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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Avenue, N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H6

[redacted]

DATE: JAN 13 2012 OFFICE: OAKLAND PARK, FL FILE: [redacted]

IN RE: [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:

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,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Oakland Park, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application will be approved.

The applicant is a native and citizen of Denmark who entered the United States pursuant to the Visa Waiver Program (VWP) on several occasions from 1995 to 1998[1]. On May 24, 1998, the applicant was denied admission to the United States under the VWP and returned to Denmark. On October 7, 1999, the applicant was paroled in to the United States until October 15, 1999, pending completion of deferred inspection, but the applicant failed to appear for deferred inspection on that date. The Immigration and Naturalization Service sent a letter to the applicant on June 21, 2000, stating that she failed to appear for deferred inspection on October 15, 1999, and ordering her to appear on August 3, 2000. The applicant once again failed to appear for deferred inspection. The applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on July 28, 2010 and departed the United States on November 18, 2010. The applicant accrued unlawful presence in the United States from October 15, 1999, because she did not satisfy the terms of her parole, until July 28, 2010, when her Form I-485 was filed. The applicant 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 ten years of her last departure from the United States[2]. The applicant is a beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen spouse.

The Field Office Director concluded that the record failed to establish the existence of extreme hardship to the applicant's spouse and denied the application accordingly. *See Decision of the Field Office Director*, dated June 23, 2011.

On appeal, the applicant asserts that her U.S. citizen spouse needs her to remain in the United States because his health has deteriorated and he needs her to serve as his caretaker. The applicant

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[1] It is noted that the Field Office Director determined that the applicant was admitted to the United States in October 1996 with authorization to remain until January 12, 1997and did not depart until November 15, 1997. However, travel records indicate the applicant departed the United States and returned under the VWP three times during that time period and did not accrue more than 180 days of unlawful presence in 1997 as stated in the field office director's decision.

[2] It is noted that the applicant may also be inadmissible to United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured a visa by fraud or willful misrepresentation. The record reflects that the applicant stated on a nonimmigrant visa application, dated July 19, 1999, that she had never been refused admission to the United States. Nevertheless, because the applicant is inadmissible under section 212(a)(9)(B)(i) of the Act and demonstrating eligibility for a waiver under section 212(a)(9)(B)(v) also satisfies the requirements for a waiver of inadmissibility for fraud or misrepresentation under section 212(i) of the Act, the AAO will not determine whether the applicant is also inadmissible under section 212(a)(6)(C)(i).

further contends that her spouse's health problems make travel between Denmark and the United States near impossible.

In support of the waiver application and appeal, the applicant submitted letters, criminal background documentation, financial documentation, the applicant's spouse's medical records, and letters from his physicians. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (B) ALIENS UNLAWFULLY PRESENT.-
>
> (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .
>
> (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 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). [redacted]he totality of the circumstances in determining whether denial of [redacted] hardship to a qualifying relative.

In the present case, the record reflects that the applicant is a [redacted] of the Denmark who was unlawfully present in the United States from October 7, 1999 to July 28, 2010, the date of her Form I-485 filing. The applicant's spouse is a seventy-eight year-old native of Denmark and citizen of the United States. The applicant and her spouse are residing [redacted]

The applicant asserts that her spouse's health has deteriorated in the past decade and he has undergone several heart surgeries. *See Statement from* [redacted] Specifically, the applicant states that her husband underwent a double bypass procedure and two other surgeries for the insertion of a stent and pacemaker. *Id.* In support of these assertions, the applicant submitted medical records containing operative notes, but no accompanying medical report or analysis of these notes. *See Medical Records from* [redacted], discharge date of March 20, 2006 and July 23, 2006. However, the record does contain a letter from the applicant's spouse's primary care physician stating that he has been overseeing the entire scope of his care. *See Letter from* [redacted] dated July 18, 2011. According to [redacted] the applicant's spouse is under evaluation for a possible hematologic malignancy and currently suffering from severe right knee osteoarthritis, active coronary artery disease, and active cerebrovascular disease. *Id.* The applicant's spouse's physician further states that the complicated nature of the applicant's spouse's medical history necessitates frequent medical visits and diagnostic testing. *Id.* It is noted that the applicant states that the applicant's spouse does not have any other family members in the United States and that she is the only source of support and caretaking for the applicant. *See Statement from* [redacted]

The record further contains a letter from the applicant's spouse's orthopedic physician stating that the applicant's spouse is scheduled for surgery on August 8, 2011 and he will need a great deal of assistance from his spouse to perform his daily living activities for six to eight months thereafter. *See Letter from* [redacted] dated July 11, 2011. Based on the applicant's spouse's medical history and the extent to which he requires a caretaker due to his medical conditions, the AAO concludes that the applicant's spouse would suffer extreme hardship if the applicant's spouse were to remain in the United States without the applicant.

The applicant asserts that due to the applicant's spouse's active heart conditions and pacemaker, it is extremely difficult and risky for him to travel back and forth between the United States and Denmark. *See Statement from* [redacted] The applicant also states that the applicant's spouse's occupation and business require him to stay in Florida. *Id.* It is noted the applicant's spouse's orthopedic physician projected that the applicant's spouse would not even be able to perform his daily living activities without assistance for six to eight months after his surgery on August 8, 2011. *See Letter from* [redacted] dated July 11, 2011. It is further noted that it is currently less than six months after the date of the applicant's spouse's surgery and relocation to Denmark would require the applicant's spouse to travel outside the United States.

The applicant's spouse's primary care physician states that he is overseeing the applicant's spouse's medical care, including, as noted above, a possible hematologic malignancy, severe right knee osteoarthritis, active coronary artery disease, and cerebrovascular disease. *See Letter from* [redacted] dated July 18, 2011. [redacted] further states that the applicant's spouse's medical care is being handled by himself and other physicians in the fields of oncology, gastroenterology, and orthopedic surgery. It is acknowledged that the applicant's spouse's relocation to Denmark would disrupt the continuity of his extensive medical care in the United States. It is also acknowledged that the applicant's spouse has submitted medical records

concerning cardiac treatment dating back to 2006. *See Medical Records from* [redacted] discharge date of March 20, 2006 and July 23, 2006. In this case, the record contains sufficient evidence to show that the hardships faced by the qualifying relative, if he were to relocate to Denmark, rise to the level of extreme hardship.

Considered in the aggregate, the applicant has established that her spouse would face extreme hardship if the applicant's waiver request is denied. Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of* [redacted] 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that [redacted] 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

> We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra,* is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the extreme hardships the applicant's U.S. citizen spouse would face if the applicant were to reside in the Denmark, regardless of whether he accompanied the applicant or remained in the United States; the applicant's lack of criminal convictions; letters of support submitted in conjunction with the Form I-130 filed on the applicant's behalf; and the passage of more than ten years since the applicant began accumulating unlawful presence in the United States. The unfavorable factors in this matter include the applicant's unlawful presence in the United States and a misrepresentation regarding a prior refusal of admission to the United States on a nonimmigrant visa application.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.