

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: FEB 06 2012 OFFICE: PHILADELPIA, PA FILE: A'

IN RE: Applicant: I

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:

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INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The application will be approved.

The record reflects that the applicant is a native and citizen of El Salvador 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 ten years of his last departure from the United States and pursuant to section 212(a)(9)(C)(i)(I) of the Act for having entered the United States without being admitted after having accrued more than one year of unlawful presence. The record indicates that the applicant is married to a United States citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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.

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The Field Office Director also determined that the applicant was inadmissible under section 212(a)(9)(C)(i) of the Act, for having entered the United States in violation of the ten-year bar imposed by section 212(a)(9)(B)(i)(II) of the Act. She denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated May 7, 2009.

On appeal, counsel asserts that the applicant has established extreme hardship to his qualifying relative and is eligible for a waiver of inadmissibility. He also contends that the Field Office Director erred in determining that the applicant is inadmissible under section 212(a)(9)(C)(i) of the Act. Counsel submits a brief. *See Notice of Appeal or Motion (Form I-290B) and attachments.*

The record includes, but is not limited to, a statement from the applicant's spouse describing the hardship claim; medical prescriptions for the applicant's spouse; a Bio-Psychosocial Hardship Evaluation of the applicant's spouse; 2004 – 2008 income tax returns and W-2 Wage and Tax statements; bank statements; an auto loan disbursement document; earnings statements for the applicant; online information on the list of flights to El Salvador; an employment letter for the applicant; country conditions information; and counsel's briefs and attachments. The entire record was reviewed and considered in arriving at a decision on appeal.

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.

In the present application, the record indicates that the applicant entered the United States without inspection in 1998. He applied for Temporary Protected Status (TPS) on April 25, 2001 and was granted TPS on March 18, 2002. He has since re-registered for and maintained TPS status. On January 10, 2008 the applicant departed the United States, thereby triggering the unlawful presence provisions under the Act.

Based on the evidence of record, the applicant accrued unlawful presence from March 13, 1998 when he entered the United States without inspection, until April 25, 2001, the date he filed for TPS. For determining unlawful presence TPS is a period of authorized stay. *See Memorandum by Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, et al., Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 312(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009. The applicant is seeking admission to the United States within ten years of his 2008 departure. The applicant is, therefore, 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 more than one year.

Section 212(a)(9) of the Act states in pertinent part:

....

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the

Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

As counsel contends, the applicant is not inadmissible under Section 212(a)(9)(C)(i)(I) of the Act for having entered the United States without being admitted after accruing more than one year of unlawful presence. It is noted that the Field Office Director reached the same conclusion in her May 7, 2009 denial of the applicant's Form I-485, where she acknowledged that the applicant returned to the United States under advance parole and therefore had not violated section 9(C) of the Act. As noted above, the record establishes that after his departure on January 10, 2008, the applicant presented himself and was paroled into the United States at Houston, Texas, port of entry pursuant to Advance Parole Authorization on January 18, 2009. Section 9(C)(i)(I) of the Act applies only to individuals who enter the United States with inspection after having accrued more than one year of unlawful presence. *See Memorandum by Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, et al., Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 312(a)(9)(C)(i)(I) of the Act, dated May 6, 2009.* Accordingly, the Field Office director's determination that the applicant was inadmissible under section 212(a)(9)(C)(i)(I) of the Act is withdrawn.

We now turn to the issue whether the applicant has established eligibility for a waiver of inadmissibility under 212(a)(9)(B)(v) of the Act.

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 or his child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. 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 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.

On appeal, counsel asserts that the applicant's spouse depends on the applicant for emotional and moral support and that separation would cause her emotional hardship. Counsel asserts that the applicant's spouse has high blood sugar and is borderline diabetic, and suffers from physical and clinical depression and anxiety.

Counsel also asserts that the applicant's spouse would suffer financial hardship in the applicant's absence. Counsel states that the applicant's spouse has been pursuing a business management degree to enable her to advance in her career and without the applicant's income and assistance caring for their child she would not be able to continue her studies. Counsel further asserts that the applicant is a business owner and that the loss of his income would reduce the family's budget by a half. He states that without the applicant's income, his spouse and his child would have to move in with his parents-in-law, both of whom are unemployed and have health problems.

The applicant's spouse also asserts that she would be under unbearable financial strain without the applicant's financial contribution. She states that she would have to give up their apartment and move in with her parents who are unable to support her and her child as they are both unemployed and disabled. The applicant's spouse also asserts that without the applicant's financial contribution, they would likely lose their cars, which would harm their credit and would make it difficult to get housing in the future. She further asserts that the applicant operates his own business and that without him the business would fail resulting in financial losses.

In support of the financial hardship claim, a Bio-Psychosocial Evaluation prepared by Licensed Clinical Social Worker [redacted] has been submitted. Ms. [redacted] indicates that the applicant's spouse has been treated with psychotropic medications for her conditions since 2006, and she takes Paxil and Ativan. She diagnosed the applicant's spouse with Generalized Anxiety Disorder, Panic Disorder without Agoraphobia, and Dysthymic Disorder, and indicates that she has symptoms of panic attacks, and being "overwhelmed by work or school related stress that she is unable to think or act rationally and becomes emotionally labile." The evaluator further indicates that the applicant's spouse's Dysthymic Disorder is in a form of "depression that lasts for two years or more," and reports feeling unhappy, sad, of low self-esteem, a lack of emotions, and a poor self-

image.” The record includes prescriptions dated February 13, 2009 for Lorazepam and Paroxetine for the applicant’s spouse.

The AAO notes that Ms. [redacted] appears to have undertaken the hardship analysis that is the responsibility of the USCIS under the Act, rather than a full mental health analysis. While we acknowledge her opinion regarding the hardships that would be created by the denial of the waiver application, her opinion does not establish extreme hardship for the purposes of section 212(a)(9)(B)(v) of the Act. We have, nonetheless, considered what the evaluation does conclude concerning the spouse’s mental health and we have also considered her statements regarding the spouse’s physical health as she indicates that she has reviewed the spouse’s “medical profile,” provided by her primary care provider.

We also note that Ms. [redacted] reports that the spouse has a history of clinical depression and anxiety and has been on psychotropic medication since 2006, medication that has been prescribed by her primary care provider. She also indicates that the spouse has never been evaluated to determine a specific mental health diagnosis, but that based on the spouse’s reporting and the observations made by her family, her symptoms support a diagnosis of Generalized Anxiety Disorder, Panic Disorder without Agoraphobia and Dysthymic Disorder. We also note that Ms. [redacted] reports that the applicant is a great source of support for his spouse and plays a crucial role in reducing her stressors by providing financial, domestic and parenting support.

We note that the input of any mental health professional is respected and valuable, but that in this case, we find Ms. [redacted]’s conclusions regarding the state of the spouse’s mental health to be of limited value in our consideration of extreme hardship as they are based solely on what Ms. [redacted] describes as “subjective self-reports” from the spouse and the observations of her family, during the course of a single interview with the spouse and a telephone interview with her parents. However, we take note that Ms. [redacted]’s review of the spouse’s medical records show that she has been on medication used to treat anxiety and depression since 2006 and find the record to contain supporting documentation in the form of two medical prescriptions for the spouse, one for Lorazepam, an anti-depressant, and one for Paroxetine, a medication used to treat anxiety.

We also note that Ms. [redacted]’s review of the spouse’s medical records indicates that during the spouse’s 2008 pregnancy, she had elevated blood glucose levels, that these levels remain high post-delivery and that she is a borderline diabetic, with family history of diabetes. She also reports that the spouse has a family history of hypertension, and that she has also reported having frequent migraine headaches and gastrointestinal problems, the cause of which has not been determined.

We note, in addition, that Ms. [redacted] indicates that the applicant has been influential and supportive in making lifestyle changes that would minimize his spouse’s health risks, including changing the family diet, accompanying his spouse to exercise and reducing her stress levels.

Ms. [redacted]’s evaluation indicates that the applicant and his spouse have \$3,000 a month in combined income, \$1,400 of which is earned by the applicant, and \$1,600 of which is earned by his

spouse. The evaluation also reports an average of \$2,650 in monthly expenses. The record, however, does not support these findings. Besides an October 22, 2008 Disbursement Request and Authorization for an \$8,000 car loan due on October 21, 2011 statement, the record does not include supporting documentation of the applicant's and his spouse's monthly expenses. It is also noted that the record does not include evidence that the applicant's spouse's parents are unemployed, have health problems, or are receiving financial support from the applicant and his spouse. Without documentation to establish the applicant's spouse's financial circumstances, the AAO is unable to assess the nature and extent of financial hardship she would face without the applicant's financial contribution.

The record also lacks documentation to establish that the applicant owns his own business. An April 7, 2008 employment verification letter from [redacted], Owner and Manager of [redacted], indicates that the applicant had been employed at the rate of \$12.00 hourly as Head Cook since March 2003.

We note that the record establishes that the applicant's spouse has been medically treated since 2006 for depression and anxiety, and that when her long-term need for mental health treatment, the added responsibilities she would have as a single parent and the hardships routinely created by the separation of spouses are considered in the aggregate, we find the applicant has established she would suffer extreme hardship.

Counsel asserts that if applicant's spouse relocates to El Salvador due to the applicant's inadmissibility, she would experience extreme hardship. Counsel asserts that she does not have any familial or cultural ties to El Salvador and that she does not speak Spanish. He also contends that El Salvador is a dangerous place and that the applicant's spouse would be at risk there. Counsel further asserts that El Salvador is impoverished and that the applicant's spouse would be moving to a country where half of the population lives in poverty. He also points to El Salvador's extremely poor healthcare system and maintains that the spouse's physical and mental health issues would not be properly addressed if she relocates.

The applicant's spouse states that she cannot join the applicant in El Salvador. She contends that she has an obligation to support her family and that she would find it difficult to obtain employment in El Salvador because she does not speak Spanish. She also states that she would not be able to maintain her relationship with her parents and her family all of whom live in the United States. The applicant's spouse further maintains that she would not be able to continue her education in El Salvador. She states that in El Salvador she would be easily targeted by criminals.

In reviewing the record, the AAO has specifically noted that the applicant was born in the United States and has lived her entire life in the United States, that all her family ties are to the United States, and that she does not speak Spanish, which would have a significant negative impact on her ability to obtain employment or assimilate to El Salvador culture and society. Moreover, the AAO observes that El Salvador has been designated as a Temporary Protected Status (TPS) country, based on extensive damage to the country caused by natural disasters, and that this designation does not

expire until March 9, 2012. Based on the specific hardship factors just noted, the continuing designation of TPS for El Salvador and the normal hardships created by relocation, the AAO finds the applicant to have demonstrated that his spouse would experience extreme hardship upon relocation.

It has thus been established that the applicant's spouse would suffer extreme hardship if she relocates to El Salvador to reside with the applicant due to his inadmissibility. Accordingly, the applicant has established that she is eligible for waiver under section 212(a)(9)(B)(v) of the Act.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) 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-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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).

The favorable factors in this matter are the applicant's U.S. citizen spouse and child; the extreme hardship his spouse would suffer if the waiver application is denied; the absence of a criminal record; his lawful employment in the United States since 2001; and his TPS status which he has maintained since 2002. The unfavorable factors in this matter are the applicant's unlawful entry to and residence in the United States.

While the AAO does not condone the applicant's immigration violations, we find that the mitigating factors in the applicant's case outweigh the unfavorable factors such that a favorable exercise of the Attorney General's (now Secretary) discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The waiver application is approved.