



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

(b)(6)

DATE: **JAN 18 2013**

Office: VIENNA, AUSTRIA

IN RE: Applicant:

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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Hungary 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.

The Field Office Director concluded that the applicant had failed to demonstrate extreme hardship to his U.S. citizen spouse and denied the application accordingly. *See Decision of Field Office Director*, dated March 9, 2012.

On appeal, the qualifying spouse asserts that she and her son are suffering extreme hardship in the applicant's absence. She states that she has medical and financial problems and that she and her son need the applicant's support.

The record includes, but is not limited to: statements from the applicant and his qualifying spouse; medical records relating to the qualifying spouse; a letter from a social worker; a letter from the qualifying spouse's son's teacher; and a court order regarding custody and visitation with the qualifying spouse's son. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) of the Act provides:

(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.

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(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.

In the present case, the record reflects that the applicant entered the United States with a B1/B2 visa on November 10, 2002 with authorization to remain until May 9, 2003. The applicant remained in the United States until June 22, 2004. He then returned to the United States on several occasions between 2006 and 2009 until being refused admission at the airport in Newark, New Jersey on July 6, 2009. Therefore, the applicant accrued one year or more of unlawful presence and is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for a period of 10 years from his departure from the United States. The applicant does not contest this finding of inadmissibility on appeal.

The applicant is eligible to apply for a waiver of this ground of inadmissibility under section 212(a)(9)(B)(v) of the Act as the spouse of a U.S. citizen. In order to qualify for this waiver, however, he must first prove that the refusal of his admission to the United States would result in extreme hardship to his qualifying relative. Hardship to the applicant or his child is not directly relevant under the statute and will be considered only insofar as it results in hardship to the applicant's spouse. 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 U.S. 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.

The qualifying spouse indicates that she and her son miss the applicant and that their family will fall apart if the applicant is not permitted to return to the United States. She also notes that she is suffering from anxiety and depression which would worsen if the waiver application were denied. She feels that it is harmful for her son to see her suffer from depression. She also indicates that although she has physical custody of her son, her son's biological father has visitation rights and she therefore cannot move out of the state of New Jersey with her son. She also alleges that her only other family member in Hungary is her mother, who is poor and cannot provide her with financial or physical support. She also states that she has been unable to continue her education and that she may be unable to repay her student loans without the applicant's assistance.

The AAO finds that the qualifying spouse will suffer extreme hardship in the applicant's absence if the waiver application is denied. Medical documentation in the record indicates that the qualifying spouse has received treatment for depression, anxiety, obesity, insomnia, high cholesterol, back pain, wrist pain, and cardiomegaly. A nurse who has treated the qualifying spouse states that she has been under intense stress due to the applicant's absence and that her emotional difficulties have negatively affected her physical health. See Letter from [REDACTED] APN, dated October 26, 2011. The nurse also notes that the qualifying spouse's depression and back pain have made it difficult for her to care for herself and her son. *Id.* A social worker also notes that the qualifying spouse has received treatment for depression and severe anxiety and that she has struggled to care for her son. Letter from [REDACTED] MSW LCSW, dated November 1, 2011. Other medical records indicate that the qualifying spouse suffered a back injury in 2005 which resulted in chronic pain and a permanent disability. The records note that the qualifying spouse has had trouble carrying out basic tasks, caring for her child, and working. The qualifying spouse's serious physical and mental health conditions constitute extreme hardship for her on separation from the applicant.

The AAO also finds that the qualifying spouse would suffer extreme hardship upon relocation to Hungary. Documentation in the record indicates that the qualifying spouse is party to a custody agreement which grants her ex-husband visitation rights with her son. The qualifying spouse also states that she cannot move out of New Jersey with her son due to the custody arrangement. The evidence therefore indicates that the qualifying spouse would be separated from her son if she were to relocate, and that she may lose custody of her son to her ex-husband. This factor, when considered in combination with the qualifying spouse's serious health conditions and her lack of family ties in Hungary, would create extreme hardship for the qualifying spouse. See *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996); *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998).

In that the applicant has established that the bars to his admission would result in extreme hardship to a 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).

*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 favorable factors in this case include the extreme hardship the qualifying spouse would suffer if the applicant's waiver application were denied and the hardship the applicant's young step-son has experienced in the absence of the applicant, an important father figure to him. The unfavorable factor is the applicant's unlawful presence in the United States.

Although the applicant's violation of immigration law cannot be condoned, the positive factors in this case outweigh the negative factor. 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.

**ORDER:** The appeal is sustained.