



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF R-E-G-

DATE: AUG. 9, 2016

APPEAL OF NEWARK, NEW JERSEY FIELD OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY

The Applicant, a native and citizen of El Salvador, was found inadmissible for entering the United States without being admitted after having accrued more than one year of unlawful presence in the United States and after having been ordered removed and seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) section 212(a)(9)(C)(iii), 8 U.S.C. § 1182(a)(9)(C)(iii). The Applicant is the beneficiary of an approved self-petition under the Violence against Women Act (VAWA), as an abused spouse of a U.S. citizen. Inadmissibility may be waived for VAWA self-petitioners if there is a connection between the foreign national's battery or subjection to extreme cruelty and the foreign national's removal, departure from the United States, reentry or reentries into the United States, or attempted reentry into the United States.

The Applicant also seeks a waiver of the ground of inadmissibility for unlawful presence. *See* Immigration and Nationality Act (the Act) section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). A foreign national seeking to be admitted to the United States as an immigrant or to adjust to lawful permanent resident (LPR) status must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives. An approved VAWA self-petitioner can claim an exception from inadmissibility for unlawful presence if the foreign national can establish a substantial connection between the abuse suffered, the violation of the terms of the foreign national's nonimmigrant visa, and the foreign national's departure from the United States.

The Field Office Director, Newark, New Jersey, denied the application. The Director determined the Applicant inadmissible 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. The Director further determined that the Applicant was inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having reentered the United States without being admitted after having accrued more than one year of unlawful presence in the United States, and pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for having reentered the United States without being admitted after having been removed from the United States. The Director found that the Applicant was the beneficiary of an approved VAWA self-petition but concluded that the Applicant had not established that his periods of unlawful

presence in the United States, his reentry to the United States after accruing unlawful presence, and his reentry to the United States after removal, were connected to the battery or extreme cruelty he experienced. The Director further determined that the Applicant had not established that his case merited approval as a matter of discretion.

The matter is now before us on appeal. In the appeal, the Applicant submits additional evidence and claims that the Director erred in not finding that there was a connection between the battery or extreme cruelty he suffered and his periods of unlawful presence, his removal, and his reentry to the United States without being admitted.

Upon *de novo* review, we will dismiss the appeal because the Applicant has not established that he merits an exception to his inadmissibility for unlawful presence. Alternatively, the Applicant has not established that he is eligible for a waiver of inadmissibility for his unlawful presence pursuant to section 212(a)(9)(B)(v). Moreover, the Applicant's prior removal order has been reinstated pursuant to section 241(a)(5) of the Act, rendering him statutorily ineligible for any relief under the immigration laws.

I. LAW

The Applicant is seeking to adjust status to that of an LPR and has been found inadmissible pursuant to sections 212(a)(9)(C)(i)(I) and (II) of the Act for entering the United States without being admitted after having accrued more than one year of unlawful presence in the United States and after having been ordered removed.

Inadmissibility pursuant to section 212(a)(9)(C)(i) of the Act may be waived pursuant to section 212(a)(9)(C)(iii) if there is a connection between the foreign national's battery or subjection to extreme cruelty and the foreign national's removal, departure from the United States, reentry or reentries into the United States, or attempted reentry into the United States.

The Applicant has also been found inadmissible pursuant to section 212(a)(9)(B)(i) of the Act, for unlawful presence. Section 212(a)(9)(B)(ii) of the Act provides that a foreign national is deemed to be unlawfully present in the United States if present in the United States after the expiration of the period of authorized stay or if present in the United States without being admitted or paroled.

Section 212(a)(9)(B)(iii)(IV) of the Act provides that an approved VAWA self-petitioner can claim an exception from inadmissibility under section 212(a)(9)(B)(i) of the Act if the foreign national can establish a substantial connection between the abuse suffered, the violation of the terms of the foreign national's nonimmigrant visa, and the foreign national's departure from the United States. If the exception applies, the foreign national is deemed to not be inadmissible under section 212(a)(9)(B)(i) of the Act.

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Section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), provides that section 212(a)(9)(B)(i) inadmissibility may be waived as a matter of discretion if refusal of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent.

Decades of case law have contributed to the meaning of extreme hardship. The definition of extreme hardship “is not . . . fixed and inflexible, and the elements to establish extreme hardship are dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (citation omitted). Extreme hardship exists “only in cases of great actual and prospective injury.” *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (BIA 1984). An applicant must demonstrate that claimed hardship is realistic and foreseeable. *Id.*; see also *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968) (finding that the respondent had not demonstrated extreme hardship where there was “no showing of either present hardship or any hardship . . . in the foreseeable future to the respondent's parents by reason of their alleged physical defects”). The common consequences of removal or refusal of admission, which include “economic detriment . . . [.] loss of current employment, the inability to maintain one’s standard of living or to pursue a chosen profession, separation from a family member, [and] cultural readjustment,” are insufficient alone to constitute extreme hardship. *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (citations omitted); but see *Matter of Kao and Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* 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 the qualifying relatives would relocate). Nevertheless, all “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted). Hardship to the Applicant or others can be considered only insofar as it results in hardship to a qualifying relative. *Matter of Gonzalez Recinas*, 23 I&N Dec. 467, 471 (BIA 2002).

II. ANALYSIS

The first issue on appeal is whether the Applicant is eligible for a waiver for entering the United States without being admitted after having accrued more than one year of unlawful presence in the United States and after having been ordered removed.

The second issue on appeal is whether the Applicant is eligible for an exception or alternatively, a waiver of inadmissibility, for unlawful presence pursuant to section 212(a)(9)(B)(i) of the Act.

A. Inadmissibility

A review of the record shows that on or about June 1, 2004, the Applicant entered the United States without inspection. The Applicant filed the Form I-589, Application for Asylum and Withholding of Removal, on January 26, 2005. The Applicant’s request for asylum was denied and he was ordered removed from the United States. On [REDACTED] 2007, the Board of Immigration Appeals affirmed the decision of the immigration judge. The Applicant was removed from the United States on [REDACTED] 2012, and he subsequently reentered the United States without inspection in November or December 2012. On [REDACTED] 2013, the Applicant was detained by U.S. Immigration and

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Customs Enforcement (ICE) and was issued a Form I-871, Notice of Intent/Decision to Reinstate Prior Order. The record reflects that the Applicant is currently in the United States.

The Applicant accrued unlawful presence from his [REDACTED] birthday on [REDACTED] 2004, until his removal from the United States on [REDACTED] 2012.¹ The record also establishes that the Applicant entered the United States without being admitted in November or December 2012 after unlawful presence of more than one year and after having been ordered removed.

B. Waiver for Unlawful Presence after Previous Immigration Violations

As detailed above, the Applicant was found inadmissible pursuant to sections 212(a)(9)(C)(i)(I) and (II) of the Act, for entering the United States without being admitted after having accrued more than one year of unlawful presence in the United States and after having been ordered removed. This inadmissibility may be waived if there is a connection between the foreign national's battery or subjection to extreme cruelty and the foreign national's removal, departure from the United States, reentry or reentries into the United States, or attempted reentry into the United States.

The Applicant states that he returned to the United States without inspection to pursue visitation rights for his daughter, to fight for custody, and to obtain a protection order against his spouse. He states that after he was released from ICE custody he did what he intended to do: file for custody, pay child support, and seek a restraining order. The Applicant further details the relationship with his spouse the led to him filing a Form I-360 petition, and asserts that he had filed for an order of protection on [REDACTED] 2012, and was scheduled for a [REDACTED] 2012, hearing when he was apprehended outside Family Court of New York by ICE officers. The Applicant contends that his spouse had often threatened to contact immigration authorities about him and that he was only at Family Court that day due to her violence against him. The Applicant maintains that his attorney at the time did not attempt to reopen his case before the immigration judge and that after he was removed, he reentered the United States because his entire family was here and he was desperate for emotional support, and because he wanted to see his daughter since his spouse refused to let him speak to her over the phone from El Salvador. The Applicant further maintains that he was planning to pursue court action in the United States to fight for custody and visitation, but he had a chance

¹ Pending asylum applicants do not accrue unlawful presence unless they are employed without authorization while the application is pending. The Applicant indicated on the Form G-325A, Biographic Information, that he was self-employed from June 2004, in Construction. USCIS records do not establish that the Applicant had valid work authorization while his asylum application was pending. See Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate, Pearl Chang, Acting Chief, Office of Policy and Strategy, USCIS, HQDOMO 70/21.1, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Section 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, Revision to and Re-designation of Adjudicator's Field Manual (AFM) Chapter 30.1(d) as Chapter 40.9 (AFM Update AD 08-03) (May 6, 2009)*, (https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF).

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encounter with his spouse and was shortly thereafter apprehended and believes that his spouse had reported him to immigration officers.

In a letter dated June 10, 2014, a coworker of the Applicant's spouse states that the spouse had claimed she arranged for the Applicant to be placed in immigration custody because of his outstanding removal order, and that she had called immigration authorities in [REDACTED] 2012. An October 23, 2013, letter from the Applicant's sister describes the Applicant's spouse as abusive, and a letter dated October 23, 2013, from another sister contends that the Applicant's spouse would not allow the Applicant to see his daughter so the sister recommended he go to court, but that as the Applicant was here illegally his spouse would threaten to call immigration authorities. A letter dated October 21, 2013, from the Applicant's brother-in-law also states that the spouse had threatened the Applicant and a letter dated October 18, 2013, from the Applicant's mother describes the spouse as being violent and threatening to contact immigration authorities about the Applicant.

A letter dated July 1, 2014, from the Applicant's prior counsel states that he had represented the Applicant at Family Court in [REDACTED] 2012, when the Applicant was apprehended by ICE officers, and that he had witnessed the Applicant's spouse threatening to report the Applicant to immigration authorities. A letter dated October 7, 2013, from the same counsel states that he represented the Applicant at Family Court for parental rights and child support proceedings, and that the Applicant continued to support his child despite the spouse's refusal to accept payments and telling the court that she did not want his money.

The Applicant has submitted to the record a copy of an email from an ICE deportation officer confirming that the Applicant was taken into custody on [REDACTED] 2012, at the New York Family Court building. Other documentation in the record includes a Modified Temporary Order of Parenting Time from [REDACTED] 2015, Family Court of New York hearing based on a petition filed by the Applicant on [REDACTED] 2015; documentation dated April 24, 2015, March 27, 2015, and March 13, 2015 establishing the payment of child support by the Applicant; a Temporary Order of Protection against the Applicant's spouse dated [REDACTED] 2012; a [REDACTED] 2009, Family Court Order stating that custody of the Applicant's child was to the spouse but that parental time was granted to the Applicant; and a [REDACTED] 2015 request for a restraining order made by the Applicant against his spouse.

Here we find the evidence in the record, considered in its totality, sufficient to establish a direct connection between the Applicant's removal and subsequently reentry without being admitted and the abuse he suffered at the hands of his U.S. citizen spouse that led to approval of his VAWA self-petition. The Applicant has thus met his burden of proving eligibility for a waiver under section 212(a)(9)(C)(iii).

C. Exception from Inadmissibility for Unlawful Presence

As noted above, an approved VAWA self-petitioner can claim an exception from inadmissibility under section 212(a)(9)(B)(i) of the Act if the foreign national can establish a substantial connection

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between the battery or extreme cruelty that is the basis of the VAWA claim and the violation of the foreign national's prior nonimmigrant admission. The Applicant has not established that this exception is applicable to him as the Applicant did not violate the terms of any nonimmigrant visa, but rather entered the United States without being admitted. Pursuant to the USCIS Adjudicator's Field Manual, a VAWA self-petitioner can claim this exception from section 212(a)(9)(B)(i) inadmissibility if he or she can establish a substantial connection between the abuse suffered, the unlawful presence (rather than only violation of nonimmigrant admission), and his or her departure from the United States. *See* AFM ch. 40.9.2(b)(2)(E). The record indicates, however, that the Applicant had already accrued over two years of unlawful presence before he states the abuse by his U.S. citizen spouse commenced shortly after his child was born in [REDACTED]. Even if the Applicant can establish eligibility for the exception through a connection between the abuse and his unlawful presence rather than violation of the terms of a nonimmigrant admission, he has not established that his periods of unlawful presence in the United States were connected to the abuse he suffered.

D. Waiver of Inadmissibility for Unlawful Presence

As the Applicant is not eligible to claim an exception from inadmissibility, the Applicant must demonstrate that refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives, in this case, his U.S. citizen spouse pursuant to section 212(a)(9)(B)(v) of the Act. This criterion has not been addressed. As the Applicant has not demonstrated extreme hardship to a qualifying relative or qualifying relatives, we need not consider whether the Applicant warrants a waiver in the exercise of discretion.

E. Reinstatement of Prior Removal Order

Even if the Applicant had established eligibility for the exception from inadmissibility for unlawful presence, or alternatively, eligibility for a waiver under section 212(a)(9)(B)(v) of the Act, and despite our finding that the Applicant is eligible for a waiver under 212(a)(9)(C)(iii) of the Act, the Applicant remains statutorily ineligible for relief at this time.

As detailed in the Notice of Intent to Dismiss, the Applicant was given Notice of Intent/Decision to Reinstate Prior Order (Form I-871) on [REDACTED] 2013 as required by 8 C.F.R. 241.8(b), and his prior removal order was thus reinstated.²

Section 241(a)(5) of the Act provides that if a foreign national has reentered the United States illegally after having been removed pursuant a removal order, the prior removal order is reinstated from its original date and the foreign national is not eligible to apply for any relief under the Act.

VAWA self-petitioners who are inadmissible under section 212(a)(9)(C)(i)(II) of the Act are subject to reinstatement based on a prior removal order. Memorandum from Michael Aytes, Acting Deputy Director, USCIS, *Adjudicating Forms I-212 For Aliens Inadmissible Under Section 212(a)(9)(C) or*

² U.S. Immigration and Customs Enforcement (ICE) is the agency responsible for issuance of the Form I-871.

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Subject to Reinstatement Under Section 241(a)(5) of the Immigration and Nationality Act In Light of Gonzalez v. DHS, 508 F.3d 1227 (9th Cir. 2007), page 6, (May 19, 2009), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AD2%20Memo-Adjudicating%20Forms%20I-212_051909.pdf

As the Applicant reentered the United States without being admitted after having been removed, and his prior removal order has been reinstated, the Applicant is statutorily ineligible for any relief under the Act at this time.

III. CONCLUSION

The Applicant has the burden of proving eligibility for the benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of R-E-G-*, ID# 15248 (AAO Aug. 9, 2016)