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U.S. Citizenship  
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Services

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[Redacted]

FILE: [Redacted] Office: NEWARK, NEW JERSEY (CHERRY HILL) Date: **MAY 13 2008**

IN RE: Applicant: [Redacted]

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:

[Redacted]

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Newark, New Jersey. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be sustained.

The applicant is a native and citizen of Belarus who was found to be inadmissible to the United States under 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. The applicant, who is married to a citizen of the United States, sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, which the district director denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the District Director, dated February 3, 2006.*

The AAO will first address the finding of inadmissibility.

Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.<sup>1</sup> For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.<sup>2</sup>

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* DOS Cable, note 1. *See also Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists). With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997).

The record reflects that the applicant entered the United States on a J-1 visa and her I-94 card indicates D/S, duration of status. The Approval Notice for the Form I-539, Application to Extend/Change Nonimmigrant Status, indicates that the applicant changed her status from the J-1 to B2 classification and was authorized to remain in the United States in B2 status until March 13, 2002. The applicant overstayed her authorization, voluntarily departing from the country in 2004 and returning on advance parole on July 27, 2004. For purposes of calculating unlawful presence under section 212(a)(9)(B) of the Act, the applicant began to

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<sup>1</sup> Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

<sup>2</sup> *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

accrue time in unlawful presence on March 13, 2002. From March 12, 2002 to 2004, the applicant accrued over one year of unlawful presence, and when she voluntarily departed from the country in 2004, she triggered the ten-year-bar. Consequently, the finding of inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II), is correct.

The AAO will now address the finding that the grant of a waiver of inadmissibility is not warranted.

A waiver under section 212(a)(9)(B) of the Act for unlawful presence provides that:

- (v) Waiver. – The Attorney General [now Secretary, 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 Attorney General [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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant and his or her child are not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, they are not included under section 212(a)(9)(B) of the Act. Thus, hardship to the applicant and her children will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s U.S. citizen spouse. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The record contains an affidavit, a letter, income tax records, medical records, a Superior Court of New Jersey court order, a marriage certificate, birth certificates, information about Belarus, and other documents.

The letter by the applicant dated January 15, 2005 conveys that her husband and stepson would experience extreme hardship if she returned to Belarus. She states that she has known her stepson since he was five months old and that he is now a healthy three-year-old baby because of their joint care. She states that her husband, whose parents are deceased, would become a single parent if she returns to Belarus. The applicant states that her stepson’s biological mother has never helped raise him, which, since October 2002, helped provide her husband with full custody of the child. She states that they are a close relationship, and moved into a new house recently.

The affidavit of the applicant’s husband states that he has diverticulitis, which sometimes requires him to go to the hospital. He states that his son has problems breathing because of dust, stress, or other reasons which are unknown. He indicates that his son takes medication and may require a machine to help him breathe, which he may not be able to afford. The applicant’s husband states that he does not know what he would do in Belarus. He indicates that his family needs what the United States has: a good medical system, good schools, and English as the spoken language.

The court order by the Superior Court of New Jersey, Chancery Division-Family Part, dated October 10, 2002, states that the applicant’s husband shall pay support for [REDACTED] and/or allocated support for [REDACTED]

[REDACTED], born on September 6, 2001. The order conveys that the applicant's husband was awarded full primary legal custody of the child. The defendant [REDACTED] was granted supervised parenting time with the child, which is to be arranged between the parties.

The medical records of the applicant's stepson reflect treatment of asthma on a regular basis and prescriptions for Singulair, Albuterol Sulfate, Rondec-dm, Zithromax, and a nebulizer. On May 11, 2004, the applicant's stepson was treated for acute bronchitis. For the August 23, 2004 medical appointment, Medicaid was the primary source of insurance.

The medical records of the applicant's husband convey that he was treated for diverticulitis in 2004.

The CNN.com document conveys that Belarus is a "dictatorship."

The U.S. Department of State Background Note on Belarus for 2005 shows per capital gross domestic product (2003) as \$1,765, and it shows the languages spoken are Belarusian and Russian (official). The U.S. Department of State conveys that the most serious environmental issue in Belarus is from the accident at the Chernobyl nuclear power plant in 1986, which "had a devastating effect on Belarus." "About 70% of the nuclear fallout from the plant landed on Belarusian territory, and about 20% of the land remains contaminated." "[A]s a result of the radiation release, agriculture in a large part of the country was destroyed, and many villages were abandoned. Resettlement and medical costs were substantial and long-term." The U.S. Department of State reports that the Belarusian government announced plans to increase agricultural production in the contaminated regions, and it states that the government receives U.S. assistance in its efforts to deal with the consequences of radiation.

The income tax records show the applicant as a homemaker and her husband as self-employed with his income varying from year to year. In 2003, he had business income of \$22,015. In 2005, he earned business income of \$14,150 and wages of \$3,820. In 2006, he had business income of \$18,000 and wages of \$8,730.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The BIA in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. 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.* at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the

case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Applying the *Cervantes-Gonzalez* here, extreme hardship to the applicant’s husband must be established in the event that he joins the applicant, and in the alternative, that he remains in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The record establishes that the applicant’s husband would endure extreme hardship if he remained in the United States without his wife.

The federal poverty guidelines are updated periodically in the Federal Register by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2). For a household of three persons in 2006, the poverty line is set at \$16,600. Because the applicant is required to be 125 percent above the poverty guideline to sponsor an immigrant, the family’s income must be at least \$20,750. In 2006, the [REDACTED]’s total income was \$26,730, exceeding the poverty line by \$4,150. For a family of three persons in 2005, the poverty line is set at \$16,090, and 125 percent of the poverty line is \$20,112. In 2005, the [REDACTED]’s income was \$17,970, falling below the required sponsor guideline. The AAO notes that the applicant’s son qualified for Medicaid in 2004.

As shown by the income tax records, the applicant’s husband would experience extreme hardship if he were to remain in the United States without his wife as he would not be able to afford childcare services for his son.

The documentation in the record is sufficient to establish that the applicant’s husband would experience extreme hardship if he were to join his wife to live in Belarus.

The conditions in the country where the applicant’s husband would live if he joined his wife are a relevant hardship consideration. While political and economic conditions in an alien’s homeland are relevant, they do not justify a grant of relief unless other factors such as advanced age or severe illness combine with economic detriment to make deportation extremely hard on the alien or his qualifying relatives. *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994)(citations omitted).

The applicant’s husband conveys that he is concerned about the well-being of his six-year-old son if they were to live in Belarus. As previously stated, although hardship to the applicant’s stepson is not a consideration under section 212(a)(9)(B) of the Act, the hardship endured by the applicant’s husband, as a result of his concern about the education of their son, is a relevant consideration.

U.S. courts have held that the consequences of deportation imposed on citizen children of school age must be considered in determining extreme hardship. For example, *In Re. Kao & Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the respondent’s 15-year-old daughter would have difficulty transitioning to daily life in Taiwan because she had inadequate language capabilities, and after living her entire life in the United States and completely integrating into an American lifestyle, the BIA determined that uprooting the respondent’s daughter at that stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5<sup>th</sup> Cir. 1983), the court indicated that “imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture

where they do not speak the language,” must be considered in determining whether “extreme hardship” has been shown. And, in *Prapavat vs. I.N.S.*, 638 F. 2<sup>nd</sup> 87, 89 (9<sup>th</sup> Cir. 1980), the court found the BIA abused its discretion in concluding that extreme hardship had not been shown where the aliens' five-year-old citizen daughter, who was attending school, would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

The record here establishes that the applicant’s stepchild is six years old, thus he is of school age. The record further shows that the languages spoken in Belarus are Belarusian and Russian (official). Uprooting the applicant’s stepson at this stage in his education and social development to survive in an environment that is completely foreign to him would constitute extreme hardship to the applicant’s son, as was found in *In Re. Kao & Lin, Ramos, and Prapavat*. The AAO therefore finds that the record establishes that the concern of the applicant’s husband about the consequences of removal imposed on his son would result in hardship to him.

In addition, the record establishes that Belarus has a serious environmental issue: radiation from the Chernobyl nuclear power plant. Given the devastating effects of the Chernobyl disaster, the contamination of a large part of Belarus’ agriculture, with 20% of the land still contaminated; the long-term medical costs caused by radiation; and the Belarus government’s continued efforts to deal with the consequences of radiation; the AAO finds that the applicant’s husband would experience hardship if he were to live in Belarus with his son.

In considering the hardship factors raised here, with regard to whether the applicant’s husband would experience extreme hardship if he were to join his wife to live in Belarus, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

The AAO finds that when the individual factors are considered cumulatively, they establish that the applicant’s husband would experience extreme hardship if he were to join his wife to live in Belarus.

It is noted that the AAO has found that the applicant’s husband would experience extreme financial hardship if he were to remain in the United States without his wife.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in removal has been met so as to warrant a finding of extreme hardship. Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do in this case constitute extreme hardship to a qualifying family member for purposes of relief under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The grant or denial of the above waiver does not depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's family. The unfavorable factor in this matter is the applicant's unlawful presence. The AAO notes that the applicant does not appear to have committed any crimes.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's immigration violation, it finds that the hardship imposed on the applicant's husband and stepson as a result of her inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.