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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: LONDON, ENGLAND Date: DEC 02 2008

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

Michael Thurmay
for
John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, London, England. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of the United Kingdom 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 applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that based on the evidence in the record, the applicant failed to establish extreme hardship to his U.S. citizen spouse based on his inadmissibility to the United States. The application was denied accordingly. *Decision of the Field Office Director*, dated June 18, 2008.

On appeal, the applicant's spouse asserts that she is suffering extreme hardship as a result of the applicant's inadmissibility because she has been diagnosed with cancer and is now undergoing treatment for the disease. She states that she needs her husband with her in the United States to help her through her recovery and to help with her financial obligations, as she is not able to work as a result of her treatment. *Letter from Applicant's Spouse*, dated July 15, 2008.

In the present application, the record indicates that the applicant entered the United States through the Visa Waiver Program on June 5, 2004 with an authorized stay until September 4, 2004. There is no departure record for the applicant relating to this entry. However, on his Biographic Information Form (Form G-325A) the applicant states that he resided in the United States from January 2002 to August 2007, violating his status under the Visa Waiver Program. The record also indicates that the applicant previously entered the United States through the Visa Waiver Program on July 31, 2002 with an authorized stay until October 30, 2002. There is no departure record for the applicant relating to this entry. Therefore, at a minimum, the applicant accrued unlawful presence from when he entered the United States on June 5, 2004 until August 2007, when he departed the United States. In applying for an immigrant visa, the applicant is seeking admission within 10 years of his August 2007 departure from the United States. Therefore, the applicant is 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.

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.

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 U.S. citizen or lawfully resident spouse and/or parent of the applicant. Hardship the applicant experiences due to separation is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's spouse. 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).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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. *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

The AAO notes that in *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, "the most important single hardship factor may be the separation of the alien from family living in the United States," and that, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion."(Citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that she resides in the United Kingdom and in the event that she resides in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

The record shows that the applicant's spouse has been diagnosed with stage IV colon cancer and that the average anticipated life expectancy of a patient with stage IV colon cancer is twelve to eighteen months. *Letter from* [redacted] dated July 8, 2008. The applicant's spouse's doctor states that the applicant's spouse was originally diagnosed with colon cancer in October 2007 and has been undergoing chemotherapy and medical surveillance. [redacted] states that it is her experience working with patients like the applicant's spouse that their quality of life during their treatment is often enhanced by the degree to which they have reliable and local family support to sustain a positive mental attitude. [redacted] also states that as the applicant's spouse's health care providers they view relocation to the United Kingdom as inappropriate and harmful because any disruption in the applicant's spouse's continuity of care poses some degree of risk to her health. In addition, [redacted] states that the applicant's spouse currently enjoys some degree of care from her elderly parents and son and to separate her from this support would be detrimental. [redacted] is careful to note, however, that the support she receives from her son and parents is limited, is not in-home support and is not the kind of support that a significant, intimate relationship can and does provide. *Id.* Because of the applicant's spouse's life threatening medical condition the AAO finds that it would be an extreme hardship for her to relocate to the United Kingdom leaving her family and doctors.

The AAO notes that the field office director determined that the applicant's spouse would be able to receive adequate medical care from the United Kingdom's National Health Service (NHS). However, in her letter, Dr. [redacted] indicates that "without assurance of a smooth and seamless transition of care . . . [the applicant] is at risk for further progression of her illness." There is no evidence in the record to demonstrate that the applicant's spouse, as a foreign national, would immediately receive the same level of specialized care required for her condition in the United Kingdom as she presently does in the United States. The AAO takes administrative notice of information provided by the NHS on its website indicating that even if the applicant's spouse established residency in the U.K. and obtained access to the medical care provided by the NHS, there would likely be a significant delay before she began receiving the specialized care she requires, if indeed such care is offered. *See* National Health Service, United Kingdom, *Common Health Questions: Do I need a GP referral for private treatment, How do I get a referral to an NHS specialist, How long will I have to wait to see a consultant*, http://www.nhs.uk. The evidence in the record demonstrates that a break in the continuity of care would pose serious risks to the applicant's spouse, and a preponderance of the evidence shows that the applicant's spouse would not experience a seamless transition in care if she relocated to the U.K

In addition, the AAO finds that because of the applicant's spouse's medical condition, it is an extreme hardship for her to be separated from the applicant. As stated by the applicant's spouse's doctor, the applicant's spouse, as a patient undergoing treatment for Stage IV cancer, would benefit from the applicant's presence and emotional support during her treatment. The applicant, by providing in-home support and a significant intimate relationship to the applicant's spouse, would enhance the applicant's spouse's quality of life and ability to sustain a positive mental attitude. Furthermore, the evidence also reflects that the applicant's spouse is facing increasing financial hardship as a consequence of her inability to work and her mounting medical expenses, and that this hardship would be alleviated by the applicant's employment in the United States. The applicant's spouse states that she is suffering financially without the help of the applicant. *Letter from Applicant's Spouse*, dated July 15, 2008. The applicant's spouse states that though her employer has been "extremely supportive," she is currently on unpaid leave and is incurring mounting medical expenses. She notes that the applicant has an offer of employment in the United States that includes medical insurance

and that she needs the applicant's help meeting all of her financial obligations. *Id.* Thus, the AAO finds that due to the emotional, physical, psychological, and financial circumstances surrounding the applicant's spouse's medical condition, being separated from the applicant has resulted and continues to result in extreme hardship to the applicant's spouse.

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 adverse factor in the present case is the applicant's unlawful status in the United States. The favorable factors in the present case are the presence of the applicant's spouse in the United States, the extreme hardship to his spouse if he were to be denied a waiver of inadmissibility, and the applicant's lack of any criminal record.

The AAO finds that the immigration violation committed by the applicant is serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.