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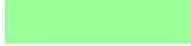
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals
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Washington, DC 20529-2090

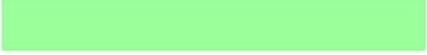


U.S. Citizenship
and Immigration
Services



DATE **OCT 22 2014** Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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.

In a decision, dated March 3, 2014, the director found that the applicant had failed to show that his spouse would suffer extreme hardship as a result of his inadmissibility. More specifically, the director found that although the record showed that the applicant's spouse would suffer extreme hardship as a result of relocation, it did not show that she would suffer extreme hardship as a result of separation. The waiver application was denied accordingly.

On appeal, counsel states that the director abused his discretion in finding that the applicant's spouse would not suffer extreme hardship as a result of separation. Counsel submits additional evidence on appeal.

Section 212(a)(9) of the Act provides:

(B) ALIENS UNLAWFULLY PRESENT.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(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).

...

(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 record reflects that the applicant entered the United States in 1997 at approximately nine years old. He resided in the United States until September 4, 2011, when he voluntarily departed and returned to Mexico. The applicant is therefore inadmissible under section 212(a)(9)(B)(i) of the Act for having been unlawfully present in the United States from 2006, when he turned 18 years old, to September 4, 2011. The applicant's qualifying relative is his U.S. citizen spouse.

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 v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998)(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 stated above, the Director found that the applicant established that his spouse would suffer extreme hardship as a result of relocation. We will not disturb this finding and will focus on whether the applicant has established that his spouse will suffer extreme hardship as a result of separation.

In his decision, the director stated that the record lacked supporting documentation and pertinent details of the emotional, financial, and medical hardships the applicant’s spouse would suffer in relation to separation.

With the initial waiver application, the applicant submitted the following hardship documentation: an affidavit from his spouse, a psychosocial assessment of his spouse, financial documentation, numerous articles on country conditions in Mexico, medical documentation, and a letter from a U.S. employer offering the applicant employment upon his return to the United States.

On appeal, the applicant submits documentation showing the applicant's spouse's income and expenses, as well as an affidavit from the applicant's parents regarding the household expenses his spouse pays to them per month.

The applicant's spouse states that she is suffering emotional and medical hardship in the form of depression, anxiety, and severe pain from having gallstones as a result of her separation from the applicant. The record includes hospital discharge papers showing that the applicant's spouse was discharged from the hospital on September 21, 2012 with abdominal pain. She states that she suffers emotional hardship as a result of worrying about the applicant's safety in Mexico because of the crime and violence in the area where he lives and works. She states that she does not even visit her husband in Mexico because she is concerned about the violence in the area and she cannot afford to visit.

She states that she is also suffering financial hardship and cannot afford surgery to have her gallbladder removed. Counsel states that the applicant's spouse earns \$871.50 per pay period, living below the poverty line for a family of three. The Department of Health and Human Services guidelines shows that the poverty line for a family of three in 2014 was \$19,530 per year. Assuming the applicant's spouse works all year at the same rate she would have earned approximately \$22,659 for the year, \$3,129 above the poverty level. Nevertheless, we acknowledge that the applicant's spouse's income, as shown by her two most recent pay stubs, in relation to her family size, could cause financial hardship. The record also indicates, through a 2008 Federal Income Tax Return, that the applicant and her spouse earned \$51,022 during that year, indicating that applicant contributed approximately 45% to the household income. The applicant's spouse also states that she sends money to Mexico to support the applicant because he works in agriculture, while also helping the applicant's relatives in the United States. She states that when the applicant was in the United States, he helped his relatives and his family with his earnings. These statements are partially supported by the 2007 and 2008 Federal Income Tax Returns in the record for the applicant and his spouse, where they claimed the applicant's five nieces and nephews as dependents. The record also contains a letter from an employer in the United States stating that the applicant would have a position in his manufacturing facility upon his return to the United States with the proper immigration status. Counsel states that exacerbating the applicant's spouse's hardship is her not being able to obtain her license as a medical assistant because she states that she cannot afford the licensing exam.

We find that the record establishes that the applicant's spouse will suffer extreme hardship as a result of separation. The extreme hardship as a result of separation in this case is a matter of the aggregate accumulation of hardship. The financial hardship the applicant's spouse is experiencing, the loss of income and potential earnings as a result of separation, the applicant's spouse's inability to visit her husband in Mexico, and the emotional hardship increased by the concern she has for the applicant's safety in Mexico, amount to experiencing extreme hardship as a result of separation. Thus, the applicant has now shown that his U.S. citizen spouse will suffer extreme hardship as a result of his inadmissibility.

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.

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.

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 in the applicant's case include: the extreme hardship the applicant's spouse would face if his waiver applicant were denied; the applicant's other family ties to the United States, including a U.S. citizen child; the lack of any criminal record in the United States; his steady employment; and the support he provided for his spouse and other family members when he was in the United States.. The unfavorable factors in the applicant's case include: his illegal entry into the United States and his unlawful residence in the United States. A mitigating factor in the applicant's case is the fact that he entered illegally as a nine year old boy.

Although the applicant's violations of immigration law are serious, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.