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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H/3

[REDACTED]

FILE:

[REDACTED]

Office: MOSCOW, RUSSIA

Date: APR 21 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:

[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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant is a native of Georgia and a citizen of the former Soviet Union 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 ten years of his last departure from the United States. The applicant is the husband and father of U.S. citizens and seeks a waiver of inadmissibility in order to reside in the United States with his family.

The officer in charge found that the record failed to establish that the denial of the Form I-601, Application for Waiver of Ground of Excludability, would result in extreme hardship to the applicant's spouse. She denied the application accordingly. *Decision of the Officer in Charge*, dated September 28, 2006.

On appeal, counsel contends that Citizenship and Immigration Services (CIS) has failed to explain why the favorable factors in the applicant's case are outweighed by negative, making it impossible to determine the basis for the denial of the waiver request. Counsel asserts that the evidence already submitted in support of the Form I-601 and that to be provided on appeal establish that the applicant's spouse and family have incurred extreme hardship over and above the normal economic and social disruptions associated with removal and that this hardship merits CIS approval of the Form I-601. *Form I-290B, Notice of Appeal to the Administrative Appeals Office*, dated October 22, 2006.

The record indicates that the applicant was admitted to the United States on May 18, 1996 on a B-1 nonimmigrant visa and that he remained in the United States after the validity of his visa expired on December 17, 1996. On May 19, 1997, the applicant filed a Form I-589, Application for Asylum and for Withholding of Deportation. The applicant's Form I-589 was denied by the immigration judge on September 28, 1998 and he appealed to the Board of Immigration Appeals (BIA). On December 3, 2002, the BIA affirmed the immigration judge's decision, granting the applicant 30 days in which to depart the United States voluntarily. The applicant's petition to the 10th Circuit Court of Appeals for review of the BIA order was denied on April 8, 2004. On June 18, 2004, a warrant of removal was issued for the applicant. On July 26, 2004, the applicant departed the United States for Russia and, based on the record, has remained in Russia since that date.

Section 301(b) of the Illegal Immigration and Immigrant Responsibility Act of 1996 Pub.L. 104-208, amended section 212(a) of the Act to render inadmissible any alien who departs the United States after accruing unlawful presence. The unlawful presence provisions of the Act became effective as of April 1, 1997. As defined in section 212(a)(9)(B)(ii) of the Act, an alien is deemed to be unlawfully present in the United States if:

The alien is present in the United States after the expiration of the period of stay authorized by the Attorney General [now Secretary of Homeland Security] or is present in the United States without being admitted or paroled.

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.

On May 18, 1996, the applicant was admitted to the United States as a B-1 visitor for a six-month period ending on December 17, 1996. Although he began to accrue unlawful presence as of April 1, 1997, the effective date of the unlawful presence provisions of the Act, the applicant applied for asylum on May 19, 1997. Pursuant to section 212(a)(9)(B)(iii) of the Act, no period of time in which an alien has a pending bona fide application for asylum may be taken into account in determining unlawful presence, unless the alien was employed without authorization in the United States. CIS considers an asylum application to be pending while an alien is in administrative or judicial proceedings (including review in federal court). Paul W. Virtue, Acting Executive Associate Commissioner, Immigration and Naturalization Service, *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)*, 96ACT 043, HQIRT 50/5.12 (June 17, 1997); Bo Cooper, Acting General Counsel, Immigration and Naturalization Service, *INA 212(a)(9)(B)(iii)(II): Asylee Exception to Unlawful Presence*, HQPGM 70/6.2.6 (June 8, 1999). If the applicant in the present matter was not employed without authorization during the period that began on May 19, 1997 with the filing of the Form I-589 and ended on April 8, 2004 with the 10th Circuit's denial of the applicant's motion for review, he was not unlawfully present in the United States for one or more years and is not inadmissible to the United States under the provisions of section 212(a)(9)(B)(i)(II) of the Act.

The Form G-325A, Biographical Information, submitted by the applicant and dated December 19, 2002 indicates that he was employed as a day laborer in various types of work from 1996 until 1998 and thereafter as a truck driver. A check of relevant CIS records indicates that the applicant was granted employment authorization in connection with his asylum application beginning January 1, 1998 and that his employment authorization was extended annually through March 13, 2003. In that the record demonstrates that the applicant was working without authorization at the time he filed the Form I-589 and for more than seven months thereafter, he may not benefit from the provisions of section 212(a)(9)(B)(iii) of the Act. Accordingly, the AAO finds the applicant to have accrued unlawful presence for the purposes of section 212(a)(9)(B)(i)(II) of the Act from April 1, 1997 until he departed the United States on July 26, 2004, a period of more than four years. As he is seeking admission to

the United States within ten years of his 2004 departure, he is inadmissible to the United States and must apply for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act.

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 lawful permanent resident spouse and/or parent of the applicant. Hardship that the applicant or other family members experience as a result of separation is not considered in section 212(a)(9)(B)(v) waiver proceedings, except to the extent that it causes hardship to the applicant's spouse and/or parent. In the present case, the applicant's only qualifying relative is his spouse, [REDACTED]

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 alien 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. The BIA has held:

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)].

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

The AAO notes that the record must establish that [REDACTED] would suffer extreme hardship whether she resides with the applicant in Russia or remains in the United States, as she is not required to reside outside the United States based on the denial of the applicant's waiver request. The AAO will now consider the relevant factors in the adjudication of this case.

The record on appeal includes, but is not limited to, the following evidence in support of the applicant's waiver request: counsel's brief and letters, dated January 2, 2006, December 29, 2006 and April 4, 2008; sworn

statements from [REDACTED], her older son and her parents; country conditions information on the situation of ethnic Armenians in Russia; documentation related to the health of [REDACTED], her younger son and her parents; evidence related to [REDACTED]'s financial situation; and letters of support from [REDACTED]'s supervisor at her place of employment, her pastor, friends and coworkers.

The first part of the analysis requires the applicant to establish that [REDACTED] would suffer extreme hardship if she joined the applicant in Russia. On appeal, counsel asserts that [REDACTED], an ethnic Armenian, and her children would be at risk if they relocated to Russia or Georgia to live with the applicant. She contends that the situation in Russia for ethnic Armenians has grown more dangerous following the massacre of school children in Beslan by Chechens and that Russians now view all people from the Caucasus region as potential terrorists. She points to the increase in attacks on and harassment of non-Slavic individuals and reports that such abuse is often ignored by government authorities who, at times, participate in the abuse. Further, counsel contends that Ms. [REDACTED] cannot relocate to Russia because she is not a Russian citizen and there is no guarantee that she could obtain employment or housing in Russia or permission to reside there. Counsel also notes that Armenians are not welcome in Georgia, the applicant's country of birth, as they are viewed as having supported Abkhazia in the civil war with Georgia that began in 1992.

Relocation to Russia, counsel asserts, would also require [REDACTED] to abandon her parents who live with her, are emotionally and financially dependent on her, and have health conditions that require her assistance in their daily lives. Counsel states that [REDACTED]'s father suffers from a heart condition that cannot be treated in Russia and that he would die if he were to move to Russia with his daughter. As [REDACTED]'s parents have no other relatives in the United States to care for them, counsel contends that leaving them in the United States would constitute extreme emotional hardship for [REDACTED]. Counsel also asserts that should [REDACTED] relocate to Russia and her parents remain in the United States, she would be unable to support them because of the poor Russian economy and the fact that the applicant is currently unable to work because of back problems that developed following his departure from the United States.

In her statements, [REDACTED] reiterates counsel's concerns regarding the treatment of Armenians in Russia and states her obligation to remain in the United States to care for her elderly parents. She notes that her parents do not speak English and depend on her to take them wherever they need to go. [REDACTED] also contends that she is unable to join her husband outside the United States because she must physically reside in the United States and earn sufficient income if she is to meet the requirements of the affidavit of support needed for an immigrant visa.

The AAO finds the country conditions information in the record to support counsel's claims regarding the treatment of non-Slavic peoples in Russia. The submitted materials include reports from Amnesty International, Human Rights Watch, and the Union of Councils for Jews in the Former Soviet Union, as well as the Department of State's 2003 Country Reports on Human Rights Practices for Russia. They establish that, in Russia, individuals who are identified as non-Slavic people, routinely experience harassment and violence. While these materials demonstrate that this abuse occurs across Russia, in both urban and rural areas, the AAO specifically notes the reporting of the threats and attacks made against Armenians and other ethnic minorities in Krasnodar Kray, the region in which the applicant lived prior to his arrival in the United States.

The tax returns submitted by the applicant establish that [REDACTED]'s parents reside with her and are her financial dependents. The psychiatrist treating [REDACTED] indicates in a November 21, 2006 statement that [REDACTED] has experienced severe emotional problems as a result of her husband's

absence and that she feels “trapped and hopeless” because she is unwilling to expose her children to the risks facing ethnic Armenians in Russia or to leave her elderly and ill parents alone in the United States. A December 22, 2004 letter from [REDACTED], the medical doctor treating [REDACTED] and [REDACTED]’s father, supports counsel’s claim that [REDACTED] could not move her parents to Russia if she relocated there. Dr. [REDACTED] indicates that [REDACTED]’s father is taking ten medications on a daily basis for high blood pressure, diabetes, high cholesterol and atrial fibrillation. [REDACTED] states that as someone who has worked in the Russian medical system, she is aware that the medical care required by [REDACTED]’s father would not be available in Russia.

The AAO finds the record’s documentation of the abuse of ethnic minorities, including Armenians, in Russia, when considered in combination with the severe emotional problems for which [REDACTED] is currently receiving treatment and the concerns she has expressed to her psychiatrist regarding the impact of relocation on her children’s safety to be sufficient to establish that joining the applicant in Russia would constitute an extreme hardship for her. The AAO also notes the additional stress that would be placed on [REDACTED]’s mental health were she to be separated from her dependent parents

The second part of the analysis requires the applicant to prove that [REDACTED] would also suffer extreme hardship if she remains in the United States without the applicant. On appeal, counsel claims that [REDACTED] would experience extreme emotional and financial hardship if the applicant’s waiver request is denied. In support of counsel’s claims regarding the impact of continued separation on [REDACTED]’s mental health, the record provides statements from [REDACTED]’s psychiatrist, [REDACTED], statements from her primary care physician, [REDACTED], materials related to a disability claim filed by [REDACTED], and statements from her friends and coworkers. The financial impact on [REDACTED] of remaining in the United States is demonstrated by a range of financial documents, including [REDACTED]’s 2004 tax return and W-2 Form, Wage and Tax Statement, copies of billing statements, bank statements and medical documentation concerning the applicant’s health, and listings of [REDACTED]’s monthly expenses.

The record contains three separate statements from [REDACTED] dated November 12, 2004, November 21, 2006 and January 18, 2008, which document that he has been treating [REDACTED] since November 4, 2004 for severe depression, which he stated has resulted from her separation from the applicant. He reports that the antidepressants prescribed for [REDACTED] have been increased in dosage due to her ongoing “mood and anxiety and psychotic symptoms” and that she requires medication to continue to function at her job, although her work performance has been significantly diminished as a result of her mental state. As of January 18, 2008, he found her to be in a “fragile condition which appears near completely disabling,” but stated that the most relief [from] her condition will come from having her husband with her and being able to rely on a secure source of income. [REDACTED]’s statements, dated December 22, 2005 and November 12, 2006, report that she referred [REDACTED] to [REDACTED] because her patient was having panic attacks, and showing other physical symptoms of stress. She reports that [REDACTED]’s stress has most recently led to the development of diabetes and high cholesterol and that she believes that the return of the applicant to the United States will relieve the stress underlying [REDACTED]’s medical problems. Letters written by [REDACTED]’s friends and coworkers report their observations of the emotional toll that separation from the applicant has taken on [REDACTED].

The record establishes that [REDACTED] supports her sons and, to an unknown extent, her parents, whose income is not documented in the record. Although the applicant has submitted medical proof that he currently suffers from back problems and must limit his physical activity, this evidence does not demonstrate that his health

precludes him from obtaining any employment in Russia. Statements made by counsel concerning the applicant's inability to work are not sufficient to establish that the applicant would be unable to find some employment that would allow him to assist [REDACTED] in meeting the range of expenses she now faces. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

While the record does not establish that the financial concerns facing [REDACTED] would constitute an extreme hardship for her if she remains in the United States, the AAO finds the documentation of the mental and physical **problems that have beset [REDACTED]** as a result of her separation from the applicant to establish that she would experience extreme emotional hardship if the applicant's waiver request were to be denied and she remained in the United States. In reaching its decision, the AAO has taken specific note of the additional medical documentation presented on appeal, documentation that traces the downward trajectory of [REDACTED] mental and physical health since the applicant's departure from the United States.

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 that 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 adverse factors in the present case are the applicant's overstay of his B-1 visa, his employment without authorization, his failure to depart the United States in response to the BIA's order of voluntary departure or to comply with that order once it became a final order of removal, and his long-term unlawful presence in the United States, the basis of his inadmissibility. The AAO notes that in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), the BIA declined to limit the factors to be considered in the exercise of discretion, indicating that the alien's initial fraud, the basis for his inadmissibility, was appropriately considered in the weighing of positive and negative factors. Accordingly, the applicant's unlawful presence in the United States will be counted among the unfavorable factors in the present case.

The positive factors in the present case are the applicant's family ties to the United States; the extreme hardship to the applicant's U.S. citizen wife if he were to be denied a waiver of inadmissibility; the general hardship to his U.S. citizen children; the approved Form I-130, Petition for Alien Relative, benefiting him; the absence of a criminal record; and the letters of support identifying the applicant as an exemplary father and husband. The AAO notes that diminished weight will be given to the applicant's family ties to the United States and to the hardship faced by the applicant's spouse and children as these relationships were established after the applicant was ordered removed from the United States.¹

The AAO finds the immigration violations committed by the applicant to have been serious in nature and does not condone them. Nevertheless, it concludes that, when considered in the aggregate, 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.

¹ The court held in *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991) that less weight is given to equities acquired after a removal order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of removal proceedings, with knowledge that the alien might be deported. The 9th Circuit Court of Appeals in *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9th Cir. 1980) held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-635 (5th Cir. 1992), the 5th Circuit Court of Appeals held that giving diminished weight to hardship experienced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.