



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: **MAR 19 2014**

Office: ATHENS, GREECE

IN RE: Applicant:

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 waiver application was denied by the Field Office Director, Athens, Greece, and was appealed to the Administrative Appeals Office (AAO), which dismissed the appeal. The matter is now before the AAO on motion. The motion will be granted, and the prior AAO decision to dismiss the appeal is affirmed.

The applicant is a native and citizen of Egypt who was found to be inadmissible to the United States 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 from the United States. The applicant seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), to reside in the United States with his U.S. citizen spouse.

The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated March 22, 2013.

The AAO, reviewing the applicant's Form I-601 on appeal, found that extreme hardship to a qualifying relative had been established; however, the AAO dismissed the appeal as a matter of discretion. *Decision of the AAO*, dated December 17, 2013.

On motion, the applicant's spouse requests reconsideration of the AAO's decision. She asserts that the applicant already provided sufficient evidence to establish her extreme hardship and that the applicant is a good person. The applicant's spouse also submits additional letters of reference on behalf of the applicant from her two children and evidence that the applicant has no criminal record in New York or in Egypt. According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts to be proved and be supported by affidavits or other documentary evidence. As the applicant's spouse has submitted new documentary evidence to support the applicant's claim, a motion to reopen will be granted.<sup>1</sup>

The record includes but is not limited to: statements from the applicant, the applicant's spouse, and the applicant's step-children; a statement by applicant's previous counsel in support of the Form I-601; mental-health evaluations for the applicant's spouse, step-daughter and mother-in-law; medical documentation for the applicant's spouse; criminal-record search results for the applicant; country-conditions information about Egypt; and letters of reference. The entire record was reviewed and considered in rendering a decision on the appeal.

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<sup>1</sup> On page 1 of the Form I-290B, Notice of Appeal or Motion accompanying the motion, the applicant's spouse checked the box indicating she is filing a motion to reconsider. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must 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 Service policy. The applicant's spouse does not assert that the decision was based upon an incorrect application of law or Service policy, nor does she present any pertinent precedent decisions. The notice, however, has been accepted as a motion to reopen.

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.

The record indicates that the applicant entered the United States with a nonimmigrant tourist visa on October 13, 2000, and was authorized to stay in the United States until April 12, 2001. The applicant did not depart when his period of authorized stay expired. The applicant married his first wife on November 2, 2002, and filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on December 18, 2002. Thus, the applicant accrued unlawful presence in the United States from April 12, 2001 to December 18, 2002, a period in excess of one year.

The applicant was placed in immigration proceedings on April 1, 2003, for remaining in the United States beyond his period of authorized stay. The applicant then failed to appear for a scheduled interview concerning his Form I-485 application, and the Form I-485 was denied on September 16, 2005. On June 13, 2006, an immigration judge ordered the applicant removed from the United States. On November 8, 2007, the Board of Immigration Appeals (BIA) dismissed the applicant's appeal. The applicant divorced his first wife on August 15, 2008. The applicant married his current wife on September 29, 2008, and filed his second Form I-485 on November 27, 2009. The applicant was removed from the United States on March 1, 2010. Thus the applicant also accrued over a year of unlawful presence in the United States between September 16, 2005, the date his initial Form I-485 was denied, and March 1, 2010, the date he was removed. The applicant does not contest his inadmissibility.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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.

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 can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse is the only qualifying relative in this case. Although the applicant submits evidence of hardship to his U.S. citizen step-children resulting from his inadmissibility, under this provision of the law, children are not deemed to be qualifying relatives. Though children are not qualifying relatives under this statute, U.S. Citizenship and Immigration Services (USCIS) does consider that a child's hardship can be a factor in the determination whether a qualifying relative experiences extreme hardship. 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 BIA 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 BIA 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 BIA 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 BIA 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 1292, 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.

In its previous decision, the AAO determined that the applicant established that his spouse is experiencing psychological, medical, and financial hardships that are related to the applicant's absence, and that these hardships, when considered in the aggregate, are beyond the common results of removal and would rise to the level of extreme hardship if she remains in the United States without the applicant. In addition, the AAO determined that the applicant established that his spouse would suffer extreme hardship if she were to relocate to Egypt, based upon her strong ties to the United States, lack of ties to Egypt, unfamiliarity with the cultures and customs of Egypt, and safety concerns.

The applicant's spouse, on motion, correctly asserts that the applicant has already provided sufficient evidence showing that she would experience extreme hardship if his waiver were not approved. However, as noted in the previous decision, 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 he may by regulations prescribe. In discretionary matters the alien bears the burden of proving eligibility in terms of equities in the United States that 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).

In that the applicant established that the bar to his admission would result in extreme hardship to a qualifying relative, the AAO now will consider whether the applicant merits a waiver of inadmissibility as a matter of discretion, taking into account the new evidence accompanying this motion.

The favorable factors in this case are as follows:

- The applicant's U.S. citizen wife lives in the United States, and the record indicates that the applicant's spouse will suffer hardship without the applicant.
- The applicant is the beneficiary of a Form I-130, Petition for Alien Relative (Form I-130) filed by his spouse.
- The applicant has no criminal record in New York or in Egypt.
- The applicant's relatives and friends submit positive letters of reference on his behalf.

The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, the Seventh Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7<sup>th</sup> Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9<sup>th</sup> Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), need not be accorded great weight by the district director in a discretionary determination. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5<sup>th</sup> Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper. The AAO finds these legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion. In this case, although the applicant's spouse states that she was unaware that the applicant had a final deportation order before she married him on

September 9, 2008, the applicant's spouse states that she met the applicant in the summer of 2007, and began living with him in October 2007. The record indicates that the applicant was ordered removed on June 13, 2006, and the Board of Immigration Appeals dismissed the applicant's appeal on November 8, 2007, one month after the applicant began living with his qualifying relative. As such, the applicant's spouse likely was aware that the applicant could be deported when they began living together and when they married in September 2008. The AAO therefore accords factors related to his spouse diminished weight.

On motion, the applicant's spouse submits additional letters of reference on behalf of the applicant from her children. These two letters, which emphasize the applicant's role in their family and his positive personal qualities, have been taken into consideration when rendering this decision.

Concerning the applicant's unfavorable factors, as indicated in the previous AAO decision, the record indicates that the applicant did not depart the United States when his period of authorized stay expired, and he did not apply to extend or change his non-immigrant status. He and his former spouse failed to appear for a scheduled interview concerning the Form I-130 she had filed on his behalf. On June 13, 2006, an immigration judge ordered the applicant removed from the United States. On November 8, 2007, the applicant's appeal was dismissed. Despite the applicant having been ordered removed and having his appeal denied, the applicant failed to depart the United States.

On four occasions between October 2009 and January 2010, Immigration and Customs Enforcement (ICE) officials attempted to serve the applicant with Form I-229(a), Warning For Failure to Depart (Form I-229(a)), and after refusing to sign the form the first three times, the applicant signed Form I-229(a) on January 11, 2010.

On January 29, 2010, ICE officers escorted the applicant to John F. Kennedy International Airport to remove him to Egypt. The record indicates that the applicant initially refused to exit the van and subjected the ICE officers to verbal abuse. After the applicant voluntarily exited the van, in the departure area the applicant then refused to board the airplane. The record indicates that the applicant issued a threat, stating, "I will do something to this plane while in the air." The pilot refused to allow the applicant to board the plane, and the applicant was returned to ICE detention. The applicant subsequently was removed from the United States on March 1, 2010.

The unfavorable factors in this case are as follows:

- The applicant remained in the United States after his initial period of authorized stay expired on April 12, 2001 without extending his stay or applying for a change of status.
- Although the applicant was the beneficiary of a Form I-130 filed by his first U.S. citizen wife, the applicant and she failed to appear for a scheduled interview in pursuit of that application.
- The applicant did not depart the United States after being ordered removed by an immigration judge and after his appeal was denied by the BIA.

- The applicant refused to depart the United States on January 29, 2010, initially by refusing to leave the ICE van, and then by threatening to “do something” to the airplane if he were forced to board the plane.

Thus, while the AAO acknowledges the hardship that the applicant’s spouse will face as a result of a denial of the applicant’s waiver request, it does not find the favorable factors in the present matter to outweigh the negative and will not favorably exercise the Secretary’s discretion.

In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has not met that burden.

**ORDER:** The motion is granted, and the prior AAO decision to dismiss the appeal is affirmed.