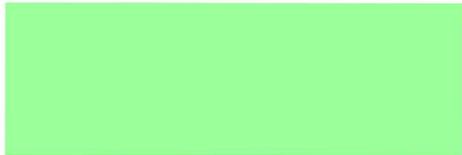




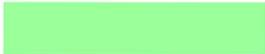
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: OCT 01 2013 OFFICE: SANTO DOMINGO

FILE: 

IN RE: 

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), and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Santo Domingo, Dominican Republic denied the waiver application. A subsequent appeal was denied by the Administrative Appeals Office (AAO) on appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the prior decision of the AAO will be affirmed, and the underlying application will remain denied.

The applicant is a native and citizen of St. Kitts-Nevis who was found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of 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. The applicant was also found to be inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant seeks a waiver of inadmissibility and permission to reapply for admission into the United States in order to reside with his wife in the United States.

The Field Office Director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601 application for a waiver accordingly. The Field Office Director also denied the applicant's Form I-212 application. *Decision of the Field Office Director*, dated March 14, 2011. The AAO determined that the applicant demonstrated extreme hardship to a qualifying relative but did not merit a favorable grant of discretion. *Decision of the AAO*, dated March 8, 2013.

The applicant has submitted a motion to reopen and reconsider, stating that the applicant was never convicted or sentenced for any allegations and suffers from medical ailments necessitating care outside his country of residence. In support of the motion to reopen and reconsider, the applicant submitted medical documentation and a letter from his daughter. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) of the Act, in pertinent part, 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.

....

(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 applicant is a native and citizen of St. Kitts-Nevis who entered the United States on September 5, 1987 pursuant to a B-2 visa with authorization to remain in the United States until March 4, 1988. The applicant remained in the United States beyond that date and filed a Form I-485, Application for Permanent Residence, on January 14, 1992. The application was denied on August 11, 2000, after the petitioner withdrew her petition filed on behalf of the applicant. The applicant was placed in removal proceedings and ordered removed by an immigration judge on April 13, 2006. The applicant was removed from the United States in February 2007. The applicant accrued unlawful presence in the United States from August 11, 2000 until his removal in February 2007. Accordingly, he accrued over one year of unlawful presence in the United States, and he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest his inadmissibility in his motion.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant's wife. 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 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.

The record reflects that the applicant is a 51 year-old native and citizen of St. Kitts-Nevis. The applicant’s spouse is a 61 year-old native of St. Kitts-Nevis and a citizen of the United States. The applicant and his spouse are currently residing in St. Kitts-Nevis.

The AAO previously determined that the applicant demonstrated extreme hardship to his spouse upon separation. The applicant provided evidence of a lumbar injury diagnosis and imaging was consistent with a low-grade chondrosarcoma. The applicant’s spouse demonstrated that she needed to care for the applicant through his medical care in Canada, as he could not receive sufficient care in St. Kitts-Nevis and had no family members for support in Canada. The

applicant's spouse also demonstrated that she was suffering financial hardship in supporting the applicant's medical procedures and would suffer further financial hardship upon separation.

The AAO also determined that the applicant had demonstrated extreme hardship to his spouse upon relocation. The applicant's spouse submitted medical documents evidencing consistent treatment in the United States for fibromyalgia and asserted that she could not receive care for her ailments or have her health insurance accepted in St. Kitts-Nevis. The applicant's spouse also demonstrated ties in the United States based upon property ownership, family relationships, and employment.

The applicant's spouse asserts that she has been unable to attend to her own health issues because the applicant had to undergo a left hemipelvectomy in April 2012, requiring follow up care and medication unavailable in St. Kitts-Nevis. The applicant's spouse contends that the applicant will have to return to Canada every six months in the next five years for follow up care and that this hardship would be relieved if he resided in the United States. The applicant's spouse further asserts that the applicant's children need him emotionally and financially in the United States. A letter of support was submitted by the applicant's daughter asserting that she and her brother need the applicant in their lives. The record does not contain supporting financial or medical documentation concerning the applicant's daughter's assertion. It is also noted that the applicant's children are not qualifying relatives in the context of this application. Further, the AAO has already determined that the applicant has demonstrated extreme hardship to a qualifying relative upon both separation and relocation. As such, the AAO determined that the applicant had established that his spouse would face extreme hardship if his waiver request were denied.

However, the AAO also determined that the applicant did not merit a grant of the waiver as a matter 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. *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 applicant's spouse asserts that the applicant was never convicted or sentenced following any of his arrests. The applicant's spouse also contends that the applicant has not been arrested for any crime in St. Kitts-Nevis since his arrival in February 2007. However, the record reflects that the applicant was convicted after a guilty plea of simple assault and battery on April 17, 2002 after having been charged with criminal sexual conduct with a minor. It is further noted that the police certificate from St. Kitts-Nevis indicates only that the applicant does not have a criminal record in the country, which does not necessarily reflect the absence of an arrest record. Aside from the applicant's criminal conviction, the AAO previously noted the applicant's extensive history of contact with the criminal justice system in the United States, including at least two other arrests, in December 2005 and August 2002, for charges of sexual conduct involving minors. The record also indicated that the applicant was arrested for criminal contempt involving violation of a protection order, criminal mischief, menacing, obstruction, and resisting arrest from 2003-2004,

and received an adjournment in contemplation of dismissal for his March 26, 2004 arrest for intent to damage and harassment. The applicant does not dispute that any of these arrests occurred, but asserts his innocence unless proven guilty. The record contains dispositions for only two of these arrests.

The AAO also found the negative discretionary factors against this applicant to include an immigration violation, physical presence in the United States beyond the authorized date of March 4, 1988, and uncharged allegations of bodily harm or threats. The AAO noted that the applicant's ex-spouse withdrew a Form I-130 petition she filed on behalf of the applicant, asserting a fear of bodily harm as retribution and including claims of physical and mental abuse from the applicant. The applicant's spouse asserts that the applicant's ex-spouse later acknowledged that she was untruthful in these allegations. Though the record contains a letter from the applicant's ex-spouse, dated August 27, 2006, stating that she no longer felt threatened by the applicant, she also reiterated that she and the applicant had their problems in the earlier years of their marriage. Accordingly, the record does not contain a recantation of the applicant's ex-spouse's prior assertions. Further, the record indicates that the applicant, prior to his removal from the United States, threatened bodily harm against a government official, an immigration enforcement agent.

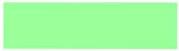
The favorable discretionary factors for this applicant are the extreme hardship the applicant's spouse would experience whether she remained in the United States, separated from the applicant, or accompanied the applicant in St. Kitts-Nevis, the submission of a police report from St. Kitts-Nevis indicating no criminal record for the applicant in his current country of residence, and a letters of support, including a letter from his daughter.

The immigration and criminal violations committed by the applicant are serious in nature and cannot be condoned. As such, the AAO finds that the applicant has 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(a)(9)(B)(i)(II) 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 prior decision of the AAO will be affirmed and the underlying application will remain denied.

The AAO previously found that no purpose would be served in granting the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212). *Matter of Martinez-Torres*, 10 I&N Dec. 776 (reg. Comm. 1964) held that if an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, no purpose would be served in granting the application.

(b)(6)



NON-PRECEDENT DECISION

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ORDER: The motion is granted, the prior decision of the AAO is affirmed, and the underlying application remains denied.