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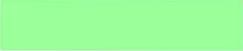


U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**

DATE: **OCT 04 2013**

Office: GUANGZHOU

File: 

IN RE: Applicant: 

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 (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,


for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Guangzhou, China, originally denied the waiver application on April 6, 2011, the applicant appealed, and the Administrative Appeals Office (AAO) remanded for consideration of the applicant's extreme hardship claim.¹ The matter is again before the AAO on appeal. The appeal will be sustained.

The applicant is a native and a citizen of China, 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 for one year or more. The applicant seeks a waiver of inadmissibility in order to immigrate to the United States as the beneficiary of the approved Petitions for Alien Relative (Form I-130) filed by his wife and reside with his family in the United States..

The field office director found that the applicant failed to establish that the bar to his admission would result in extreme hardship to his U.S. citizen wife and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly. *Decision of the Field Office Director*, January 4, 2013.

On appeal, the applicant contends that USCIS erred in misconstruing the extreme hardships that his qualifying relatives are suffering as a result of the applicant's inadmissibility, if he is unable to remain in the United States. In support of the appeal, the applicant submits a letter from counsel and documentation including: an updated hardship statement and a supportive statements; copies of birth and naturalization certificates, permanent residence cards, and other identity documents; documentation of residential mortgage, property tax assessment and bill, and credit card statement. The record also includes, but is not limited to, counsel's prior brief, statements from the qualifying relative and the applicant, financial records and various immigration applications. The entire record was reviewed and considered in rendering this decision.

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

(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.

....

¹ The first denial was based on section 212(a)(6)(B) of the Act for the applicant's failure to attend a removal proceeding. Noting that no waiver is available for this ground of inadmissibility, the field office director denied the application without addressing the merits of the applicant's extreme hardship claim under section 212(a)(9)(B)(v). On appeal, determining the section 212(a)(6)(B) inadmissibility not to apply, the AAO remanded to determine eligibility for the section 212(a)(9)(B)(v) waiver.

(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 Attorney General (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 the applicant attempted to enter the United States without possession of a valid passport on May 22, 1993 and was consequently placed into exclusion proceedings. He was ordered excluded August 9, 1993 and remained in the country until September 3, 2008. Having accrued unlawful presence of one year or more from April 1, 1997 until his departure, he is thus inadmissible under the Act.²

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 U.S. citizen spouse and father, and lawful permanent resident mother are qualifying relatives 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-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 applicant has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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; the Board added that not all of these factors need be analyzed in any given case and emphasized that the list is 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,

² The record shows that a consular officer also found the applicant inadmissible under section 212(a)(6)(C) of the Act for misrepresentations at a visa interview. Because the applicant is inadmissible under section 212(a)(9)(B) of the Act, and demonstrating eligibility for a waiver under section 212(a)(9)(B)(v) also satisfies the requirements for a waiver under section 212(i), the AAO will not review the determination of the applicant's inadmissibility under section 212(a)(6)(C).

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, while 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, or cultural readjustment 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, although 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)); conversely, 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 case-by-case whether denial of admission would result in extreme hardship to a qualifying relative.

For reasons discussed below, the AAO finds that the situations of the applicant's wife and children, as well as his parents, should the applicant be unable to return here, comprise circumstances which, on aggregate, meet the extreme hardship requirement under the Act.

Regarding whether the applicant has established that his wife would suffer extreme hardship by relocating to China, the record reflects that her relatives in the United States include her three children, ages 8, 15, and 16, as well as her parents, siblings, and in-laws. The record reflects that she immigrated in 1993 at the age of 20, naturalized in 1999, has lived her entire adult life in the United States, and has her entire extended family here in the United States. She fears being unable to survive economically in China due to the poor job prospects she and the applicant both face due to lack of family or local contacts after lengthy time overseas, the social stigma involved in having three children, and repercussions for violating China's one-child policy. Counsel reports that, since

returning to China in 2008, the applicant has been unable to find employment. Evidence that the family has been receiving financial help from relatives to meet their expenses and documentation of over \$500,000 remaining on a mortgage loan support the claim that relocation will likely cause loss of the family home that shelters the applicant's wife and children, as well as his parents.³ His wife also is afraid of the potential adverse consequences to her children, whose U.S. birth and lack of Chinese fluency she claims will impede their ability to adjust to life there. The applicant's children, two of whom are attending high school, state they are fearful of leaving their home, relatives, and friends for a country where they do not speak the language and will have fewer educational and social options due to their communication difficulties and the family's inability to afford to send them to special schools. There is evidence that the older children, in particular, are "completely integrated into their American lifestyles," *cf. Kao and Lin*, 23 I&N Dec. 45 (BIA 2001), such that uprooting them would be a significant disruption amounting to extreme hardship. Official U.S. government reporting regarding increasing unemployment supports the qualifying relative's concerns about working in China, as well as her fears that cultural obstacles will make it difficult for her U.S. citizen children to gain social acceptance and for the family to qualify for benefits (including education and healthcare). See *Country Condition Information—China*, U.S. Department of State (DOS), 2013 and *Country Reports on Human Rights Practices for 2012--China*, DOS, April 19, 2013.

Based on the totality of the circumstances, the evidence is sufficient to establish that a qualifying relative would experience extreme hardship by moving to China as a result of fears for her family's financial security and children's ability to adjust, poor employment prospects, social stigma, and health care that is below U.S. standards. Further, relocating would deprive the applicant's wife (and her children) of contact with extended family members, all of whom live here.

Regarding the claim of emotional hardship due to separation from the applicant, the evidence shows that the qualifying relative and the applicant had been married nearly 12 years when he left, at which time the applicant had run their restaurant for ten years. Statements of household members substantiate the negative impact his departure has had not only on his wife, but on his minor children and his 66 year old mother: the qualifying relative's efforts to keep the family's restaurant and sole source of income operating; the applicant's parents' despair at their child's return to China; and the applicant's children's discipline and social problems stemming from his departure. Several letters from the eldest child reflect the degree to which the applicant's absence has created insecurities which, in turn, weigh heavily upon the applicant's wife and mother. There is no evidence the applicant's wife has visited him to ease the pain of separation, or that she has the financial means to do so.⁴

Regarding the financial component of separation hardship, there is evidence that the applicant was the breadwinner, while his wife's role was as a homemaker and caregiver to their children. His

³ The record shows that the applicant's parents, wife, and children reside in the home, that neither of his elderly parents contributes earnings to the household, and that his mother is bedridden.

⁴ Documented financial limitations, as well as age-related infirmities, make it unlikely the applicant's qualifying relative-parents will be able to travel to China to see their son.

departure forced her to take responsibility for running the restaurant, which counsel reports has closed despite her efforts. Counsel's assertions that the applicant's departure caused financial hardship are supported by statements detailing the economic constraints experienced by his family during the past five years. The evidence shows that the applicant's departure caused financial disruption from which the family has been unable to recover, despite economic assistance from relatives.

For all these reasons, the cumulative effect of the physical and emotional, as well as financial, hardships the applicant's wife, children, and parents are experiencing due to his inadmissibility rises to the level of extreme. The AAO concludes based on the evidence provided that, were his wife to remain in the United States without the applicant due to his inadmissibility, she would suffer extreme hardship beyond those problems normally associated with family separation.

The documentation on record, when considered in its totality, reflects the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. 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 . . . 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 favorable factors in this matter are the extreme hardships the applicant's wife and children will face if the applicant remains in China, regardless of whether they join the applicant there or remain here; supportive statements; the applicant's 16 year residence in the United States; lack of any criminal record; history of gainful employment; and statements regarding good character. The unfavorable factors in this matter concern the applicant's arrival without documentation and unlawful presence.

Although the applicant's violations of the immigration laws cannot be condoned, the positive factors in this case outweigh the negative factors. Given the equities involved, including the passage of time since the applicant's violations of immigration law and previous grant of permission to reapply for admission after removal,⁵ the AAO finds 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 appeal is sustained. The waiver application is granted.

⁵ USCIS granted the applicant's Form I-212 on June 5, 2008. The AAO finds that, since that time, the factors in this case favoring an exercise of discretion on the applicant's behalf have not diminished, but rather have increased.