qualifying relative and denied the application accordingly.

On appeal, counsel for the applicant does not contest the applicant's inadmissibility but states that the evidence demonstrates that the applicant's qualifying relative would suffer extreme hardship if the applicant is not admitted as a lawful permanent resident.

In support of the waiver application, the record includes, but is not limited to legal arguments by counsel for the applicant, letters from the applicant's spouse, biographical information for the applicant and his spouse, psychological and medical history documentation concerning the applicant's spouse, documentation of the applicant's spouse's employment and financial situation, letters of support from family and community members, photographs, and documentation concerning the applicant's immigration history.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

The applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for one year or more. Section 212(a)(9) of the Act provides:

(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.

...

(v) 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The applicant was admitted to the United States on August 21, 1999 as an F-1 student for duration of status (D/S). The record indicates that the applicant stopped attending school in December 2002. In 2003, the applicant applied for reinstatement of his student visa. His request was denied on April 16, 2005, when USCIS found that he was no longer attending the institution he applied for reinstatement through. The applicant's unlawful presence in the United States began on the day after the date of the denial, which served as a determination that the applicant was no longer in status. If USCIS finds a nonimmigrant status violation while adjudicating a request for an immigration benefit, unlawful presence will begin to accrue on the day after the request is denied. See USCIS Memorandum, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, Lori Sciaiabba, Associate Director, Refugee, Asylum and International Operations Directorate, Pearl Chang, Acting Chief; Office of Policy and Strategy (May 6, 2009). The applicant, however, was not apprehended by immigration authorities until April 10, 2008. He was placed into removal proceedings at that time, conceded removability under section 237(a)(1)(C)(i) of the Act, and was granted voluntary departure by the Immigration Judge on July 29, 2008. If a person is granted voluntary departure pursuant to section 240B of the Act after commencement of removal proceedings, unlawful presence ceases to accrue with the grant of voluntary departure and resumes after the expiration of the voluntary departure period. The record indicates that the applicant departed at his own expense pursuant to voluntary departure before November 26, 2008. The AAO finds that the applicant is subject to the ground of inadmissibility at section 212(a)(9)(B)(i)(II) of the Act as a result of the applicant's accrual of one year or more of unlawful presence from April 17, 2005 until the date of the Immigration Judge's order, July 29, 2008.

The applicant is eligible to apply for a waiver of his inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, as the spouse of a U.S. citizen. In order to qualify for this waiver, however, he must first prove that the refusal of his admission to the United States would result in extreme hardship to his qualifying relative. Hardship to the applicant will not be separately considered, except as it is shown to affect the applicant's spouse. 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).

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.

We will first address whether the applicant has established that his U.S. citizen spouse would suffer from extreme hardship based on separation from the applicant. On appeal, counsel for the applicant states that the applicant's spouse is and will continue to suffer reproductive, medical, emotional, and financial hardship that cumulatively amounts to extreme hardship. The AAO notes that the applicant and his spouse were married on July 11, 2008, just before the applicant's departure from the United States, while the applicant was subject to voluntary departure. As such, the applicant's spouse's equities and hardship were accumulated with knowledge of the applicant's inadmissibility. Counsel states that the applicant's spouse is suffering from major depressive disorder, which he says "can result in death if it is not treated with therapy and medication." He goes on to state that the applicant's spouse is receiving "supportive psychotherapy and cognitive behavioral therapy" and that her depression has "taken over every facet" of her life, negatively impacting her job performance, relationships with others, and threatening her livelihood. Counsel also states that the applicant's spouse suffers from bulimia, which she had under control before the applicant's departure. Counsel also states that the applicant's spouse "is desperate for children." In support of these statements, the record contains a letter from [REDACTED] dated March 16, 2011, which states that the applicant's spouse "has had a severe depression which has not responded to psychotherapy, powerful antidepressants and changes in her lifestyle which she has seriously tried." The AAO notes that [REDACTED] does not explain her relationship with the applicant's spouse or whether they met in person.¹ There is also no documentation in the record that the applicant's spouse has taken antidepressants or had completed a course of psychotherapy by March 16, 2011.

A letter from [REDACTED] dated March 22, 2011, states that the applicant's spouse was evaluated on two occasions, February 16, 2011 and March 2, 2011, resulting in the diagnosis of major depressive disorder and bulimia nervosa. [REDACTED] states that the dual diagnosis can be life threatening and should be considered as such. As a result, the doctor stated that she "agreed to ask her physician to consider medication for her" and "we have started a course of supportive psychotherapy, including but not limited to cognitive behavior therapy." The AAO notes that this statement by [REDACTED] does not indicate that psychotherapy had been completed by March 16, 2011, the date of [REDACTED] letter. [REDACTED] also failed to indicate that she had prescribed antidepressants for the applicant's spouse or whether another doctor had prescribed medication.

There is also no documentation in the record that the applicant's spouse's job performance has been impacted by her depression. The applicant's spouse states that she lacks motivation in the evening to perform extra work. But, a letter from the University of Nebraska, Lincoln indicates that the applicant's spouse was selected to take part in a program for teaching math in middle schools. The letter states that the applicant's spouse "has the ability to succeed" in the program and "to be an academic leader." Although the applicant's spouse's assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. *See Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should

¹ The AAO notes that the March 22, 2011 letter from [REDACTED] discussed in the next paragraph, refers to [REDACTED] as the applicant's spouse's attorney. It is unclear whether [REDACTED] and [REDACTED] are the same individual.

not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it.”). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Similarly, without supporting evidence, the assertions of counsel will not satisfy the applicant’s burden of proof. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In regards to physical hardship, counsel states that the applicant’s spouse suffers from hypothyroidism, which he also states that if not properly managed “can result in serious illness or death.” The record indicates that the applicant’s spouse has managed her condition with medication, but there is no documentation to indicate that the applicant’s spouse’s life or well-being is at risk as a result of her condition. The AAO notes that significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate, are relevant factors in establishing extreme hardship. The evidence on the record is insufficient to establish, however, that the applicant’s spouse suffers from such a condition. The record contains lab results concerning the applicant’s spouse’s endocrine function and a prescription that she received for synthroid. The documents submitted, however, were prepared for review by medical professionals and do not contain a clear explanation of the applicant’s spouse’s current medical condition. Absent an explanation in plain language from the treating physician of the exact nature and severity of any condition and a description of any treatment or family assistance needed, the AAO is not in the position to reach conclusions concerning the severity of a medical condition or the treatment needed.

Counsel also states that the applicant’s spouse is suffering from financial hardship. The record indicates that the applicant’s spouse is employed as a teacher with Omaha Public School District, earning a yearly salary of \$33,573.28 in 2009, and lives with her parents. The 2008 Federal Income Tax Return submitted jointly by the applicant his spouse indicate a combined income of \$41,824.77, with the applicant contributing \$7,961.78 prior to his departure from the United States in 2008. The record, however, does not indicate that the applicant’s spouse is suffering any financial hardship as a result of separation from the applicant and the loss of his income. The AAO has considered the emotional, physical, and financial hardship set forth in the record, and recognizes the significance of family separation as a hardship factor, but it is not possible to determine, based on the record considered in the aggregate, that refusal of the applicant’s admission would result in extreme hardship to the applicant’s spouse.

Counsel also states that the applicant’s spouse would suffer financial and emotional hardship if she were to relocate to Tanzania to reside with the applicant. In regards to financial hardship, counsel states that the applicant’s spouse has spent “thousands of dollars in higher education and cannot afford to lose her job.” He states that “she relies on her monthly income to pay for her student loans, and her debts she has incurred throughout the past three years.” The record indicates that the applicant’s spouse earned \$33,573.28 per year as a middle school teacher. The record also indicates that the applicant’s spouse had \$12,014 in educational debt through [REDACTED]

██████████ with a monthly payment of \$120.22. The record does not contain any documentation to indicate what the applicant's spouse could expect her income to be in Tanzania if she were to relocate there. The record also fails to indicate whether the applicant is presently earning an income that could support himself and his spouse in Tanzania. Although counsel for the applicant states that the applicant would not relocate to Tanzania because her educational training is specific to the work that she presently performs in Nebraska, the record does not indicate that she could *not obtain employment there*. The AAO recognizes the applicant's spouse's difficult position, however, as stated above, the inability to pursue one's chosen profession has been found to be one of the common or typical results of inadmissibility and not the type of hardship that is considered extreme. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 632-33; *Matter of Ige*, 20 I&N Dec. at 885; *Matter of Ngai*, 19 I&N Dec. at 246-47; *Matter of Kim*, 15 I&N Dec. at 89-90; *Matter of Shaughnessy*, 12 I&N Dec. at 813. The AAO also notes courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS*, 794 F.2d 491, 497 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient.").

Counsel also states that the applicant is very close to her family in the in the United States, resides with her parents, and feels that she cannot leave them to live in Tanzania. The AAO notes the applicant's spouse's strong family ties to the United States, however, she has not indicated what *hardship she would suffer if she were to relocate to Tanzania and be separated from her parents*. The record indicates that the applicant's spouse visited Tanzania for one month, but there is no indication whether she was able to maintain communication with her family in the United States during that period or whether she was able to determine on that visit whether she would be able to obtain employment or medical treatment for her hypothyroidism in that country. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Here the applicant has not demonstrated that his spouse would suffer from financial hardship, or any other type of hardship, that considered in the aggregate amounts to extreme hardship, if she were to relocate to Tanzania.

Although the applicant's spouse's concern over the applicant's immigration status is neither doubted nor minimized, the fact remains 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 involuntary 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 this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to his qualifying relative as required under section 212(a)(9)(B)(v) of the Act. As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether he 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. 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.