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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

H6

[redacted]

FILE: [redacted] Office: MOSCOW, RUSSIA Date: FEB 22 2011

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Moscow, Russia. 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 Ukraine. He was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of his last departure. He is married to a United States citizen and has one U.S. citizen child. He 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).

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on September 9, 2010.

On appeal, counsel for the applicant asserts that the Field Office Director misapplied the law, failed to take into account all hardship factors and failed to consider the hardship impacts in the aggregate. *Form I-290B*, received on September 10, 2010.

The record includes, but is not limited to, counsel's brief; a statement from [redacted] dated September 22, 2010; background materials on epileptic seizures; a Notice of Case Action from the Florida Department of Children and Families stating eligibility for food stamps and Medicaid benefits; a statement from [redacted] regarding the commercial lease for the applicant's spouse's business; a statement from the applicant's spouse; a statement from the applicant; photographs of the applicant, his spouse and their son; a Patient Report, [redacted] dated December 10, 2009, on the medical condition of the applicant's spouse; business records, licenses and related documentation for the applicant and his spouse's businesses; and educational certificates and training certifications for the applicant.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (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.

. . . .

The record indicates that the applicant entered the United States with a B2 visa on October 13, 1996, with an authorized stay until April 12, 1997. He remained beyond his period of authorized stay until he self-deported on January 10, 2010. The applicant had a pending asylum application from March 31, 1999, until June 5, 2002. As such the applicant accrued unlawful presence from April 13, 1997, through March 30, 1998, and from June 6, 2002, until his departure on January 2, 2010, a period over one year. As the applicant has resided unlawfully in the United States for over a year and is now seeking admission within ten years of his last departure from the United States, he is inadmissible under section 212(a)(9)(B)(i)(II) 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-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and

not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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.*, *In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-,* 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

Counsel asserts that the applicant's spouse suffers from debilitating lower back pain due to a car wreck in 2002 and needs the applicant to assist her on a daily basis and to care for their child. The applicant's spouse's lower back condition is established by the testimony of several doctors. It is clear from the medical documents that the applicant's spouse has a serious lower back condition. The evidence indicates she is currently limited in her physical activity and may not stand for lengthy periods of time. *Statement of* [redacted] September 10, 2010. In addition, the applicant's spouse has recently suffered from gran mal epileptic seizure and has begun undergoing treatment from her condition.

With regard to hardship upon relocation counsel asserts on appeal that the applicant's spouse would experience physical, financial and medical hardship if she were to relocate to the Ukraine. *Brief in Support of Appeal*, October 15, 2010. He explains that the applicant's spouse's mother resides with her and that she has no family ties in the Ukraine.

The applicant has submitted a statement indicating that he has been unable to find employment since he returned to the Ukraine and that he lives in conditions which would result in physical hardship to his spouse and son if they relocated. *Statement of the Applicant*, dated May 25, 2010. He explains that he lives with his father who is supported by a small retirement check each month, and that the environment of gender discrimination would make it difficult for his spouse to find employment. He asserts there are insufficient medical resources to care for himself or his family if they were to relocate to the Ukraine.

The applicant's spouse has submitted a statement corroborating counsel's assertion of hardship and explains that chiropractors are not regulated in the Ukraine, and that she would not be able to find competent chiropractors, and would not have money to afford possible back surgery to fuse her spine if it became necessary to do so in order to alleviate her pain.

The record contains sufficient evidence to establish the medical conditions of the applicant's spouse, including statements from several doctors and corroborating testimony from family members. The applicant's spouse has submitted additional evidence that she is now suffering from epilepsy and his having gran mal seizures associated with the condition. *Statement of the Applicant's Spouse*, received January 5, 2011. These conditions and the testimony submitted by the applicant's spouse's doctors are sufficient to demonstrate that they would constitute significant hardship for her should she interrupt the continuity of care she has been receiving in the United States in order to relocate to the Ukraine.

The record does not contain sufficient evidence to establish the physical living conditions in the Ukraine, however, the application for public benefits, statements from the applicant's spouse's family, business records and evidence of medical costs associated with her conditions are sufficient to establish that the applicant's spouse would experience a significant financial impact upon departure from the United States.

When these factors are considered in the aggregate, including separation from her U.S. family, the physical hardship of her back injury and the serious medical hardship of epilepsy, they rise to a degree that establishes extreme hardship upon relocation.

With regard to hardship upon separation, counsel asserts that the applicant's spouse will experience physical, medical and financial hardship. He states that the applicant's spouse's medical conditions are serious and that she needs the applicant to assist her physically in caring for her and their child. He explains that due to a back condition she has been unable to remain employed, has lost her salon business and is in danger of losing several of their real estate investments. Counsel also reveals that the applicant's spouse has recently suffered an epileptic gran mal seizure. The emergence of epilepsy in the applicant's spouse has compounded the physical hardships she is enduring due to her back pain.

The record includes testimony from numerous doctors concerning the applicant's spouse's lower back condition. Testimony indicates that rehabilitation and medication are not currently alleviating her pain and that she may require fusion of portions of her spine in the near future. *Statement of* [redacted] September 10, 2010. Another statement from [redacted] details the emergence of the applicant's spouse's epilepsy which further restricts her physical activities, including driving.

With regard to the financial hardship asserted by the applicant's spouse, the record contains documentation for three real estate mortgages, a commercial leasing agreement and a residential leasing agreement. There are also copies of bills and utility invoices, as well as a statement of eligibility and approval of an application for food stamps and Medicaid benefits. The applicant has not shown that he and his spouse are unable to access any equity in their real estate to help meet his wife's financial needs. Regardless of the current real estate market, these properties represent valuable assets which could be used to offset any financial hardships. Nonetheless, when the evidence is considered on the whole, including the application for Medicaid benefits and food stamps, it indicates that the applicant's spouse will experience some financial hardship in addition to her physical and medical hardships.

When these physical, medical and financial hardships are considered in the aggregate they establish that the applicant's spouse will experience hardship which rises above the normal impacts of separation and as such constitute extreme hardship. As the applicant has established that a qualifying relative will experience extreme hardship the AAO may now consider whether the applicant's spouse warrants a waiver as a matter of discretion.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien 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 AAO finds that the unfavorable factors in this case include the applicant's unlawful presence and unauthorized employment. The favorable factors in this case include the presence of the applicant's spouse and the hardship she would experience upon denial of the present application, the presence of his U.S. citizen child, his employment and education in the United States and the lack of any criminal record while resident in the United States. The favorable factors in this case outweigh the negative factors, therefore favorable discretion will be exercised. The Field Office Director's decision will be withdrawn and the appeal will be sustained.

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

ORDER: The appeal is sustained.