

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: JAN 02 2013

Office: CIUDAD JUAREZ

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

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:

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.

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 that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Cd. Juarez, Chih., Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal is dismissed.

The applicant is a native and 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 (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 and parent 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 established that the bar to his admission would result in extreme hardship to the qualifying relatives, as required for a waiver under section 212(a)(9)(B)(v) of the Act. *Field Office Director's Decision*, dated March 26, 2010. However, he further found that the favorable factors did not outweigh the adverse factors in the applicant's case, and denied the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, in the exercise of discretion accordingly.

On appeal, the applicant's wife asserts that the applicant merits the waiver in the exercise of favorable discretion. *See Form I-290B, Notice of Appeal or Motion*, dated April 22, 2010.

The record of evidence includes, but is not limited to, the applicant's statement; statement of the applicant's wife and son; birth certificates of the applicant and his son; death certificate of the applicant's and his spouse's second son; letter from the applicant's son's doctor; school records for the applicant's son; numerous reference letters; family photos; household bills; and the applicant's criminal record. 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 last entered the United States without inspection in approximately June 2000. He thereafter remained in the United States unlawfully until October 2008, when he departed the country to seek an U.S. immigrant visa through consular processing.

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), 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, from approximately June 2000 to October 2008, 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-130, Petition for Alien Relative, 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 and minor son are qualifying relatives 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.

In the present case, the record shows that the director determined that the applicant demonstrated extreme hardship to a qualifying relative, his U.S. citizen spouse. The record reflects that the applicant's wife is raising the couple's now ten-year-old son without the financial and emotional support of the applicant. The record contains numerous bills and expenses born by the applicant's wife, including mortgage payments, utilities, and medical bills. The applicant's wife indicates that her husband is her soul mate and that she cannot bear the separation from her husband, which has cost her job. As such, she states that she is in danger of losing their home because of the outstanding mortgage. A letter from their son's doctor and school principal indicate that he has had some emotional problems since his father's departure in 2008. The record also discloses that the applicant and his wife bore birth and loss of a second son in August 2005, causing the applicant's wife

emotional distress. The applicant's wife indicates her son deserves to have both parents raising him but is unwilling to take him to Mexico as he would not be as safe or receive the quality of education he receives in the United States. The record also shows that the applicant's wife has extensive ties in the United States, including her parents, siblings, friends, and other community ties. She also had a long employment history here as well. Based on the evidence in the record, the AAO concurs that the applicant has demonstrated extreme hardship to a qualifying relative.

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:

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).

21 I&N Dec. 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.

The favorable discretionary factors for this applicant are his U.S. citizen wife and ten-year-old U.S. citizen son; the extreme hardship that would be suffered by his U.S. citizen spouse as a result of the bar to the applicant's admission; the letters of support by the applicant's wife, her family members, and friends regarding the applicant's good character; the applicant's employment history; and the applicant's community ties. We also consider the fact that applicant's misdemeanor conviction was an isolated incident and is now over eight years old.

The negative discretionary factors against this applicant include his immigration violations and criminal history. Specifically, this applicant entered the United States unlawfully and has resided illegally in the United States without authorization for approximately eight years from June 2000 to October 2008. Additionally, criminal enforcement records show that since his initial entry, the applicant was arrested on January 26, 2005 for criminal domestic violence in violation of section 16-25-20(A) of the Code of Laws of South Carolina Annotated (S.C. Code Ann.) (2004). The applicant has not provided a certified disposition for this criminal case, although the record contains a letter from Saluda County Sheriff's Department, corroborating the applicant's arrest and subsequent conviction on March 3, 2005. See *Saluda County Sheriff's Office letter*, dated January 12, 2009. We note that the conviction is for a misdemeanor offense and the maximum penalty for the offense was thirty days imprisonment. S.C. Code Ann. § 16-25-20(B). Thus, if it is the applicant's only conviction, it would not render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, even if the offense constituted a crime involving moral turpitude.

However, the record also contains a police incident report for events from July 11, 2004. The AAO is unable to determine whether this report relates to the applicant's January 2005 arrest or to an entirely separate incident in July 2004. But according to the applicant's wife's statement contained in the Form I-290B, the applicant was arrested in 2004 shortly after the complaint was made to the police. Thus, the record suggests that the applicant was arrested on two occasions, in July 2004 and January 2005, respectively. The 2004 incident report discloses that the victim, his current wife, reported that the applicant had for some months acted jealously, suspicious of her activities. She stated that the applicant became aggressive and insisted she leave the house. We observe that although the police incident report indicates that the applicant's wife left the house with her son fearful of their safety, she did not allege that the applicant actually verbally or physically threatened or harmed her in any way.

We note again, however, that it is not clear from this record what the underlying circumstances of the applicant's January 2005 arrest for criminal domestic violence were, including whether the applicant had been charged with committing violence against his wife or another family member. Both the applicant's wife's and her sister's statements appear to be addressing only the July 2004 incident. The record lacks any evidence of the circumstances of the January 2005 arrest and subsequent conviction to enable this office to determine the discretionary impact of his criminal conduct. The AAO also observes that although the applicant addresses his immigration violations in his statement, he failed to address his arrest(s) or express any remorse or rehabilitation for his criminal conduct. In addition, the record shows that the applicant previously failed to disclose his arrests in response to question 1(b) of Part 3 on his Form I-485, Application to Register Permanent Residence or Adjust Status, which was denied on July 9, 2007.

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. However, as we have little detail concerning the applicant's 2005 conviction, we are unable to assign it appropriate negative weight. On their face, the immigration and criminal convictions violations committed by the applicant are serious in nature and cannot be condoned. Although the applicant has addressed the 2004 arrest, he has not demonstrated rehabilitation and remorse related to his 2005 conviction. Thus, he has not satisfied his burden to show that he is deserving of the waiver he seeks. The AAO finds that the applicant has

(b)(6)

Page 7

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.