

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: **AUG 29 2013** OFFICE: NEBRASKA SERVICE CENTER

IN RE: Applicant:

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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in cursive script, appearing to read "Michael Shumway".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Nebraska Service Center Director denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Colombia 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)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of her last departure from the United States. The record indicates that the applicant is married to a U.S. citizen. She is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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.

The Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *See Decision of the Service Center Director*, dated January 12, 2013.

On appeal counsel contends that the adverse decision failed to consider that the applicant's U.S. citizen spouse is 79 years old, in poor health, and is suffering extreme hardship due to separation from the applicant and will continue to suffer extreme hardship if a waiver is not granted. *See Notice of Appeal or Motion* (Form I-290B), received February 12, 2013.

The record contains, but is not limited to: Form I-290B; counsel's appeal letter; various immigration applications and petitions; hardship letters; letters from the applicant; letters of character reference, support and concern; medical records; financial records; and marriage, birth and divorce records. The entire record was reviewed and considered in rendering this decision on the appeal.

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.

The record reflects that the applicant was admitted to the United States on June 20, 2004 as a temporary B-2 nonimmigrant, authorized to remain for six months. The applicant overstayed the period authorized by her visa before departing the United States in July 2006. The applicant accrued unlawful presence from December 20, 2004 to July 2006, a period in excess of one year.

As the applicant is seeking admission within 10 years of her departure, she was found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The record supports this finding, the applicant does not contest inadmissibility, and the AAO concurs that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

A waiver of inadmissibility under section 212(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 can be considered only insofar as it results in hardship to a qualifying relative. In the present case, the applicant's spouse is the only 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).

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 record reflects that the applicant’s spouse is a 79-year-old native of Yugoslavia who has been a citizen of the United States since 1965. He explains that he is elderly, retired, in poor health and in need of essential care and companionship from the applicant from whom he has been separated since her departure to Colombia in 2006. The applicant and his spouse met when residing in the same apartment complex in New York and corresponded with one another after her departure. The applicant’s spouse invited the applicant to spend vacation with him in Cancun in June 2008, during which he proposed marriage. The applicant writes that her spouse traveled to Colombia thereafter to meet her family, they married in Colombia in November 2009, and he has traveled several times to Colombia to be with her but each trip becomes more difficult due to the altitude sickness he suffers in Bogota and because of his ongoing medical treatment in New York. Dr. [REDACTED] writes that the applicant’s spouse suffers dyspnea when in Bogota as a result of the high altitude, and diagnoses him with hypertension, hypersensitivity reaction of the upper respiratory tract and high altitude disease, and recommends that the applicant not reside there. [REDACTED] writes that the applicant is under his care for hypertension, chronic obstructed pulmonary disease, and arthritis in both knees. Documentary evidence in the record shows that the applicant’s spouse has been prescribed a number of medications and is under the regular care and treatment of physicians at [REDACTED]. The applicant’s spouse states that he loves the applicant very much, wants to spend every day he has left of his life with her, and needs her assistance with simple daily activities like walking, accompanying him to medical appointments, picking up prescriptions, and providing personal motivation to keep him alive. He explains that while he has a brother, close friends and neighbors in his life, his brother is 72 years old, in poorer health than him, and lives 60 miles away. And while his friends and neighbors love him, they have their own lives and responsibilities and are unable to provide the same companionship and daily care and assistance as one’s spouse. The applicant’s spouse indicates that he lives on a modest income from his pension and Social Security, he does not own

the apartment in which he lives, and his brother pays for all utilities and services. Corroborating financial documents have been submitted for the record. He describes the great financial costs incurred since first filing a fiancé petition for the applicant in March 2008, and the emotional and physical difficulties endured in receiving one denial after another and not understanding why after so many years she is still not permitted to reside with him in the United States.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant's spouse, including the emotional and physical impacts of separation, particularly at his advanced age of nearly 80 years old; his significant chronic medical conditions and the likelihood that the applicant's care and companionship would be of substantial benefit to his overall well-being; and the increasing difficulty of traveling to Colombia at his advanced age given his numerous medical conditions, the altitude sickness he suffers in Bogota, and his modest financial means. Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. citizen spouse has and would continue to suffer extreme hardship due to separation from the applicant.

Addressing relocation, the applicant's spouse indicates that he is originally from Yugoslavia and has been a U.S. citizen for more than 48 years. He explains that he attempted to reside in Colombia, fearing that this would be the only way he could live out the remainder of his life with the applicant, but he was unable to do so. The applicant's spouse states that he becomes very ill and nauseous in Bogota as a result of its high altitude, and at his very advanced age he wishes and needs to remain under the care of his trusted physicians in New York for his numerous significant medical conditions. He indicates that it is in the United States where he has his family home, his brother, his longtime friends, where he worked and paid taxes for many decades, and where he would like to spend his final years.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse, including his advanced age of 79 years old; his adjustment to a country in which he has never resided; that he has resided in the United States for many decades, having become a U.S. citizen in 1965; his close family ties to the United States – particularly to his elderly brother; his close community ties in the United States to friends and neighbors of many years; his significant medical conditions for which he is under the care of long trusted physicians in the United States; and that when he even visits Bogota he becomes very ill as a result of the high altitude. Considered in the aggregate, the AAO finds the evidence sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship were he to relocate to Colombia to be with the applicant.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, 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. 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 AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

*Matter of Mendez-Moralez* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

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 favorable factors in the present case include extreme hardship to the applicant's U.S. citizen spouse as a result of the applicant's inadmissibility; the applicant's good moral character and essential presence in her spouse's life as demonstrated both by his statements and numerous attestations by others; her desire and willingness to care for and provide companionship to the applicant at his advanced age and in his condition, and the positive impact her presence will have on his life; and her lack of any criminal record. The unfavorable factors are the applicant's

immigration violations, which include a 1 ½ year period of unlawful presence and possible periods of unauthorized employment in the United States. Although the applicant's violations of immigration law are significant and cannot be condoned, the positive factors in this case outweigh the negative factors. Therefore, the AAO finds that a favorable exercise of discretion is warranted

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

**ORDER:** The appeal is sustained.