U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-M-E-M-

DATE: DEC. 15, 2017

APPEAL OF DENVER, COLORADO FIELD OFFICE DECISION

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

The Applicant, a native and 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 be admitted to the United States as an immigrant or 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. *See* 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 Denver, Colorado, Field Office denied the application, concluding that the record did not establish, as required, extreme hardship to a qualifying relative if the Applicant is denied admission.

On appeal, the Applicant argues that a waiver of inadmissibility is unnecessary as more than 10 years have passed since the date of her last departure from the United States. She alternatively argues that she established the requisite extreme hardship and merits a favorable exercise of discretion.

Upon *de novo* review, we will sustain 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) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i). 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 or parent of the foreign

national, and 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).

Once the foreign national demonstrates the existence of the required hardship, he or she must then show that USCIS should favorably exercise its discretion and grant the waiver. Section 212(i) of the Act. When exercising our discretion, we "balance the adverse factors evidencing a [foreign national's] undesirability as a permanent resident with the social and humane considerations presented on the [foreign national's] behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 300 (BIA 1996) (citations omitted).

II. ANALYSIS

The issues on appeal are whether the Applicant is inadmissible for unlawful presence under section 212(a)(9)(B)(i)(II) of the Act, and if so, whether she has established that denial of her waiver application would result in extreme hardship to a qualifying relative and that she merits a favorable exercise of discretion. Based on a review of the entire record, we find that the Applicant is inadmissible for unlawful presence. We also find that she has established that her spouse would experience extreme hardship if she is denied admission and that a favorable exercise of discretion is warranted.

A. Inadmissibility

The Applicant entered the United States on April 13, 2000, with a B2 visitor's visa and was authorized to stay for six months, until October 12, 2000. However, she did not depart the United

States until more than three years later, in May 2004, and her departure after being unlawfully present for more than one year rendered her inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The Applicant states that she reentered the United States as a visitor in June 2004 and has been living in the United States since then. She argues that because 10 years have passed since the date of her departure, she is no longer inadmissible. In support of her assertion, she references one of our decisions from 2005 and submits a copy of an unpublished decision of the Board of Immigration Appeals. However, both of these decisions are non-precedent decisions and are therefore not binding authority. *Cf.* 8 C.F.R. §§ 103.3(c), 1003.1(g).[1] 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 in 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] While it has been more than 10 years since the Applicant's 2004 departure from the United States, she remains inadmissible under section 212(a)(9)(B)(i)(II) of the Act because she did not remain outside the United States for the 10-year period of inadmissibility.

B. Waiver

To qualify for a waiver of inadmissibility for her unlawful presence, the Applicant must demonstrate that denying her waiver application would result in extreme hardship to her U.S. citizen spouse, the only qualifying relative in this case. According to his 2016 affidavit, the Applicant's spouse is 79 years old and retired. He maintains he has lived in the United States his entire life and has five children, a stepdaughter, and nine grandchildren, all of whom he sees every week. He states he has several health problems, including high blood pressure, hyperthyroidism, memory issues, and vision problems. He also explains he fractured his finger during a car accident and has trouble holding items such as utensils. He contends that the Applicant takes great care of him, drives him around, cooks for him, and helps cover their expenses. He states he would be lonely and depressed without his wife and finds that it gets harder to be alone as he ages. He further states that it would be extremely difficult to move to Mexico to be with the Applicant because he is too old to start over in a new place that is unfamiliar to him and where he has no family or other ties.

We find that the Applicant has established her spouse would suffer extreme hardship if she is denied admission. The Applicant's spouse is now 80 years old, and documentation in the record confirms the medical conditions he described and indicates that he is a cancer survivor. Financial documents in the

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[1] We note that the non-precedent AAO decision cited by the Applicant involves a foreign national who had re-entered with advance parole, while the Applicant reentered the United States with a visitor's visa.

[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 her inadmissibility for unlawful presence before she reentered the United States with a nonimmigrant visa.

record, including copies of tax returns, bank statements, a loan modification agreement, and a payment from a pension fund, corroborate his contention regarding his limited financial means and his reliance on his wife's income "to help make ends meet." In addition, the record indicates the Applicant's spouse was born in the United States. Letters from his children state that he needs the Applicant to continue to take care of him, particularly considering that they are unable to see him on a daily basis. They contend that he cannot be alone for long periods of time and that his health would suffer significantly if the couple were separated. We further take administrative notice that the U.S. Department of State has issued a Travel Warning for parts of Mexico, urging U.S. citizens to defer non-essential travel to [redacted] where the Applicant was born, due to the high incidence of violent crime. U.S. Department of State, Mexico Travel Warning, dated August 22, 2017, https://travel.state.gov/content/passports/en/alertswarnings/mexico-travel-warning.html.

The evidence, considered both individually and cumulatively, establishes that the Applicant's spouse would experience extreme hardship if the Applicant is denied admission, whether he remains in the United States without her or relocates to Mexico to avoid the hardship of separation. In addition, the balancing of the positive equities in this case against the negative factors warrants the favorable exercise of our discretion. Accordingly, we withdraw the Director's decision, as the waiver application merits approval.

ORDER: The appeal is sustained.

Cite as *Matter of D-M-E-M-*, ID# 706226 (AAO Dec. 15, 2017)