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U.S. Citizenship  
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Services

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FILE:



Office: MOSCOW, RUSSIA

Date: DEC 12 2007

IN RE:



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:



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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The applicant is a native and citizen of Moldova 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 a period of one year or more and seeking readmission within ten years of her departure. The applicant is the spouse of a U.S. citizen. 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 her spouse.

The field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility. *Decision of the Field Office Director*, dated September 11, 2007.

On appeal, counsel asserts that the field office director's evaluation was done with missing initial evidence and based on the erroneous conclusion that the applicant's spouse would be spending most of the next four years in the United States. *Form I-290B*, received on October 2, 2007.

The record includes, but is not limited to, the applicant's spouse's statement, photographs, information on the post-war reintegration of U.S. soldiers into American society, medical records for the applicant's spouse and letters from the applicant's spouse's commanding officers. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant entered the United States with a B1/B2 visitor visa in June 2002 and she departed the United States on July 18, 2004.<sup>1</sup> Therefore, the applicant accrued unlawful presence from approximately December 2002, the month in which her maximum authorized period of stay would have expired, until July 18, 2004, the date she departed the United States. As the applicant was unlawfully present in the United States for more than one year, she is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

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-

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<sup>1</sup> The AAO notes that the applicant was the beneficiary of an I-730, Refugee/Asylee Relative Petition, however, she was not married to her spouse on the date he received his asylee status. Therefore, it was not a bona fide application and it did not toll her accrual of unlawful presence.

(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.

Therefore, the applicant requires a waiver under section 212(a)(9)(B)(v) of the Act which is dependent first upon a showing that the bar imposes an extreme hardship to the applicant's U.S. citizen 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).

*Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship. These factors include the presence of lawful permanent resident or United States citizen family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that he resides in Moldova or in the event that he resides in the United States, as he is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that he resides in Moldova. The record reflects that the applicant's spouse is currently serving in the United States Army, is currently assigned to the 1<sup>st</sup> Battalion, 23<sup>rd</sup> Infantry Regiment, 3<sup>rd</sup> Brigade, 2<sup>nd</sup> Infantry Division (SBCT) and is set to be deployed to Iraq in 2008-2009. *Letter from H. Charles Hodges, Jr., LTC, IN, Department of the Army*, dated November 29, 2001. Further, the applicant's spouse's active duty status is not scheduled to end until February 2011. *Applicant's Enlisted Record Brief*, dated August 13, 2007. As the applicant's spouse would be physically unable to reside in Moldova while on active duty in the U.S. military, the AAO finds by default that the applicant has demonstrated extreme hardship to her spouse in the event he resides in Moldova.

The second part of the analysis requires the applicant to establish extreme hardship in the event that her spouse remains in the United States. The applicant's spouse's commanding officer states that the applicant's spouse has two dependent children who will be entering the United States in January 2008 and he will be involuntarily separated from active duty due to the lack of a Family Care Plan. *Id.* The applicant's spouse states that his family was not able to greet him when he returned from Iraq, he was only able to spend two weeks with his family in the last three years, the two week visit gave him the strength to finish his combat deployment without breaking down, he has to learn how to live in a normal society again after prolonged periods of combat, his wife is the best person to get him back to normalcy, most of his remaining Army service will be in the United States and his next potential deployment would be from September 2008 until December 2009. *Applicant's Spouse's Letter*, at 1-3, dated October 1, 2007. The record reflects that the primary source of support for a returning soldier is likely his family, families can help a veteran avoid withdrawal from others and they can provide a sense of belonging to counter feelings of separateness. *Warzone-Related Stress Reactions: What Families Need to Know, A National Center for PTSD Fact Sheet*, at 1, undated.

The applicant's spouse's squad leader states that the applicant's spouse's separation from his wife and the resettlement of their children in the United States without their mother is affecting his performance and well-being, and this is disconcerting as his training involves live fire. *Letter from SSG John Reeves*, at 1-2, dated September 27, 2007. The applicant's spouse's physician states that the applicant's spouse has "adjustment disorder with anxious mood" and that separation from his wife and children is the direct cause of the majority of his symptoms. *Applicant's Spouse's Medical Records*, at 2, dated September 26, 2007. The applicant's spouse's physician further states that until he resolves his situation, the applicant's spouse's symptoms will continue to get worse and will ultimately affect his work performance and his health. *Id.* Based on the aforementioned factors, the AAO finds that separation will 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 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-Morales*, 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 main adverse factor in the present case is the applicant’s unlawful presence.

The favorable factors include the presence of her U.S. citizen spouse, extreme hardship to her spouse and lack of a criminal record.

The AAO finds that the applicant’s violation 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.