



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JAN 02 2013

Office: SAN DIEGO

FILE: [REDACTED]

IN RE: [REDACTED]

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:

SELF-REPRESENTED

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 District Director, San Diego, California, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and a 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 (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 admission within 10 years of her last departure. The applicant is the spouse of a U.S. citizen. She seeks a waiver 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 her U.S. citizen spouse and daughter.

On August 10, 2011, the District Director concluded that the applicant failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, the applicant submits new evidence and states that the evidence, when considered cumulatively, demonstrates that her U.S. citizen spouse will suffer from extreme hardship as a result of her inadmissibility.

The evidence of record includes, but is not limited to, statements from the applicant's spouse, a mental health evaluation of the applicant's spouse, medical records for the applicant's spouse, documentation regarding the applicant's spouse's income and employment, documentation regarding the applicant's spouse's property ownership, a letter from the applicant's daughter's school, letters of support from family, clergy, neighbors and friends, biographical information for the applicant, his spouse, and their daughter, and documentation of the applicant's immigration history.

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 was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) states 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 Attorney General or is present in the United States without being admitted or paroled.

The applicant stated that she entered the United States without inspection in March 1995 and remained unlawfully in the United States through September 27, 2010. The applicant began accruing unlawful presence on April 1, 1997, when the unlawful presence provisions of the Act went into effect, until the time of her departure. As the applicant accrued unlawful presence of more than one year and is seeking admission within 10 years of her departure, she is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest her inadmissibility.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now 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 . . . 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.

A waiver of inadmissibility under section 212(a)(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 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*, 21 I&N Dec. 296, 301 (BIA 1996).

It is noted that Congress did not include hardship to an applicant'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 hardships to the applicant's daughter will not be separately considered, except as they 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, 631-32 (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, “[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., In re 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 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.

The AAO now turns to the question of whether the applicant in the present case has established that a qualifying relative would experience extreme hardship as a result of her inadmissibility.

On appeal, the applicant's spouse states that he is suffering from emotional, physical, and financial hardship as a result of the applicant's inadmissibility. The record indicates that the applicant and her U.S. citizen spouse have been married since May 8, 2000, have a U.S. citizen daughter who was born on November 10, 2001, and have been living apart since the applicant departed the United States on September 27, 2010. The applicant's spouse states that he is caring for the couple's eleven-year-old daughter and that he visits the applicant in Mexico several times a week despite the safety risks, because he cannot stand to be apart from her. He states, however, that the stress of being a single parent, supporting two households, and worrying about the crime in Mexico has been overwhelming for him. The applicant lives in Matamoros, Mexico and the applicant's spouse stated that his car was hit by gunfire last year when he was traveling home from Mexico to Brownsville, Texas. He submitted photographs of the bullet holes in the vehicle's windshield. In regards to the emotional hardship that the applicant's spouse is experiencing, a letter in the record from Licensed Clinical Social Worker, [REDACTED] dated August 29, 2011, indicates that the applicant's spouse is suffering from Post-Traumatic Stress Disorder and Major Depression. [REDACTED] states that the applicant's spouse experienced past trauma as child when his younger brother drowned and that since that time, difficult experiences in the applicant's spouse's life have caused the applicant's spouse to turn to alcohol and be inconsolable. [REDACTED] reports that the applicant's spouse, at the time of her evaluation, was struggling to control his urges to seek refuge in alcohol as he had done in the past. She also states that the applicant's spouse is experiencing guilt and shame associated with his daughter's separation from her mother. A letter in the record, submitted by the applicant's daughter's school, contains a plea by the applicant's daughter for her mother's return to the United States. [REDACTED] states that the applicant's spouse's guilt retrigger the trauma that the applicant's spouse felt when his younger brother drowned. Although the record indicates that the applicant's spouse is able to maintain care for himself and his daughter, the record indicates as well that past periods of depression have left the applicant's spouse incapacitated.

The applicant's spouse states that being separated from the applicant has also caused him financial hardship. He states that he not able to work 40 hours of week because of various physical problems and as a result of the economy's impact on his employer. In support of that statement, the record contains a letter from the applicant's spouse's employer stating that the applicant's spouse's hours have been cut back to 32 hours per week. The applicant's spouse's employer stated

that the economy, as well as the applicant's health and family problems, have limited the work that the applicant's spouse can perform. Medical records indicate that the applicant's spouse had surgery for a hernia in 2006 and most recently has suffered from painful foot problems. Nonetheless, the record indicates that the applicant's spouse has continued to maintain steady employment, as well as care for his daughter. Letters in the record from neighbors, colleagues and friends attest that the applicant's spouse is hardworking and doing his best to care for his daughter but that at the same time, he has been suffering from hopelessness and shame. Although [REDACTED] in her mental health evaluation, states that the applicant's spouse reports being at risk for losing the home that he owns, there is no indication in the record of that. Although the applicant's spouse's assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. See *Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Nonetheless, having reviewed the preceding evidence, the AAO finds it to establish that the applicant's spouse is experiencing extreme hardship resulting from his separation from the applicant. In reaching this conclusion, we note the applicant's spouse's medical and emotional condition, as well as his limited financial means. The Health and Human Services Poverty Guidelines for 2012 indicate that the poverty guideline for a family of three was \$19,090. The applicant's spouse's W-2 form for 2010 indicates that he earned \$17,225.88 that year. Documentary evidence and statements from family, friends, and community members corroborate the applicant's spouse's claims of emotional hardship and financial concerns. The applicant's spouse is also concerned about his family's safety due to their frequent travel between the United States and Mexico. Furthermore, the record demonstrates that the applicant's spouse's past trauma has negatively affected his ability to adapt to his present circumstances particularly in light of the real concerns for safety that exist along the U.S. Mexico border. The AAO concludes that, considering the evidence in the aggregate, the applicant's spouse is experiencing extreme hardship resulting from his separation from the applicant.

The AAO also finds the record to establish that the applicant's spouse would experience extreme hardship if he were to relocate to Mexico. The applicant's spouse's safety concerns about living in Mexico appear to be justified, given the applicant's spouse's direct experience with gunfire along the border. The AAO further notes that the U.S. Department of State has issued a travel warning for Mexico, updated on November 20, 2012, reporting an increase in violence particularly in Matamoros where the applicant resides. The Travel Warning indicates that non-essential travel to Matamoros, where the applicant lives, should be deferred. The record indicates that the applicant's emotional hardship would be aggravated as a result of the trauma that he suffered in childhood in Matamoros, as well as due to his fears for the safety of his young daughter who he currently cares for in the United States. The record also demonstrates that the applicant's spouse has important employment and property ties in the United States. The applicant's spouse has had his current employment since October 15, 1996, according to a letter from his employer in the

record. The applicant's spouse has also obtained regular medical care from community clinics in Brownsville, Texas and his health could be negatively impacted by his relocation to Mexico. The AAO concludes that, considering the evidence in the aggregate, the applicant's spouse would experience extreme hardship should he relocate to Mexico to reside with the applicant.

When the specific hardship factors noted above and the hardships routinely created by the separation of families are considered in the aggregate, the AAO finds that the applicant has established that her spouse would face extreme hardship if the applicant's waiver request is denied. The applicant has established statutory eligibility for a waiver of her inadmissibility under section 212(a)(9)(v) of the Act.

In that the applicant has established that the bar to her admission would result in extreme hardship to her qualifying relative, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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).

See Matter of Mendez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's initial entry without inspection and the unlawful presence in the United States, for which she now seeks a waiver. The mitigating factors include the hardship to the applicant's spouse and the couple's young school age daughter, the letters in the record indicating the applicant's volunteer work and involvement in the community in the United States, and the lack of a criminal record for the applicant.

The AAO finds that the immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, when taken together, the mitigating factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. See *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.