

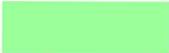


U.S. Citizenship
and Immigration
Services

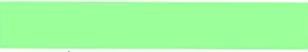
(b)(6)

Date: **APR 17 2013**

Office: MEXICO CITY

FILE: 

IN RE:

Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico 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 (Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking admission within 10 years of his last departure. The applicant is the spouse of a U.S. citizen. The applicant seeks a waiver of inadmissibility under 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 wife and son.

In a decision dated June 6, 2011, the field office director concluded that the applicant established that his qualifying relative would experience extreme hardship as a consequence of his inadmissibility. However, the field office director denied the waiver application in the exercise of discretion after finding that the applicant's immigration violations and "numerous arrests and convictions, ..., although not a [c]rime [i]nvolving [m]oral [t]urpitude, reflect significant negative factor[s]." The field office director further states that the applicant's disobedience of the laws of the United States outweigh the positive factors of the case and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, counsel for the applicant contends that the field office director's denial constitutes an abuse of discretion. She asserts that the record contains sufficient evidence of rehabilitation, and that the factors relied upon by the director to deny the waiver as a matter of discretion have been overcome by the applicant's good character, efforts towards rehabilitation, and the extreme hardship his qualifying relative currently experiences resulting from the denial of his admission.

The record includes, but is not limited to: counsel's brief; statements from the applicant; the applicant's wife hardship letters; psychological evaluations; medical reports; employer reference letters; documentation pertaining to the applicant's wife's mother medical conditions, cancer diagnosis, and death; documentation regarding the applicant's wife's father disability; character reference letters from the applicant's family members and friends; documentation evidencing rehabilitation, including letters from Church Pastors and the director of the [redacted]; mortgage statements; and documentation regarding the applicant's arrests and two criminal convictions.

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 has been reviewed and considered in rendering a decision on the appeal.

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

(B) Aliens Unlawfully Present.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

(b)(6)

.....

(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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

The record reflects that the applicant entered the United States without inspection in August 1989, and remained in the United States until his removal to Mexico on June 10, 2010. The applicant was placed in removal proceedings in April 1998, and was ordered removed in May 1999. The applicant appealed that decision and the Board of Immigration Appeals (Board) dismissed the appeal on August 15, 2003. The applicant then filed a petition for review of the Board's decision with the Fifth Circuit Court of Appeals, which was dismissed on June 15, 2005. The applicant remained in the United States until his removal on June 10, 2010. The applicant's period of unlawful presence in the United States began accruing on his April 12, 1999, the date of his 18th birthday, and continued until his removal in June 2010. Thus, the AAO finds that the applicant accrued unlawful presence in the United States for more than one year. As the applicant accrued unlawful presence of more than one year and is seeking admission to the United States within 10 years of his 2010 departure, he is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant does not dispute his inadmissibility on appeal.

In his decision, the field office director noted that the applicant was convicted in the 32nd Judicial District Court of Louisiana of battery on a police officer on September 21, 1998. The field office director further noted that on March 28, 2004, the applicant was convicted in Louisiana of first degree vehicular negligence. On March 13, 2011, counsel for the applicant submitted a legal memorandum to the field office director contending that the applicant's convictions did not render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The field office director reviewed counsel's brief and concluded that "[a] closer subsequent review of your immigration record revealed that you are not subject to the inadmissibility provisions of section 212(a)(2)(A)(i)(I) of the Act," an assessment with which we agree.¹ The applicant, however, remains inadmissible

¹ In Louisiana, the offense of battery on a police officer "is a battery committed without the consent of the victim when the offender has reasonable grounds to believe the victim is a police officer acting in the performance of his duty." LA R.S. § 14:34-2. The state courts have defined battery as any physical contact, whether injurious or merely offensive, and may be committed by touching another through the clothing. *State v. Schenk*, 513 So.2d 1159 (1987).

Battery on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his official duty and the assault results in bodily injury to the officer. See *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond "simple" assault).

under section 212(a)(9)(B)(i)(II) of the Act for having accrued unlawful presence in the United States in excess of one year.

Section 212(a)(9)(B)(v) of the Act provides that:

Waiver.-The Attorney General [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 to the satisfaction of the Attorney General [Secretary of Homeland Security] 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 [Secretary of Homeland Security] regarding a waiver under this clause.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent upon 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 other family members can be considered only insofar as it results in hardship to a qualifying relative. 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). Here, the record reflects that the applicant is the spouse of a U.S. citizen. The applicant's wife therefore meets the definition of a qualifying relative.

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 of Immigration Appeals (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 the 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

The applicant's record of conviction gives no indication that the applicant was charged with battery on a law enforcement officer resulting in bodily injury under section 14:34-2(3). Rather, count three of the indictment tracks the language of section 14:34-2 by charging that the applicant committed a battery against a deputy sheriff. Even though the record of conviction establishes that the victim was a uniformed law enforcement officer, the record does not establish that the law enforcement officer was injured.

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 is 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.

In a decision dated June 6, 2011, the field office director found the applicant had established extreme hardship to his spouse given both the current separation from the applicant and possible relocation to Mexico. In support of a finding of extreme hardship, the applicant provided evidence that his spouse suffered from significant ongoing emotional and psychological hardship due to separation. The record evidence shows that the applicant's wife has been diagnosed with Major Depressive Disorder with Severe Psychosocial Stressors. The record includes a psychological evaluation of the applicant's wife by Dr. [REDACTED] Ph.D., in which it is stated that she has a genetic predisposition to depression that has manifested itself severely due to the applicant's removal, her mother's sudden terminal cancer diagnosis and unexpected death, and her father's current medical conditions. The applicant submitted documentary evidence demonstrating that his father-in-law is a 100% disabled veteran who depends entirely on the applicant's wife for daily care. The applicant also submitted evidence that his wife is experiencing financial hardship from relocation based on her

inability to receive the tuition, stipend, and financial assistance that she received while she was enrolled in college. Moreover, the evidence in the record indicates that the applicant's wife must complete her degree in the next year in order to receive the financial benefits as the daughter of a disabled veteran. Furthermore, the applicant submitted evidence that his wife would experience financial hardship should she relocate to Mexico and that the applicant and his son are experiencing health-related difficulties in Mexico, which results in emotional hardships to the applicant's wife. In light of the individual hardship factors viewed in the aggregate, the AAO agrees with the field office director's finding that there is sufficient evidence to show the spouse experiences extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). The burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the Board stated:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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) . . .

Id. at 301.

The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The field office director found the applicant did not warrant a favorable exercise of discretion, given that the applicant's favorable factors failed to outweigh the unfavorable factors. Specifically, the field office director found that one of the favorable factors in the applicant's case is the extreme hardship his U.S. citizen wife is experiencing as a result of his inadmissibility. The field office director then noted the applicant's unfavorable factors including his unlawful presence; failure to appear to his removal appointment; that the government found and arrested him, later removing him at government expense; and the applicant's arrests and two convictions.

Upon review, the AAO notes that the unfavorable factors in this case are the applicant's criminal convictions and arrests; any periods of unlawful presence and employment; and the applicant's

failure to appear to his removal appointment and subsequent deportation after arrest by immigration officers. On the other hand, the favorable factors presented by the applicant are the extreme hardship his U.S. citizen spouse; the applicant's family ties to the United States, including his children; the applicant's 20 years of residence in the United States, considering that he was brought to the country by his parents when he was eight years of age; the applicant's work history in the United States; the lack of any criminal convictions since his last conviction in 2004; and the evidence demonstrating rehabilitation.

On appeal, the applicant has provided additional evidence of positive equities in his case. The applicant submits a declaration in which he does express remorse for his actions, and in which he states that he has made mistakes in his life. In a declaration dated July 2, 2011, the applicant admitted his involvement in the crimes which resulted in his convictions. He expressed remorse for his participation, and apologized for the bad choices he made in the past. The applicant asserts that his marriage to his wife makes him want to be a better person, and that he wants to work hard to support and maintain his family. The applicant states that thanks to his wife, he began attending church and now lives his life according to its precepts. The applicant also asserts that he has continued to attend church after his removal to Mexico, and a letter from the [REDACTED] in Mexico corroborates this assertion.

The record reflects that, as part of his sentence resulting from the 2004 conviction, the applicant was required to attend an Intensive Substance Abuse Program. The applicant successfully completed the program and its treatment recommendations and requirements without any difficulties. In a letter dated November 9, 2011, [REDACTED] a clinic director and the [REDACTED] Louisiana, stated that the applicant developed into a group leader while attending the outpatient program. According to Mr. [REDACTED], the applicant is not chemically dependent and does not suffer from the disease of addiction. Mr. [REDACTED] further stated that the applicant took the program seriously, and attended and participated in all meetings. Mr. [REDACTED] believes that the applicant learned from past mistakes and "moved forward in a positive direction." Mr. [REDACTED] further indicates that the applicant was recognized for his efforts as the recipient of the program's "Most Improved Person in Recovery" award for the year 2008. The declarations from the applicant's wife and family members further corroborate the assertions Mr. [REDACTED] made about the applicant.

The record further reflects that the applicant has been a member of the [REDACTED] in Mexico since his removal to that country in 2010. In a letter dated June 29, 2011, church leader Pastor [REDACTED] asserts that the applicant attends church regularly, that he has taken his son and wife with him to church services, that he has a good attitude, and that he is a reliable and hard-working individual. Additionally, the record includes a letter dated June 29, 2011, from Pastor [REDACTED] of the [REDACTED] in Louisiana, in which he states that the applicant became an active member of the church in January 2010. The applicant and his family sought counseling at the church through the "[REDACTED]" and that the applicant "was turning his life around, searching for spiritual growth and happiness with his family." Pastor [REDACTED] indicates that though the applicant was arrested by immigration officials in May 2010, his wife and son continue to attend the church regularly. Moreover, the applicant has a history of stable employment as a waiter and manager of [REDACTED]. His history of employment is supported by an employment reference letter submitted by the applicant with his

waiver application. These are favorable indicators of efforts at rehabilitation which, when evaluated in the aggregate, demonstrate that the applicant has rehabilitated.

Here, the AAO has weighed the negative factors, including the severity of the applicant's criminal convictions, against his efforts towards rehabilitation, his 20 years of residence in the United States, and the other favorable facts in the record, including the extreme hardship to his U.S. citizen wife, his three children and family ties, and his employment history. We find that the applicant merits a favorable exercise of discretion. The AAO recognizes that it is favorably exercising discretion in a case presenting criminal conduct and immigration violations. However, the AAO finds that the applicant is sincere in his remorse for his crimes and has been rehabilitated. The AAO acknowledges the significant positive factors which were not present at the time of the applicant's convictions. The applicant is now an active member of his church and community. He is married to a U.S. citizen and they have a U.S. citizen son together. The evidence in the record indicates that his marriage has served as a significant stabilizing factor, and the absence of arrests and convictions since he met his wife support this assertion. Additionally, the applicant's wife is experiencing extreme hardship as a result of his inadmissibility, and his son is experiencing health difficulties as a result of relocation to Mexico. Furthermore, the evidence in the record indicates that the applicant has long residence in the United States, and that his wife and son depend on him financially and emotionally. Given these factors, coupled with the hardship that would be experienced by his U.S. citizen wife and children upon his denial of admission, we find that the positive factors outweigh the negative factors in this case.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.