



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **OCT 03 2013**

OFFICE: MEXICO CITY

FILE: [REDACTED]

IN RE: [REDACTED]

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)

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 District Director, Mexico City, Mexico denied the waiver application. A subsequent appeal and motion to reopen and reconsider were dismissed by the Administrative Appeals Office (AAO). This matter is now before the AAO on a second motion to reopen and reconsider. The motion will be granted and the prior decision of the AAO will be affirmed.

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 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 record failed to establish the existence of extreme hardship for a qualifying relative and denied the application accordingly. *See Decision of the District Director*, dated October 19, 2010. On appeal, the AAO determined that the applicant does not merit a favorable exercise of discretion and dismissed the appeal accordingly. *See Decision of the AAO*, dated December 8, 2012. On motion, the AAO again determined that the applicant does not merit a favorable exercise of discretion and affirmed its prior decision. *See Decision of the AAO*, dated July 9, 2013.

The applicant has submitted a second motion to reopen and reconsider. In the applicant's motion to reopen, the applicant's spouse asserts that the applicant's unfavorable factors are not enough to outweigh his favorable factors for an exercise of discretion

In support of the applicant's motion to reopen, the applicant submitted a letter from his spouse and documents concerning his criminal history. The entire record was reviewed and considered in rendering this decision.

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 Mexico who entered the United States without admission or parole on May 15, 1990 and departed from the United States pursuant to a grant of voluntary departure on November 6, 2008. The applicant began to accrue unlawful presence in the United States from April 1, 1997, the effective date of the unlawful presence provisions, until his departure on November 6, 2008. Accordingly, the applicant accrued over one year of unlawful presence in the United States. As he now seeks readmission within 10 years of his last departure, he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. 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-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 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 40 year-old native and citizen of Mexico. The applicant’s spouse is a 62 year-old native and citizen of the United States. The applicant is currently residing in Mexico and his spouse is residing in Gainesville, Georgia.

The AAO previously determined, in both its December 8, 2012 and July 9, 2013 decisions, that the applicant has demonstrated extreme hardship to his spouse upon both separation and relocation if his waiver application were denied. As such, the AAO determined that the applicant had established extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act, but that this applicant, as a matter of discretion, does not merit approval of this waiver.

The AAO determined that negative discretionary factors against this applicant include both immigration and criminal violations. The applicant entered the United States without admission or parole and accrued unlawful presence in the United States. The AAO also noted that the applicant was employed in the United States with no indication of work authorization or payment of taxes.

The applicant's spouse asserts that the state of immigration law will be changing, so that Mexicans residing in the United States will be eligible to obtain permanent residence status. As such, the applicant's spouse contends that the applicant's immigration violations should not constitute a negative factor. The applicant's spouse further contends that the applicant was unable to file taxes with a social security card or tax ID number because of his immigration status.

It is noted that the applicant's spouse, in her assertions, rely upon potential future changes in immigration law, which are speculative. Further, the applicant accrued unlawful presence by residing in the United States for over a year, without authorization, followed by his departure. An alien residing in the United States without authorization, who has not departed, would not have accrued such unlawful presence. It is also noted that the applicant, on motion, does not dispute that he worked in the United States without authorization. Further, the record contains no supporting documentation concerning the assertion that he was unable to obtain an individual taxpayer identification number.

The AAO previously noted that the applicant has several criminal convictions and extensive contact with the criminal justice system in the United States spanning a decade, from a driving under the influence arrest in 1996 to an arrest for battery against his spouse in 2006. As such, the AAO determined that the applicant does not merit a favorable grant of discretion due to an extensive criminal history demonstrating dangerous behavior involving alcohol combined with disorderly and violent conduct in the United States.

The applicant's spouse asserts that the charges against the applicant in the United States are not serious enough that his waiver application should be denied and that he has never served time in prison. The applicant's spouse also asserts that the applicant went to a program for drinking, has not been in any trouble in Mexico, and has not drunk or driven since October 13, 1998. The applicant's spouse further contends that the applicant has changed and there are programs in the United States he can attend for help.

It is noted that the applicant's spouse asserts an inability to obtain supporting documentation for the applicant's treatment program attendance in the United States. The applicant's spouse contends that the applicant attended these programs as part of imposed probation. It is also noted that the applicant's criminal record reflects, contrary to the applicant's spouse's claims, that he did drink alcohol after October 13, 1998 and was convicted of driving under the influence of alcohol in 1998.¹ Further, the applicant was convicted of simple battery on August 25, 1999, and police

¹ The applicant was also arrested for driving under the influence on November 30, 1996, but did not submit a court disposition indicating whether he was convicted of the offense.

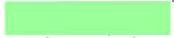
and court records for these charges indicate that the applicant was drinking during the incident. The applicant was subsequently arrested for two counts of public drunkenness in 2001 and 2002, resulting in a public indecency conviction, and again arrested for public drunkenness in 2004. During his two driving under the influence arrests, the applicant was also charged with driving on the wrong side of the road, driving without insurance or driver's license, and providing false information to the police.

Both the applicant and the applicant's spouse assert that on June 11, 2003, the applicant was merely charged with disorderly conduct and sentenced to a fine. However, the record reflects that the applicant was charged with simple assault, obstruction, and disorderly conduct, and entered an Alford plea as to all three counts on May 23, 2003, filed June 11, 2003. The applicant was sentenced to 60 days incarceration. As noted, the applicant was convicted of simple battery on August 25, 1999 based on the charge of striking a victim, with court records for this conviction state that the applicant had been drinking. The applicant was also convicted of criminal trespass and drunkenness on June 2, 2004, when he intentionally damaged the windshield of a taxi. In 2006, the applicant was charged with battery and reckless conduct against his spouse, who is over 20 years older than the applicant and diagnosed with numerous medical ailments, and obstructing his spouse from making an emergency call. The applicant's spouse, in 2007, invoked marital privilege and did not testify against the applicant. The applicant's spouse asserts that the applicant did not assault her because she would be dead if he had, as she is on blood thinner medication.

The favorable discretionary factors for this applicant are the extreme hardships that would be suffered by his U.S. citizen spouse whether she remains separated from the applicant in the United States or relocates to Mexico, as detailed above; the letters of support submitted on behalf of the applicant; the letters submitted by the applicant's spouse; and the evidence submitted by the applicant's spouse that the applicant does not have a criminal record in the state of Guanajuato, Mexico.

The AAO previously noted that the applicant, in a recent letter submitted with his motion to reopen and reconsider, asserts that his charges from 2003 resulted from speaking too loud with a woman, with children playing nearby and that he was only charged with disorderly conduct based upon that incident. The applicant further asserted that he does not know why he ended up in jail for an incident that took place with another woman in 1997. The AAO also noted that even as the applicant requested forgiveness for his 2003 arrest, he stated that he was only charged with disorderly conduct. However, the record reflects that the applicant was convicted of assault, obstruction, and disorderly conduct. The record does not contain any updated statements from the applicant and the AAO previously determined that the applicant had not demonstrated rehabilitation based upon his unwillingness to accept the elements of his crimes of conviction.

The immigration and criminal violations committed by the applicant are serious in nature and cannot be condoned. In addition, the applicant has not demonstrated sufficient evidence of reformation or rehabilitation. 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.



(b)(6)

NON-PRECEDENT DECISION

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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. 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.

ORDER: The motion to reopen is granted and the prior decision of the AAO is affirmed.