

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
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U.S. Citizenship
and Immigration
Services

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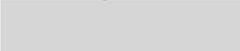


DATE: JUN 04 2015

FILE #:



APPLICATION RECEIPT #:



IN RE: Applicant:



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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

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 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 for one year or more and seeking readmission within 10 years of his last departure. The applicant's spouse and two stepchildren are U.S. citizens. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) in order to reside in the United States with his family.

The Director found that the applicant did not establish extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Director*, dated September 3, 2014.

On appeal, the applicant, through counsel, asserts that the Director overlooked the effect the applicant's stepchildren's hardship would have on his qualifying relative, the applicant's spouse, and states that his spouse would experience extreme hardship if the waiver application is denied. *Form I-290B, Notice of Appeal or Motion*, received October 2, 2014.

The record includes, but is not limited to, a brief, statements from the applicant and his spouse, financial records, medical records, educational records, statements from the applicant's children, statements in support of the applicant, photographs and country-conditions information about Mexico. The entire record was reviewed and considered in arriving at a decision on the appeal.¹

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.

¹ Counsel's brief includes several excerpts from other AAO decisions. Only AAO decisions that are published and designated as precedents in accordance with the requirements discussed in 8 C.F.R. § 103.3(c) are binding on U.S. Citizenship and Immigration Services officers. The decisions counsel refers to are unpublished and not designated as precedent decisions. The findings made in the other AAO decisions, therefore, have no binding precedential value for purposes of the applicant's case.

- (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 [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 applicant entered the United States without inspection in February 2004 and departed the United States in December 2013. The applicant accrued unlawful presence during this entire period of time. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more and seeking readmission within ten years of his December 2013 departure from the United States. The applicant does not contest this ground of inadmissibility.

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, in this case the applicant's spouse. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and U.S. Citizenship and Immigration Services 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 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.

We will first address hardship to the applicant’s spouse if she relocates to Mexico. The applicant’s spouse states that she has lived in [REDACTED] her entire life; her parents live with her; and she is very close to her parents. The applicant also submits statements from family and friends describing her close ties to her family and to her community.

Concerning additional hardships related to family, the applicant submits evidence corroborating assertions that both of his stepchildren have health conditions that require on-going medical care and treatment; they see a doctor twice a week to receive allergy shots and have prescriptions for skin disorders and asthma; and the high pollution levels in Mexico could exacerbate their health conditions. The applicant’s spouse states that her older daughter has serious allergies and receives allergy shots twice a week from her doctor; and she and the applicant could not afford her daughters’ allergy treatments. The record also includes several prescription records for both of the applicant’s stepchildren and an article describing high levels of pollution in Mexico.

The applicant states that his older stepdaughter attends a top charter school and the younger stepdaughter earns good grades; and they would lose the opportunity to attend exceptional schools and progress academically in Mexico. The applicant’s spouse states that her daughters would not receive the

same educational opportunities in Mexico. The record includes academic certificates and other school records for the applicant's children.

The applicant's spouse states that moving to [REDACTED] is not an option; she has a custody agreement with her ex-spouse, and he would not allow their daughters to move to Mexico; her daughters do not speak enough Spanish to survive and could not handle the culture shock; and the applicant lives in a small house with four people.

The applicant's spouse also states that she is concerned about the violent crime, including murder and kidnapping, in [REDACTED]. The applicant describes kidnapping of children where he lives and how he limits the amount of time he spends outside of his house. The record includes information about human-rights issues in Mexico and insecurity in [REDACTED] with one article about the arrest of the leader of the [REDACTED] drug cartel in [REDACTED]. The May 5, 2015 U.S. Department of State Travel Warning for Mexico details safety issues in Mexico, and in particular the state of [REDACTED]. The travel warning does not specifically reference [REDACTED].

The record reflects that the applicant's spouse has always resided in the United States and she has close family and community ties in the United States. The record does not reflect that she has ties to Mexico, other than the applicant. The record reflects that she would experience hardship due to the educational and medical issues that her children would experience in Mexico. The record does not include evidence of the custody agreement that the applicant's spouse references. The record also reflects that the family would face serious security issues in Mexico and that the applicant's living conditions are difficult. Based on the totality of the hardship factors presented, we find that the applicant's spouse would experience extreme hardship if she relocated to Mexico.

Concerning the hardship that the applicant's spouse would experience if she remained in the United States, the applicant's spouse explains that the applicant was very involved in her children's upbringing, and their success is partly due to his support and encouragement. She adds that the applicant has been the only father figure in her children's lives; her children are experiencing emotional difficulty without him, crying themselves to sleep at night; and the applicant would take her daughters to school and doctor's appointments, cook, clean the house and help her children with their homework. The applicant's older stepdaughter states that the applicant cared for her and her sister while her mother was at work; he helped her and her sister with their homework; she is having anxiety attacks; her biological father has never been around; and he advises her on life issues. The applicant's younger stepdaughter expresses her concern for the applicant's safety in Mexico and says that she loves him.

The record also includes evidence corroborating counsel's claims that the applicant's spouse is experiencing depression and anxiety as a result of the applicant's absence and emotional distress because of the effect of his absence on his stepchildren. The psychologist who evaluated the applicant's spouse states that she has developed symptoms of depression and has moderate to severe anxiety; she suffers from insomnia and isolative behavior; she has gained thirty pounds; she has had anxiety attacks; she has a congenital heart murmur; her symptoms support a diagnosis of anxiety disorder and adjustment disorder with depressed mood; and her daughters also have anxiety and depressed mood. The applicant's spouse states that she and their children fear for the applicant's safety in Mexico.

Several friends and family members, in letters, describe difficulties the applicant's spouse is experiencing without the applicant.

The applicant's spouse also describes financial hardship caused by the applicant's absence. She states that she could not afford their home after he left and has moved in with her parents; she has borrowed money from her parents; she has relied on food stamps and Medicaid for assistance; she owes money on her student loans; she has taken out loans from her retirement plan; she has medical bills from a car accident; and the applicant would help her financially if he lived in the United States. The record reflects that the applicant's spouse works as a clerk at an elementary school and according to her 2013 federal tax return, she earned \$15,110. The record also includes loan information, a credit card statement, collection letters, evidence of a car accident, a medical bill, evidence of remittances to the applicant, an insurance bill and several other documents concerning the applicant's spouse's financial obligations. In addition, the record includes offers of employment for the applicant as a painter.

The record reflects that the applicant's spouse would experience significant emotional hardship without the applicant, including hardship caused by the hardship that her children are experiencing without him. In addition, she has been experiencing financial hardship since his departure. Based on the totality of the hardship factors presented, we find that the applicant's spouse would experience extreme hardship if she remained in the United States without the applicant.

Considered in the aggregate, the applicant has established that his spouse would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 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.

We note that *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-Morales*, 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 (citation omitted).

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 include the applicant's U.S. citizen spouse and stepchildren, extreme hardship to his spouse, hardship to his stepchildren, the lack of a criminal record and numerous detailed statements about his community ties and good moral character. The unfavorable factors include the applicant's entry without inspection, his unauthorized stay and unauthorized employment.

We find that the favorable factors in the present case outweigh the adverse factors, such 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.