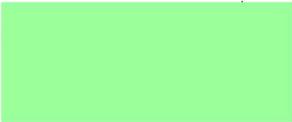




**U.S. Citizenship
and Immigration
Services**

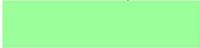
(b)(6)



Date: **FEB 28 2013**

Office: TAMPA

FILE: 

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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. Do not file any motion directly with the AAO. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The record establishes that the applicant is a native and citizen of Canada who entered the United States in 1979 on an L-1 visa with authorization to remain until 1982. The applicant made subsequent departures and returned to the United States using his Canadian passport. The applicant 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. The applicant contests this finding of inadmissibility.

The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the Field Office Director*, dated October 6, 2011.

On appeal the AAO determined the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The AAO found that the applicant entered the United States in 1979 with authorization to remain until 1982, prior to implementation of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996, which enacted the unlawful presence provisions of the Act. The applicant's subsequent entries into the United States were as a non-controlled Canadian. Non-controlled Canadians admitted and not issued an I-94 are treated as duration of status for the purposes of determining unlawful presence. See *USCIS Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, Lori Sciaiabba, Associate Director, Refugee, Asylum and International Operations Directorate, Pearl Chang, Acting Chief; Office of Policy and Strategy (May 6, 2009)*. In this case, the applicant was not found to have violated his status by an Immigration Judge nor by USCIS until March 2010 when the applicant applied for admission and was refused, but subsequently was paroled into the United States. Accordingly, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act as he did not depart the United States after accruing unlawful presence for a period of one year or more.

The AAO determined, however, that the applicant is inadmissible under Section 212(a)(6)(C) of the Act, which provides in pertinent part:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The principal elements of a misrepresentation that renders an alien inadmissible under section 212(a)(6)(C)(i) of the Act are willfulness and materiality. In *Matter of S- and B-C*, 9 I&N Dec 436

(BIA 1960 AG 1961), the Attorney General established the following test to determine whether a misrepresentation is material:

A misrepresentation . . . is material if either (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded. *Id. at 447.*

The Supreme Court has addressed the issue of material misrepresentations in its decision in *Kungys v. United States*, 485 U.S. 759 (1988). In that case, which involved misrepresentations made in the context of naturalization proceedings, the Supreme Court held that the applicant's misrepresentations were material if either the applicant was ineligible on the true facts, or if the misrepresentations had a natural tendency to influence the decision of the Immigration and Naturalization Service. *Id. at 771.*

The record establishes that in a sworn statement given to U.S. Customs and Border Patrol in February 2010 the applicant stated that on his previous entry into the United States as a visitor from Toronto he had told CBP officers that he did not know how long he would remain in the United States as he was on business. In fact, at that time the applicant was returning to his long-time residence in the United States rather than visiting for business. By failing to disclose that he resided in the United States and indicating he was only visiting for business purposes, the applicant shut off a line of inquiry relevant to his eligibility for admission as a nonimmigrant visitor. The AAO therefore finds the applicant willfully misrepresented a material fact when seeking admission to the United States.

On December 20, 2012, the AAO issued a Notice of Intent to Deny (NOID) the waiver application. In response to that NOID, counsel for the applicant submitted a brief, a statement from the applicant's spouse, and tax returns. Counsel asserts that the applicant is not inadmissible for having misrepresented a material fact because he did not state or write anything that was untrue, and because CBP agents, when refusing the applicant entry into the United States, did not cite misrepresentation or place him in removal proceedings, indicating the agency was satisfied that the applicant was forthcoming about his immigration history.

The AAO finds the rebuttal fails to overcome the reasons for denial as stated in the NOID. Counsel asserts the applicant did not commit misrepresentation as he did not utter or write anything untrue. However, as noted in the NOID, when the applicant told a CBP officer he was a visitor for business purposes and did not know how long he would remain in the United States, he willfully misrepresented a material fact, as he had been residing and working in the United States for nearly thirty years and was returning to his residence in Florida. By stating he was visiting for business purposes rather than truthfully stating that he was returning to his longtime residence in Florida, he shut off a line of inquiry relevant to his eligibility for admission, as he would be denied admission as a visitor had the CBP officer know the true facts. That CBP did not find the applicant inadmissible under section 212(a)(6)(C)(i) of the Act when he subsequently sought admission as a

visitor in 2010 does not establish he was viewed as forthcoming, as he was found inadmissible under other grounds and refused entry into the United States.

Section 212(i) of the Act provides:

The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien

A waiver of inadmissibility under section 212(i) 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. The applicant's wife is the only qualifying relative in this case. 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-Moralez*, 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. *Salcido-Salcido v. INS*, 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 AAO found that based on the evidence on the record, the applicant has established his spouse would suffer extreme hardship were she to relocate abroad to reside with him. The AAO found, however, that the applicant has failed to establish that his qualifying spouse will suffer extreme hardship as a consequence of being separated from the applicant. The AAO determined the applicant has not established how his spouse’s situation differs from others facing separation, that the applicant’s spouse would be unable to travel to Canada on a regular basis to visit the applicant, or that the applicant would be unable to provide financial assistance from Canada.

In rebuttal to the NOID counsel asserts that separation from the applicant would cause his spouse great financial and emotional setback. The applicant’s spouse states that she maintains a close relationship with the applicant, but that she currently receives no net income from her real estate business, making her dependent on the applicant. She states that her father is now gravely ill and that relocating to Canada would make frequent visits impossible and cause her to rarely see her daughter who needs support and encouragement. The applicant’s spouse also states that the applicant has businesses here he could not manage if he were to relocate and this would destroy their

source of income and cost employees their jobs. She further states that after past difficulties and disappointments she finds comfort and fulfillment in life with the applicant

The AAO finds that the rebuttal to the NOID fails to overcome the determination that the applicant has not established his spouse will suffer extreme hardship if she remains in the United States while the applicant resides abroad due to his inadmissibility. The applicant's spouse states that she depends on the applicant emotionally and financially. Aside from a psychological evaluation based on a single visit, the record contains no other documentation regarding the spouse's emotional hardship or evidence of how such emotional hardships are outside the ordinary consequences of removal. The applicant's spouse has her own home and business, and although she states she depends on the applicant financially and that he could not manage his businesses from Canada, no documentary evidence has been submitted to establish that the applicant would be unable to assist the spouse financially from Canada. Further, courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS*, 794 F.2d 491, 497 (9th Cir. 1986).

The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, her situation if she remains in the United States is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship based on the record. The difficulties that the applicant's spouse would face as a result of her separation from the applicant, even when considered in the aggregate, do not rise to the level of extreme as contemplated by statute and case law.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation and the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also *cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.