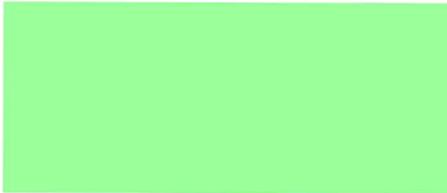


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U.S. Citizenship
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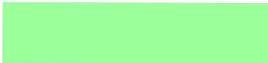


DATE: FEB 01 2013

Office: ROME, ITALY

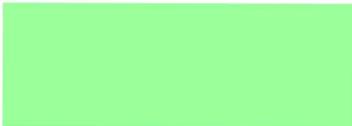
FILE: 

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.

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 with the field office or service center that originally decided your case by filing a 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 that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Tunisia 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), as an alien seeking admission within 10 years of departure or removal after having been unlawfully present in the United States for one year or more. The applicant is the spouse of a U.S. citizen. He seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(9)(B)(v), in conjunction with an immigrant visa application, in order to obtain admission to the United States as a lawful permanent resident.

The director found that the applicant had failed to establish that the bar to his admission would result in extreme hardship to the qualifying relative, as required for a waiver under section 212(a)(9)(B)(v) of the Act, and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated June 28, 2010. The director alternatively denied the applicant's waiver application in the exercise of discretion.

On appeal, counsel contends that the director incorrectly applied the extreme hardship standard, and abused discretion in denying the waiver application, as the positive discretionary factors outweigh the adverse factors. See *Counsel's Brief*, dated July 23, 2010.

The record of evidence includes, but is not limited to, counsel's brief; the applicant's statement; numerous letters and statements of the applicant's U.S. citizen wife; statements of the applicant's wife's family members; applicant's birth certificate; physician's letters and medical records for the applicant's wife; the applicant's immigration court records; and the applicant's criminal records. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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

(B) ALIENS UNLAWFULLY PRESENT.-

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

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

...

(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 record indicates that the applicant was last admitted to the United States on or about December 4, 1997 as a B-2 nonimmigrant visitor for an authorized period ending June 3, 1998. He thereafter remained in the United States beyond the authorized period of stay. The record shows that a Notice to Appear, placing the applicant into removal proceedings, was filed with the Immigration Court on February 13, 2003. On May 11, 2006, the Immigration Judge was ordered removed *in absentia*, after failing to appear. A subsequent motion to reopen was denied by the court on July 27, 2007. The applicant was located and arrested by Immigration and Customs Enforcement (ICE) officers and subsequently removed from the United States on or about November 5, 2007.

The record indicates that the applicant married [REDACTED] on October 9, 1999 but was divorced on March 19, 2001. On April 23, 2001, the applicant married [REDACTED] a U.S. citizen, who filed a Form I-130, Petition for Alien Relative, on the applicant's behalf on April 30, 2001. The petition was denied on August 27, 2002 for failure to appear. A second petition filed on or about March 5, 2003, was also denied on the same basis. Following his removal from the United States, the applicant married his current U.S. citizen wife, [REDACTED] on or about February 2, 2008, in Tunisia.

As the applicant has not disputed inadmissibility under section 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II), and the record does not show that finding of inadmissibility to be in error, the AAO will not disturb the determination. The applicant is the beneficiary of an approved Form I-129F, Petition for Alien Fiancé(e), by his U.S. citizen wife, and seeks a waiver of his inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act. The record establishes that the applicant's U.S. citizen wife is a qualifying relative for purposes of his section 212(a)(9)(B)(v) waiver application.

Section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 21 I&N Dec. 296 (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 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 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 v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (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.

Counsel contends that the evidence of record demonstrates that the medical and physical hardships of the applicant's wife, [REDACTED] are extensive and are sufficient to meet the extreme hardship standard. The record contains numerous medical records and letters from the applicant's wife's physicians detailing her health problems. A September 24, 2009 letter from [REDACTED] indicates that the applicant's wife's diagnoses include post lumbar laminectomy, lumbar degenerative disc disease, lumbar post arthropathy, lumbar spondylosis, sacroiliitis, failed back syndrome, thoracic spondylosis, cervical herniated discs, cervical spondylosis, cervicogenic headaches, cervical facet arthropathy, depression and a history of benign breast cysts. [REDACTED] states that [REDACTED] undergoes monthly radiofrequency neurotomy procedures, as well as facet injections, and is on narcotics medication. A July 22, 2010 letter from [REDACTED] who [REDACTED] sees for pain management, states that the latter has undergone numerous attempts at interventional and conservative treatment options, including numerous nerve blocks, medication regimens, adjustments, and surgical intervention for her lumbar spine and her cervical spine. [REDACTED] notes that [REDACTED] symptoms have continued to worsen and that he does not anticipate significant improvement in the future. He further states that he believes that she will be unable to maintain her current employment status given the severe limitations of the cervical and lumbar spine, and has recommended that she seek disability. [REDACTED] recommends attentive care by a family member for assistance with daily living activities, particularly to avoid further injury from falls or exacerbation of her symptoms.

The AAO also observes that the applicant's wife has submitted numerous letters and emails in her husband's immigration case, detailing the emotional, medical and physical hardships resulting from her medical ailments and treatment. Although the record indicates that the applicant's wife has a sister and an adult son, as well as friends, in the United States, the applicant's wife asserts that she requires her husband's daily presence to have any quality of life. She asserts that she is able to work from home electronically but is less and less able to function independently. In a letter of April 19, 2009, [REDACTED] asserts her arms and legs go completely numb and that she is never without severe pain. She states that she has no quality of life, has lost one of her rental properties she relied upon for income for her son's college expenses, and is fearful of losing her primary residence. She states further that the loss of income, the expense for her health conditions, and attorney fees have resulted in severe financial distress.

Having considered the evidence of record, the AAO finds that it does demonstrate that the applicant's wife would experience ongoing extreme hardship as a result of separation from the applicant. The record establishes that the applicant's spouse suffers from severe back and neck pain, and that her conditions are unlikely to improve with time and treatment. It also shows that the applicant's wife is also suffering from depression from dealing with health problems and the ongoing separation from her spouse. We conclude that the medical, physical and emotional hardship the applicant's wife continues to experience constitute "significant hardship over and above the normal disruption of social and community ties" normally associated with deportation or refusal of admission. *Matter of O-J-O-*, 21 I&N Dec. at 385

We also find that the applicant has demonstrated that his U.S. citizen wife would suffer extreme hardship as a result of relocation to Tunisia. The record shows that the applicant's wife is approximately 45 years old, was born and has resided in the United States her entire life, and has very close ties to the United States, including her father, sister, and a young adult son. She indicates that she is unfamiliar with the language and culture of Tunisia. In addition, aside from her husband,

she has no close ties to Tunisia. Further, while the record does not show the applicant's spouse would not have ready access to adequate medical care in Tunisia, we note that relocation would require her to seek care for chronic, serious health problems in an unfamiliar healthcare system from medical providers who may not speak English and with whom she may otherwise have difficulty communicating. Moreover, in relocating, the applicant's spouse would lose her current healthcare providers who are familiar with her medical history and significant needs. When the normal hardships of relocation and those created by the applicant's spouse's medical conditions are considered in the aggregate, the AAO finds the applicant to have established that relocation would result in extreme hardship for his spouse.

However, as noted, even where the applicant satisfies the statutory requirements for the waiver, it may still be denied in the exercise of discretion. 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. *Matter of Mendez*, 21 I&N Dec. 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.

In *Matter of Mendez-Moralez*, in evaluating whether relief is warranted in the exercise of discretion, the BIA stated that:

[T]he 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 (internal citations omitted). The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant must bring forward to establish a favorable exercise of administrative discretion is merited will depend in each case on the nature and circumstances of the ground of inadmissibility sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

In the instant case, the applicant, as a matter of discretion, does not merit a grant of this waiver. The negative discretionary factors against this applicant include his immigration violations and criminal history. Specifically, this applicant has resided unlawfully in the United States without authorization since 1994. Since his initial entry, the applicant has been arrested on several occasions in the United

States.

The record shows that on December 27, 1999, the applicant was arrested for disorderly conduct in violation of section 877.03 of the Florida Statutes Annotated (F.S.A.). The applicant has not furnished a certified disposition for this arrest, but criminal enforcement records show that charge was dropped or abandoned. The applicant was arrested for disorderly conduct again in Florida on July 29, 2001. The disposition for this arrest is unknown. The AAO observes that the applicant, who bears the burden to demonstrate that he merits a waiver in the exercise of favorable discretion, has not produced the arrest reports or complaints, setting forth the underlying conduct or circumstances of these arrests.

On August 2, 2002, the applicant was arrested for obstructing or opposing an officer without violence in violation of F.S.A. § 843.02. On October 7, 2002, the applicant pled nolo contendere to striking or interfering with a law enforcement animal under section 36-41 of the Hillsborough County Code of Ordinances and Laws, and was sentenced to twelve months of probation. Counsel maintains that a cursory look at the record indicates that the applicant went to pet a police officer's house, not knowing permission was required. The record does not support counsel's assertions. Rather, the criminal incident report states that while a mounted police officer was assisting with crowd control, the defendant waited until the officer and horse were looking away before stepping out of the crowd and striking a hard blow to the horse with a closed fist. The report indicates that the applicant then attempted to flee into the crowd when the officer sought to arrest him.

On March 21, 2004, while the applicant was already in removal proceedings and seeking to adjust his immigration status, he was again arrested and charged with two counts of aggravated battery with a deadly weapon in violation of F.S.A. § 784.045(1)(a)(2). A conviction for aggravated battery with a deadly weapon would constitute a crime involving moral turpitude and would render the applicant inadmissible on a separate basis. *See Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011) (noting that while a simple battery offense is generally not considered to involve moral turpitude, an aggravating factor, such as use a deadly weapon, would indicate the perpetrator's moral depravity). Here, criminal and court records in the administrative file indicate that the applicant was placed in a pretrial intervention (PTI) program pursuant to F.S.A. § 948.08 and entered into a deferred prosecution agreement. Criminal court printouts show that the charges were not prosecuted after the applicant's successful completion of the program, which included an anger management course. The printouts also show that the applicant at one time pled to the charges, but does not indicate the nature of his plea. Our review of Florida's PTI program revealed that enrollment into the program requires in some cases an admission of guilt or facts sufficient to establish guilt. The record, however, does not contain the applicant's deferred prosecution agreement to show whether the applicant pled guilty to the charges as a requirement of enrollment into the program. We note that if the applicant had in fact pled guilty, the imposition of the court ordered program, together with the guilty plea, would be sufficient to demonstrate that he had been convicted for immigration purposes, pursuant to section 101(a)(48)(A) of the Act. The subsequent dismissal of the charges based on successful completion of the PTI program would not remove the immigration consequences of the original conviction. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) (holding that no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute); *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (reiterating that if a conviction is vacated for reasons unrelated to a procedural or substantive defect in the

underlying criminal proceedings, the alien remains “convicted” for immigration purposes). We believe it likely that this offense does qualify as a conviction for immigration purposes. Regardless, we find the underlying conduct and circumstances of the arrest are relevant in evaluating whether the applicant warrants a favorable exercise of discretion. The applicant has not produced the complaint and arrest reports setting forth the underlying conduct charged, though the burden in this matter rests upon the applicant. We also observe that the applicant’s file contains no statements¹ or explanations from the applicant, addressing his past immigration and criminal violations or expressing any remorse or rehabilitation.

Finally, the applicant was arrested once again during the course of his removal proceedings, on February 13, 2006, for driving with a suspended license and having an open beer container in the car. He pled no contest to both charges on May 11, 2006. The probable cause affidavit by the arresting officer indicates that the applicant was found passed out sleeping in his car in the parking lot of a gas station. It indicates that the open can of beer was located under his seat.

The record also contains a Form I-213, Record of Deportable/Inadmissible Alien, which indicates that when ICE officers attempted to locate the applicant on or about July 13, 2007 on the final immigration court removal order, the applicant attempted to flee the officers by accelerating the car he was driving, jumping onto the curb, and driving across residential property. The applicant’s then girlfriend, now his spouse, provided a written statement acknowledging that she was in the car during this incident.

Based on the foregoing, we find the applicant’s history of criminal violations, along with his immigration violations, to be serious and showing an obvious disregard for the laws of the United States. The applicant also has not provided any statements or other evidence showing his remorse and rehabilitation for his past conduct. In fact, his most recent arrests in 2004 and 2006, during the course of his removal proceedings and his pending adjustment of status application, suggest a lack of rehabilitation.

The favorable discretionary factors for this applicant are his U.S. citizen wife; the extreme hardship that would be suffered by his U.S. citizen spouse upon separation or relocation, as detailed above; and the letters of support by the applicant’s wife, her family members, and friends requesting the applicant’s presence for his wife’s care. The AAO acknowledges that the applicant’s daily support would be of assistance to his wife. The applicant’s wife maintains that she requires the daily support and presence of the applicant to manage her medical and physical problems. We note that medical records, including a December 15, 2008 letter from [REDACTED] assert that the applicant assists his wife with daily living. The applicant’s wife, in an email of May 21, 2010, similarly asserts that the applicant makes sure the bills are paid, works with her doctors, runs the house, helps me dress, and helps her with her physical therapy at home that she cannot do on her own. The AAO notes, however, that these assertions appear in conflict with the evidence of record, which shows that the applicant has been out of the United States since November 2007 and that the couple was only married the following year in Tunisia. The record indicates that the applicant’s wife has been residing in the United States, where she receives her treatment. There is no evidence that she has returned to Tunisia since her February 2008 wedding or that the applicant returned to the United States. The record also does not reveal whether the applicant’s wife was suffering from her back and

¹ The record contains a single, incomplete statement, dated November 27, 2009, from the applicant, which, as noted, fails to address his criminal and immigration history.

(b)(6)

Page 9

neck ailments prior to their marriage. Thus, the statements made in the medical records and in the applicant's wife's statements are unsupported in the record, and do not show that the applicant has ever provided any kind of physical or financial support for his wife, as asserted by his wife and

The AAO notes that a finding of extreme hardship carries considerable weight in the exercise of discretion and has carefully considered the extent to which the applicant's spouse's hardship mitigates the numerous negative factors in this case. We find, however, that the immigration and criminal violations committed by the applicant are serious in nature and must be given significant negative weight given the applicant's failure to demonstrate rehabilitation. The applicant's recent convictions, occurring while in proceedings and while his adjustment of status application was pending, demonstrate a lack of rehabilitation and a continuing disregard for the immigration and criminal justice systems. Aside from the applicant's assertions that he wishes to come to the United States to help care for his wife, the applicant has not provided evidence that would establish good character or that he is deserving of the waiver he seeks. The AAO finds that the applicant has not established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is not warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) 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.