U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-M-A-S-

DATE: MAY 10, 2019

APPEAL OF SAN BERNARDINO, CALIFORNIA FIELD OFFICE DECISION

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

The Applicant, a citizen of Mexico currently residing in the United States, has applied to adjust status to that of a lawful permanent resident. A foreign national seeking to adjust status must be "admissible" or receive a waiver of inadmissibility. The Applicant has been found inadmissible for unlawful presence and seeks a waiver of that inadmissibility. Immigration and Nationality Act (the Act) section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). 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.

The Director of the San Bernardino, California Field Office denied the application, concluding that the Applicant did not establish, as required, extreme hardship to a qualifying relative if he is denied admission.

On appeal, the Applicant contends, among other things, that the Director did not consider the totality of the circumstances. The Applicant argues that he established the requisite extreme hardship and submits additional documentation on appeal.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A foreign national who 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 departure or removal from the United States, is inadmissible. Section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). 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 present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act. There is a discretionary waiver of this inadmissibility if refusal of admission would result in extreme hardship to the United States citizen or lawful permanent resident spouse, parent, son, or daughter of the foreign national, or in the case of an applicant for a fiancé(e) visa, extreme hardship to the petitioning U.S. citizen fiancé(e). Section 212(a)(9)(B)(v) of the Act.

A determination of whether denial of admission will result in extreme hardship depends on the facts and circumstances of each case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (citations omitted). We recognize that some degree of hardship to qualifying relatives is present in most cases; however, to be considered "extreme," the hardship must exceed that which is usual or expected. *See Matter of Pilch*, 21 I&N Dec. 627, 630-31 (BIA 1996) (finding that factors such as economic detriment, severing family and community ties, loss of current employment, and cultural readjustment were the "common result of deportation" and did not alone constitute extreme hardship). In determining whether extreme hardship exists, individual hardship factors that may not rise to the level of extreme must also be considered in the aggregate. *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted).

II. ANALYSIS

A. Inadmissibility

The Applicant states that he initially entered the United States unlawfully with his parents when he was 15 years old.[1] He departed the country at a later date and was subsequently admitted to the United States in 1999, when he was 18 years old, using a B-2 visitor's visa, with authorization to remain until April 23, 2000. The Applicant did not timely depart the United States and remained until August 2009. Therefore, 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. The Applicant reentered the United States in August 2009 under the visa waiver program as a citizen of Spain, citizenship he derived from his father, and has remained in the country ever since.

The Applicant does not contest his inadmissibility on appeal. However, we note that the Director erroneously stated that the Applicant will remain inadmissible for ten years from the date of his August 2009 departure. The terms and intent of section 212(a)(9)(B) of the Act require that an individual be subject to the inadmissibility bar until he or she has remained outside the United States for the required period. Allowing a foreign national to serve any portion of this period of inadmissibility inside of the United States while simultaneously accruing additional unlawful presence would reward recidivism and be contrary to the purpose of the enactment of section 212(a)(9) of the Act. *Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006) ("It is recidivism, and not mere unlawful presence, that section 212(a)(9) is designed to prevent.").[2] The Applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act until he has remained outside the United States for the 10-year period of inadmissibility.

B. Waiver

To qualify for a waiver of inadmissibility for his unlawful presence, the Applicant must demonstrate that denying his waiver application would result in extreme hardship to his U.S. citizen spouse, the only qualifying relative in this case. An applicant may show extreme hardship in two scenarios: 1) if the

[1] The Applicant turned 15 years old in September of 1996.

[2] A discretionary waiver of inadmissibility is available to nonimmigrants pursuant to section 212(d)(3) of the Act, but the Applicant did not obtain a waiver of his inadmissibility for unlawful presence before he reentered the United States under the visa waiver program.

qualifying relative remains in the United States separated from the applicant, and 2) if the qualifying relative relocates overseas with the applicant. Demonstrating extreme hardship under both of these scenarios is not required if the applicant's evidence demonstrates that one of these scenarios would result from the denial of the waiver. The applicant may meet this burden by submitting a statement from the qualifying relative certifying under penalty of perjury that the qualifying relative would relocate with the applicant, or would remain in the United States, if the applicant is denied admission. 9 USCIS Policy Manual B 4(B), https://www.uscis.gov/legal-resources/policy-memoranda. In the present case, the record is unclear regarding whether the Applicant's spouse would remain in the United States or relocate to Mexico if the Applicant's waiver application is denied.[3] The Applicant must therefore establish that if he is denied admission, his qualifying relative or qualifying relatives would experience extreme hardship both upon separation and relocation.

The Applicant's spouse states that he loves the Applicant and cannot imagine his life without him. The Applicant's spouse states that, as gay men, it would be very hard for them to live in Mexico because of the possibility of hate crimes being committed against them. According to the Applicant's spouse, he constantly struggles with anxiety, for which he takes medication when it becomes severe; he is prone to frequent panic attacks; and the Applicant has cared for him during hard times and breakdowns. In addition, the Applicant's spouse contends that his mother (the Applicant's mother-in-law) has multiple illnesses, including severe depression, diabetes, arthritis, and cancer, and that the Applicant helps take care of her. The Applicant's spouse contends that moving to Mexico to be with the Applicant would entail leaving his family and his job, and would make his anxiety worse.

Although we are sympathetic to the couple's circumstances, we find that if the Applicant's spouse remains in the United States without the Applicant, there is insufficient evidence to show that his hardship would rise beyond the common results of removal or inadmissibility to the level of extreme hardship. A psychological evaluation and a letter from the couple's marriage therapist describe the Applicant's spouse's panic attacks, increase in alcohol consumption, crying spells, irritability, feelings of hopelessness, and difficulty sleeping. Although we acknowledge that the Applicant's spouse has been diagnosed with major depressive disorder and generalized anxiety disorder, the record does not show that his situation, or the symptoms he is experiencing, are unique or atypical compared to others in similar circumstances. The Applicant's spouse is currently 32 years old. He does not describe how he cared for himself prior to marrying the Applicant two years ago, and the record does not show that his mental health issues have ever affected his ability to work or carry out other activities or that he requires the Applicant's assistance as a result. Regarding caring for the Applicant's mother-in-law, who is currently 58 years old, the record does not establish the extent to which she requires assistance, if any. In any event, tax documents show that the Applicant and his spouse have claimed numerous family members as dependents, including both of the Applicant's parents, his sister, his niece, his spouse's mother, and his spouse's sister. As the Director noted, the Applicant's spouse's car insurance lists a total of six approved drivers. There is insufficient evidence to show that others relatives would be unable or unwilling to assist the Applicant's mother-in-law, if needed.

[3] For example, the Applicant's spouse initial statement discussed the hardship of relocating to Mexico. However, a psychological evaluation in the record, as well as a more recent letter from the couple's marriage therapist submitted on appeal, address only separation. The Applicant's spouse did not submit an updated statement on appeal.

We acknowledge that the Applicant was diagnosed with HIV in 2014. However, letters from his physician state that his viral load is undetectable and, with continued access to medical care, his prognosis is excellent. The Applicant has not submitted sufficient documentation that he would be unable to continue receiving adequate medical care in Mexico. Financial documents show that the couple earned over $159,000 in adjusted gross income in 2017, and the Applicant's spouse's mother states he purchased his first house when he was 22 years old. The Applicant also owns a 3-unit building, and the couple's bank account statement shows a balance of over $47,000. Moreover, the Applicant's spouse, the only qualifying relative in this case, makes no mention of the Applicant's HIV status or any resulting hardship if the Applicant returns to Mexico. His mother's statement, the psychological evaluation, and the letter from the couple's marriage therapist also do not discuss this condition. There are no other letters or statements addressing the hardship the Applicant's spouse would experience if the Applicant is denied admission.

Considering all of the evidence in its totality, the record is insufficient to show that the hardship faced by the Applicant's spouse would rise beyond the common results of removal or inadmissibility if he remains in the United States without the Applicant. We find that the Applicant has not established that his spouse would experience extreme hardship if he remains in the United States while the Applicant relocates abroad due to his inadmissibility.

The Applicant must establish that denial of the waiver application would result in extreme hardship to a qualifying relative or qualifying relatives both upon separation and relocation. As the Applicant has not established extreme hardship to his qualifying relative or qualifying relatives in the event of separation, we cannot conclude he has met this requirement. As the Applicant has not demonstrated extreme hardship to a qualifying relative if he is denied admission, we need not consider whether he merits a waiver in the exercise of discretion.

The burden of proof in these proceedings rests solely with the Applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Applicant has not met this burden, and the application will remain denied.

ORDER: The appeal is dismissed.

Cite as *Matter of J-M-A-S-*, ID# 3325584 (AAO May 10, 2019)