



(b)(6)



DATE: **FEB 08 2013** OFFICE: TEGUCIGALPA, HONDURAS

FILE:

IN RE:

APPLICANT:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)

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

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

The applicant is a native and citizen of Honduras 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 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. Citizen spouse and children.

The Field Office Director concluded that although the applicant demonstrated his spouse would experience extreme hardship given his inadmissibility, he did not merit a favorable exercise of discretion and denied the application accordingly. *See Decision of Field Office Director* dated February 24, 2012.

On appeal, counsel for the applicant submits a brief in support, statements from the applicant's family, and medical and educational records. Counsel contends the applicant's positive factors outweigh the criminal and immigration violations, and that consequently the applicant merits a favorable exercise of discretion.

The record includes, but is not limited to, the documents listed above, other statements from family and friends, financial documents, psychological evaluations, other medical and educational documents, evidence of criminal and immigration proceedings, other applications and petitions, evidence of birth, marriage, residence, and citizenship, and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

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

**(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.

(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

(b)(6)

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 applicant admitted under oath that he entered without inspection in 1985, left the United States in 1988, and re-entered the United States without inspection in July 1988. He was placed in removal proceedings, and he was removed from the United States in October 1988. The applicant also admitted that he entered without inspection again later in 1988, remaining until his removal order was reinstated and immigration officials returned him to Honduras on June 5, 2009. The applicant also filed an application for temporary protected status on August 27, 1999, which USCIS denied on April 29, 2005. The applicant therefore accrued more than one year of unlawful presence, from April 1, 1997, the effective date of the unlawful presence provisions, until August 27, 1999, and from April 29, 2005 until his departure on June 5, 2009. The applicant's qualifying relative for a waiver of this inadmissibility is his U.S. Citizen spouse.

The record contains references to hardship the applicant's children would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(a)(9)(B)(v) of the Act, and hardship to the applicant's child will not be separately considered, except as it may affect the applicant's spouse.

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 v. I.N.S.*, 138 F.3d 1292 (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.

The Field Office Director found the applicant established the existence of extreme hardship to the applicant's U.S. citizen spouse in the event of relocation to Honduras and in the scenario of continued separation from the applicant. The AAO finds there is no documentation of record which would warrant reversing the Field Office Director's finding on this issue.

Evidence of record demonstrates that the applicant's spouse suffers from extreme hardship given the present separation. The applicant has submitted sufficient documentation to show his spouse and their children receive food stamps, cash assistance, and Medicaid from the Florida Department of Children and Families. The record moreover indicates that without the applicant present, the family home has been foreclosed upon, and the spouse has had difficulties meeting her financial obligations in a timely manner. In addition to the financial hardship, the applicant has established that their youngest child has speech and language impairments as well as a learning disability which require medication, educational assistance, and additional attention from the spouse. The applicant has also submitted a letter from the local workforce transition program which establishes the spouse is unable to work because her youngest child requires full-time care. Furthermore, the record indicates the spouse suffers from several medical conditions such as thyroid problems, hypertension, diabetes, seasonal allergies, depression, and carpal tunnel syndrome.

The AAO therefore finds there is sufficient evidence of record to demonstrate that the spouse's hardship would rise above the distress normally created when families are separated as a result of inadmissibility or removal. In that the record establishes that the financial, medical, psychological / emotional or other impacts of separation on the applicant's spouse are cumulatively above and beyond the hardships commonly experienced, the AAO concludes that she would suffer extreme hardship if the waiver application is denied and the applicant remains in Honduras without his spouse.

The record further establishes the applicant's spouse would experience extreme hardship upon relocation to Honduras. Although the applicant's spouse was born in Tegucigalpa, Honduras, she has three U.S. citizen children who were born and raised in the United States. Furthermore, there is documentation of record indicating that medical and educational services for the youngest child would be difficult to access in Honduras, as would medical care for the applicant's spouse. The AAO notes that assertions on safety concerns in Honduras are supported by a travel warning issued by the U.S. Department of State, which indicates that although many U.S. citizens safely visit Honduras each year for study, tourism, business, and volunteer work, crime and violence are serious problems throughout the country. *Travel warning – Honduras, U.S. Department of State, November 21, 2012.*

In light of the evidence of record, the AAO finds the applicant has established that the spouse's difficulties would rise above the hardship commonly created when families relocate as a result of inadmissibility or removal. In that the record demonstrates that the emotional, financial, medical, or other impacts of relocation on the applicant's spouse are in the aggregate above and beyond the hardships normally experienced, the AAO concludes that she would experience extreme hardship if the waiver application is denied and the applicant's spouse relocates to Honduras.

Considered in the aggregate, the applicant has established that his spouse would face 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-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 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 for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion 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.

The favorable factors include the extreme hardship to the applicant's spouse, his payment of U.S. federal income taxes, evidence of good moral character as stated in letters from family and friends, and evidence of hardship to the applicant's children. The unfavorable factors, however, are significant. The applicant admitted he entered the United States without inspection on three separate occasions. He further admitted that after he was removed in 1988 he entered without inspection shortly thereafter. These immigration violations are viewed in conjunction with his criminal record in the United States. The applicant has a 1995 conviction for driving under the influence, as well as two convictions for driving without a license, and a commercial vehicle violation. Moreover, in 1995 he was charged with battery, and although adjudication was withheld on that charge he was placed on probation.

These immigration violations, as well as his criminal convictions, occurred over 15 years ago, and the record indicates the applicant has changed since those incidents. Therefore, although the applicant's violations of immigration and criminal law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

The AAO notes that the applicant is also inadmissible for a period of twenty years after his last departure from the United States pursuant to section 212(a)(9)(A) of the Act because he had been removed once, illegally re-entered the United States, and had the prior order reinstated under section 241(a)(5) of the Act. To waive this additional inadmissibility, the applicant will need to file a Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.

**ORDER:** The appeal is sustained.