

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)



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

DATE: NOV 21 2013 Office: ANAHEIM, CA

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v),
8 U.S.C. § 1182(a)(9)(B)(v), of the Immigration and Nationality Act

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

George Papas Jr.
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the International Adjudications Support Branch on behalf of the Field Office Director, Ciudad Juarez, Mexico. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted and the underlying application will be approved.

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 (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking readmission within 10 years of his last departure from the United States. The applicant's spouse and three children are U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States.

The Field Office Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on the applicant's spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The AAO found that the applicant had failed to establish that extreme hardship would be imposed upon his spouse, specifically if she remained in the United States, and dismissed the appeal accordingly.

On motion, counsel asserts that new evidence shows that the applicant's spouse would suffer extreme hardship if she remained in the United States.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). The requirements of a motion to reconsider have not been met, because counsel has not stated reasons for reconsideration. Counsel also has not shown that the decision was incorrect based on an incorrect application of law or policy or that it was incorrect based on the evidence in the record. As the applicant has submitted new documentary evidence to support his claim, however, the motion to reopen will be granted.

The record includes, but is not limited to, medical records, counsel's motion, and statements from the applicant and his family members. The record also includes an article and prescription in Spanish, which have not been reviewed or considered because the applicant provides no translations for them. 8 C.F.R. § 103.2(b)(3) states:

- (3) Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The entire record, with the exception of the untranslated Spanish-language documents, was reviewed and considered in rendering this decision.

Section 212(a)(9)(B) of the Act provides, 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.
- (v) Waiver.—The Attorney General [now the Secretary of Homeland Security, "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.

The record reflects that applicant entered the United States without inspection in 2000, he turned 18 years old¹ on March 9, 2004 and he departed the United States in November 2006. The applicant accrued unlawful presence from March 9, 2004, the date he turned 18 years old until his departure in November 2006. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more and seeking readmission within ten years of his departure in November 2006 from the United States. The applicant does not contest his inadmissibility.

¹ Section 212(a)(9)(B) of the Acts states, in pertinent part:

(iii) Exceptions—

(I) Minors

No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

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, in this case 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*, 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. 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.

As the AAO has already found that the applicant's spouse would experience extreme hardship if she relocated to Mexico, it will only address the applicant's claims related to hardship his spouse would experience upon remaining in the United States.

The applicant states that he becomes very afraid when his family visits him in Mexico due to violence there; his family misses him; his older daughter cries when they talk on the phone and asks when he will help with her homework and take her to school; his son cries when they talk on the phone and asks when they can play and do homework together; and his spouse calls him crying and says that she needs him.

The applicant's spouse states that the applicant's absence has been devastating to her and their children; she works odd jobs and earns about \$50 per week; she helps her disabled mother pay her bills and her gas expenses; and she cannot return to school for her high-school degree because she cannot afford childcare costs.

The applicant's older daughter and son describe in letters their need for the applicant, their emotional hardship, and the difficulty that their mother is experiencing.

[REDACTED] states in his December 2011 letter that the applicant's older daughter and son have become very despondent due to their separation from the applicant, and the applicant's older daughter is seeing a psychotherapist for anxiety and depression. Further, [REDACTED] maintains that the family fears visiting the applicant regularly in Mexico due to the crime and violence there. Dr. [REDACTED] also notes that the applicant's spouse has been referred to a physician for a medication evaluation and psychotherapy for depression.

The applicant's spouse's mother states that she is disabled; she is providing shelter for her daughter and children; and they are going through difficult times without the applicant.

The applicant's spouse's cousin states that the applicant's spouse has been working part-time, but her income is not enough to support her family and that her family is "going through hard times." An acquaintance of the applicant's spouse states that raising three children on her own "is a huge strain" and the children are suffering without the applicant.

On July 12, 2013, the U.S. Department of State issued a travel warning for Mexico, and in particular, Coahuila, the state where the applicant currently resides, due to violence and criminal activity. It advises U.S. citizens to “defer non-essential travel” to [REDACTED] because of “high rates of violent crimes and narcotics-related murders.” U.S. Department of State, Bureau of Consular Affairs, *Travel Warning- Mexico*, http://travel.state.gov/travel/cis_pa_tw/tw/tw_6033.html.

The record reflects that the applicant’s spouse is experiencing emotional hardship without the applicant. In addition to her own emotional hardship, she is affected by the hardship that her children are experiencing as a result of their separation from the applicant. The applicant’s spouse also is experiencing difficulties raising three children without the applicant. Moreover, her concerns related to safety in Mexico are corroborated by at least one government source and have affected her ability to visit the applicant there. Considering the hardship factors mentioned and the normal results of separation, the AAO finds that the applicant has established that his spouse would suffer extreme hardship if she remains in the United States.

Considering the evidence in the aggregate, the applicant has established that his spouse would face extreme hardship if the applicant’s waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). 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. *Id.* 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.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. See, e.g., *Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) 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).

Id. at 301 (citation 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 for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion 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 factors include the applicant's U.S. citizen spouse and three children, extreme hardship to his spouse, and the lack of criminal record. The unfavorable factors include the applicant's entry without inspection and period of unauthorized stay.

The AAO finds that the immigration violations committed by the applicant are serious in nature; nevertheless, when taken together, we find the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The motion is granted and the underlying application is approved.