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U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: BANGKOK, THAILAND Date: MAR 02 2007
[consolidated therein]

IN RE: SONGWUTH CHUENSAI

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.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Bangkok, Thailand. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Thailand 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 10 years of his last departure from the United States. The record reflects that the applicant is the spouse of a United States citizen and that he 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 with United States citizen wife and two United States citizen stepchildren.

The Acting District Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Acting District Director*, dated March 9, 2005.

On appeal, the applicant, through counsel, asserts that the denial of the applicant's admission into the United States would result in extreme hardship to his United States citizen spouse. *Brief in Support of Appeal*, filed April 29, 2005. Counsel claims that the acting district director abused her discretion by misapplying extreme hardship standards and by not considering the hardship factors in the aggregate in the applicant's case.

The record includes, but is not limited to, counsel's brief, the applicant's affidavit, an affidavit from the applicant's wife, an affidavit by Dr. [redacted] regarding the applicant's wife's mental health, dated January 28, 2005, and numerous affidavits and statements from colleagues, friends, and family of the applicant and his wife. The entire record was reviewed and considered in arriving at a decision on the 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.
>
> ...
>
> (v) Waiver.-The Attorney General [now the Secretary of 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.

The AAO notes that the record contains several references to the hardship that the applicant's stepchildren would suffer if the applicant were denied admission into the United States. Section 212(a)(9)(B)(v) of the Act provides that a waiver, under section 212(a)(9)(B)(i)(II) of the Act, is applicable solely where the applicant establishes extreme hardship to his citizen or lawfully resident spouse or parent. Congress specifically does not mention extreme hardship to a United States citizen or lawful permanent resident child or stepchild. In the present case, the applicant's spouse is the only qualifying relative, and hardship to the applicant's stepchildren will not be considered, except as it may cause hardship to the applicant's spouse.

In the present application, the record indicates that the applicant entered the United States on a K1 nonimmigrant visa on August 16, 2000. The applicant's intentions were to marry [redacted]; however, when he arrived in the United States, Ms. [redacted] decided to call off the engagement. *Affidavit of* [redacted], dated February 9, 2005. On June 26, 2002, the applicant was placed into removal proceedings. On November 20, 2002, the applicant married [redacted] On September 17, 2003, an immigration judge in Denver, Colorado, granted the applicant voluntary departure. The applicant departed the United States on January 15, 2004. On or about September 29, 2004, the applicant filed a Form I-601. On March 9, 2005, the Acting District Director denied the applicant's Form I-601, finding that the applicant accrued more than 365 days of unlawful presence and failed to establish extreme hardship would be imposed on the applicant's spouse. The Acting District Director stated the applicant accrued unlawful presence from November 16, 2000 until January 15, 2004. The applicant is attempting to seek admission into the United States within 10 years of his January 15, 2004 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant himself experiences upon deportation is irrelevant to a section 212(a)(9)(B)(v) waiver proceeding. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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.

Counsel asserts that the applicant's spouse would face extreme hardship if she relocated to Thailand in order to remain with the applicant. Counsel claims that the applicant's wife would face emotional hardship if she

relocates to Thailand, because she has a strong relationship with her parents and assists them in caring for her niece and nephew, besides her own two children. *See Brief in Support of Appeal*, filed April 29, 2005. Additionally, counsel claims the applicant's wife is suffering from extreme emotional hardship by being separated from the applicant. *Id.*; *See also Affidavit by Dr.* [redacted], dated January 28, 2005. The AAO finds that evidence in the record establishes that the applicant's wife suffers from depression, anxiety disorder, and panic disorder. Dr. [redacted] also states there "is a family predisposition to mental illness." *Affidavit by Dr.* [redacted], page 7, dated January 28, 2005. Additionally, the AAO notes that the applicant's wife was diagnosed with major depression in January 2000. *See Kaiser Permanente Progress Notes*, dated January 22, 2000; *see also Affidavit by Dr.* [redacted], page 5, dated January 28, 2005. The applicant's wife claims that moving to Thailand would be financially difficult because she would not be able to make the same amount of money she makes in the United States. *Affidavit of* [redacted] dated September 16, 2004. Additionally, she states that since the applicant departed the United States, she has had an increase in the family responsibilities. She claims that the applicant helped in caring for the children and her stepfather, and now she has had to assume those family responsibilities. *Id.*

The record establishes that the applicant's spouse's mental and emotional problems would be exacerbated whether she remains separated from her spouse or whether she joins him in Thailand, separated from her family. Combined with the increased financial and familial burdens that the applicant's spouse is facing now that her husband has departed the United States, the hardship in this case is beyond that which is normally experienced in cases of removal. Accordingly, the AAO finds that the applicant has established that his United States citizen wife would suffer extreme hardship if his waiver of inadmissibility application were denied.

The favorable factors are the extreme hardship to his United States citizen wife, who depends on him for emotional support, the applicant's contributions in helping to raise the children and taking care of the household duties, having no criminal record in the United States, and his adherence to the voluntary departure order. The unfavorable factors in this matter are the applicant's unlawful presence in the United States from November 16, 2000 until January 15, 2004, and periods of unauthorized presence. The AAO notes that when the applicant was granted voluntary departure on September 17, 2003, he departed the United States within the time he was allowed.

While the AAO does not condone his actions, the AAO finds that the favorable factors outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.