



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: JAN 08 2013 Office: CHICAGO, ILLINOIS

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATIONS: 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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year and seeking readmission within three years of his last departure from the United States. The record indicates that the applicant is the son of a lawful permanent resident of the United States, he is married to a U.S. citizen, and he is the father of two U.S. citizen children. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to 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 his spouse and children.

The Acting Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting Field Office Director*, dated October 25, 2011.

On appeal, the applicant, through counsel, asserts that the Acting Field Office Director "erred by failing to consider all relevant factors pertaining to hardship" to the applicant's wife. *Form I-290B, Notice of Appeal or Motion*, filed November 23, 2011.

The record includes, but is not limited to, counsel's appeal brief; affidavits from the applicant, his wife, and his father-in-law; medical documents for the applicant and the applicant's children; employment documents for the applicant and his wife; financial documents; photographs; and country-conditions documents on Mexico. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

(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

.....
is inadmissible.
.....

(v) Waiver.-The [Secretary] 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 [Secretary] 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 his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife and father are the only qualifying relatives in this case. However, the record does not contain any evidence that the applicant's father is suffering any hardship. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. See *Matter of Mendez-Morales*, 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 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*, 138 F.3d at 1293 (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 application, the record indicates that on May 19, 1993, the applicant entered the United States without inspection. On September 12, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). In September 1997 the applicant departed the United States. In March 1998, the applicant was admitted to the United States, pursuant to a grant of advance parole, to resume his application for adjustment of status. On September 15, 1998, the applicant's Form I-485 was denied. On April 3, 1999, the applicant departed the United States. In July 1999, the applicant reentered the United States without inspection, and he has not departed since that time.

The applicant was found to have accrued unlawful presence from April 1, 1997 until September 12, 1997, and from September 16, 1998 until April 3, 1999. However, in *Matter of Arrabally and Yerrabally*, 25 I&N Dec. 771 (BIA 2012), the Board held that an alien who leaves the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act does not make a departure from the United States within the meaning of section 212(a)(9)(B) of the Act. Here, the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States in September 1997 pursuant to that grant of advance parole, and was paroled into the United States to pursue a pending application for adjustment of status. In accordance with the Board's decision in *Matter of Arrabally*, the applicant did not make a departure from the United States for the purposes of section 212(a)(9)(B) of the Act, and his unlawful presence from April 1, 1997 until September 12, 1997 will not

be considered. However, the applicant subsequently did accrue over 180 days but less than one year of unlawful presence between September 16, 1998, the day after his Form I-485 was denied, until his departure on April 3, 1999.

In his appeal brief filed December 23, 2011, counsel claims that based on the Chicago District Office's interpretation of section 212(a)(9)(B)(i)(I) of the Act, the applicant "is no longer subject to the bar of inadmissibility." Counsel states that during its meeting with AILA on January 20, 2011, the Chicago District Office announced that they "will no longer require that the individual accrue the necessary 3/10 years outside of the United States before seeking admission." However, for this to apply, the individual must have reentered the United States lawfully, such as a parolee, and remained in legal status during this period of time. The applicant in the present case began accruing unlawful presence when his Form I-485 was denied. Counsel also states that the three-year bar was triggered on April 3, 1999, and more than three years have passed since that date. The AAO agrees that the applicant's last departure from the United States was more than three years ago; however, the applicant has not satisfied the three-year period of inadmissibility stated in section 212(a)(9)(B)(i)(I) of the Act. The AAO finds that allowing an alien to serve any portion of the period of inadmissibility in the United States while simultaneously accruing additional unlawful presence would reward recidivism and is contrary to well-established principles of statutory construction and the congressional intent underlying the creation of section 212(a)(9) of the Act. *Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006), *followed*. Accordingly, the applicant remains inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Act.

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 child as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse and father are the only qualifying relatives for the waiver under section 212(a)(9)(B)(v) of the Act, and hardship to the applicant's children will not be separately considered, except as it may affect the applicant's spouse and father. However, as noted above, the record does not contain evidence that the applicant's father is suffering hardship.

In her affidavit dated July 23, 2010, the applicant's wife states all of her family, including her father and siblings, are in the United States. She states her father lives near them, and she helps take care of him. She states their daughter suffers from a heart condition, and in the United States, she receives good medical care and health insurance through the State of Illinois. Additionally, she states their son sees a neurologist for his speech problems. She claims that finding doctors in Mexico to treat their children would be "difficult and extremely expensive," and they could not afford medical care. She also states that it would be difficult to find work in Mexico.

In his affidavit dated July 23, 2010, the applicant states if they return to Mexico, they will reside in Zacatecas; however, the conditions there will cause his wife "great hardship." In addition to the violence they could face, he claims that his family home in Mexico is "dirty and terrible." The applicant's wife states the conditions where they would have to relocate in Mexico "are absolutely deplorable." Counsel states the Acting Field Office Director's position that the applicant and his family could relocate to another place in Mexico is unreasonable, because he is from Zacatecas and it is the only place he has

family and knows. The applicant states that Zacatecas is unsafe. The AAO notes that on November 20, 2012, the Department of State issued a travel warning to U.S. citizens about the security situation in Mexico. The warning states that "the Mexican government has been engaged in an extensive effort to counter [Transnational Criminal Organizations (TCO)] which engage in narcotics trafficking and other unlawful activities throughout Mexico.... [C]rime and violence are serious problems throughout the country and can occur anywhere." The warning also states U.S. citizens have been the victims of "homicide, gun battles, kidnapping, carjacking and highway robbery," and the rise in "kidnappings and disappearances throughout Mexico is of particular concern." In particular, the warning states non-essential travel to Zacatecas should be deferred, as certain regions in the state are "particularly dangerous" and insecure. There appears to be "a surge in observed TCO activity."

Based on her safety concerns in Mexico; her minimal ties to Mexico; her separation from her family in the United States, including her father who she helps take care of; her concern with their children's medical issues and possible disruption of their treatments; the difficulties with raising their children in Mexico; and her limited employment prospects, the AAO finds that the applicant's wife would suffer extreme hardship if she were to join the applicant in Mexico.

Regarding the hardship that would be caused by their separation, in his affidavit dated July 23, 2010, the applicant's father-in-law states his daughter has been "going through a difficult time recently," and she is "scared and worried" about the applicant's immigration situation. Additionally, the applicant's wife states the applicant was in a serious work accident; she worries that he will not receive the treatment he needs in Mexico and will be unable to fully recover.

The applicant's wife states their daughter "has a heart problem that requires monitoring and [their] son has a speech problem." Medical documentation shows that the applicant's daughter is being treated for a ventricular septal defect and their son has speech problems. The applicant's wife states she is stressed, anxious, and affected on a daily basis by her children's medical conditions, because their "problems are [her] problems." Counsel states the "health of the children greatly affects [the applicant's wife's] life as their mother." The applicant's wife states she is able to give their children "the close attention they require" only because the applicant works to pay all the household expenses. She states that being a single mother will cause her "unbearable hardship." Additionally, she states their children love the applicant "very much and would be distraught without him."

Counsel states the applicant's wife will suffer financial hardship without the applicant's presence, because he is the sole provider for the family. The applicant's wife claims that she is a housewife and completely depends on the applicant's income. The applicant states his wife has not worked "in many years," after suffering depression when her mother passed away. The applicant's wife states that she has not worked for six years, and having to find job and childcare for their children "will be too much for [her] to bear" and she will go bankrupt. Counsel states the applicant's wife "will most likely not earn enough to stay above the poverty level." The applicant's father-in-law claims that his daughter and the applicant "lost their house and are struggling to make it."

The AAO finds that when the applicant's spouse's hardships are considered in the aggregate, specifically her financial issues, having to care for their children alone, and the effect of her children's hardship on her

emotional and mental state, the record establishes that the applicant's wife would face extreme hardship if she remained in the United States in his absence. Accordingly, the applicant has established extreme hardship to a qualifying relative under section 212(a)(9)(B)(v) of the Act.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien 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 section 212(h)(1)(B) 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-Morales, 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 include the applicant's entry without inspection, unlawful presence, and unauthorized employment. The favorable and mitigating factors are the applicant's U.S. citizen wife and children, the extreme hardship to his wife and children if he were refused admission, and his history of paying taxes.

The AAO finds that although the immigration violations committed by the applicant are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

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. Here, the applicant has met that burden.

ORDER: The appeal is sustained. The waiver application is approved.