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U.S. Citizenship
and Immigration
Services

H3

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

FEB 19 2009

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 PETITIONER:

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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Georgia who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(i)(II), for having been unlawfully present in the United States for one year or more. The applicant is married to a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. 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 remain in the United States with his spouse.

The service center director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Service Center Director*, dated April 26, 2006.

On appeal, former counsel asserts that U.S. Citizenship and Immigration Services (USCIS) erred in determining that the applicant's wife would not suffer extreme hardship if the applicant is removed from the United States. Specifically, former counsel states that the applicant's wife is suffering from Major Depressive Disorder and would suffer extreme emotional hardship if she is separated from the applicant. Former counsel further asserts that the applicant's wife would suffer extreme hardship if she relocated to Georgia with the applicant because she would lose employment and educational opportunities in the United States, she would not have access to psychological treatment, and she would be separated from her family members in the United States. Former counsel additionally asserts that USCIS erred in law and fact by granting the applicant an Advance Parole Document, and the applicant should therefore be granted a discretionary waiver pursuant to Section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. 1255a(d)(2)(B)(i), for humanitarian purposes or to assure family unity. *See Memorandum in Support of Waiver of Inadmissibility* at 4. In support of the appeal former counsel submitted an affidavit from the applicant's wife, a letter from a psychologist who is treating the applicant's wife for depression, and a copy of a psychological evaluation previously submitted with the waiver application.

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.

- (v) Waiver. – The Attorney General [now Secretary, 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 or parent of the applicant. 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 AAO notes that although former counsel claims that the applicant should be granted a discretionary waiver pursuant to Section 245A(d)(2)(B)(i) of the Act, this waiver is only available to certain individuals who entered the United States before January 1, 1982 and applied for adjustment of status pursuant to section 245A of the Act, and the applicant does not qualify for such a waiver.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included 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.* at 566. The BIA has further stated:

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).

In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[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." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). 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).

U.S. court decisions have additionally 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, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA 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, in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the court 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. In *Hassan v. INS, supra*, the court further held 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. Moreover, the U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

In the present case, the record reflects that the applicant is a thirty year-old native and citizen of Georgia who initially entered the United States as a B-2 visitor for pleasure on August 5, 1998 and was required to depart the United States by February 4, 1999. The applicant remained in the United States and married his wife, a U.S. Citizen by birth, on September 22, 2003. The applicant submitted an Application to Register Permanent Resident or Adjust Status (Form I-485) on September 30, 2003. He was issued Authorization for Parole of an Alien into the United States (Form I-512, Advance Parole) on October 30, 2003, subsequently departed the United States, and re-entered with the Advance Parole document on February 1, 2004.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. See *Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002*. The applicant accrued unlawful presence from February 4, 1999 until September 30, 2003, the date of his proper filing of the Form I-485. In applying to adjust his status to that of Lawful Permanent Resident (LPR), the applicant is seeking admission within 10 years of his departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

The AAO notes that the applicant was convicted of Petit Larceny, a Class A Misdemeanor, on May 3, 2007 in Kings County, New York. Although this conviction is for a crime of theft and therefore involves moral turpitude, the offense falls under the exception in section 212(a)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(ii)(II), because the maximum sentence is one year and the applicant was sentenced to a fine and conditional discharge rather than a term of imprisonment. See *Supreme Court of the State of New York, Kings County, Certificate of Disposition Indictment* dated September 27, 2007.

Former counsel asserts that the applicant's wife would suffer extreme emotional, physical, and economic hardship if she were to relocate to Georgia with the applicant. In support of this assertion, counsel submitted a letter from a psychologist who is treating the applicant's wife for Major Depressive Disorder. The letter states that the applicant's wife, who is very close to her mother and five younger siblings, "believes she would be abandoning her mother and siblings if she leaves the United States to be with her husband. They count on her financially and emotionally." See *letter from J. [REDACTED]*, dated May 18, 2006, at 2. The letter states that this stress has taken a serious toll on the applicant's wife and she has experienced insomnia, weight gain, and passive suicidal ideation and further states:

There is a past history of depression and weight problems occurring at age nine for which she received counseling. She recalls therapy as having been helpful during a very difficult time in her life. Her father left her mother and seven siblings when Ms. Gibson was 14 years old. . .

The patient had to quit school to help out at home. She worked at various jobs and had a lot of responsibility as the oldest daughter.

recommends individual psychotherapy to treat her depressive symptoms and states: "It is important that the patient remain in the United States to receive and continue all necessary treatment." *See letter from [REDACTED]*, at 3. [REDACTED] further states: "Psychopharmacological evaluation to discuss medication may also be necessary," and states that whether she relocates to Georgia with her husband or remains in the United States and is separated from him, "[e]ither choice would exacerbate an already profound clinical depression and result in extreme hardship for this young woman." *Id.* At 3.

Significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate, are relevant factors in establishing extreme hardship. The letters from the two mental health professionals who have evaluated and treated the applicant's wife indicate that she is experiencing symptoms of severe depression and anxiety and is receiving psychotherapy. The evidence on the record establishes that the applicant's wife's psychological condition is serious and she would suffer "extensive psychological and emotional distress" if she were separated from her husband or from her family in the United States. *See letter from [REDACTED]* at 3. In light of her past history of depression, for which she needed therapy at a very young age, it appears that the resulting emotional hardship would be unusual or beyond that which would normally be expected upon deportation or exclusion. Former counsel further asserts that the applicant's wife would suffer severe emotional and financial hardship if she relocates to Georgia with the applicant because she would lose employment and educational opportunities and she would be unable to receive or afford psychological treatment in Georgia. *See Form I-290B, Notice of Appeal*. The emotional hardship the applicant's wife would experience, when combined with financial and other hardships, would amount to extreme hardship if the applicant were removed from the United States.

When considered in the aggregate, the factors of hardship to the applicant's wife should she remain in the United States or relocate to Georgia constitute extreme hardship. This finding is largely based on evidence submitted with the appeal that documents her history of major depression and anxiety. It appears that separation from the applicant or from her family, combined with the financial hardship that would result from losing the applicant's income or from relocating to Georgia, would cause the applicant's wife great emotional distress that would jeopardize her mental health. Further, as noted above, separation from close family members is a primary concern in assessing extreme hardship. *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998).

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. 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(a)(9)(B)(v) 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 "balance 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 immigration violation, remaining in the United States without authorization from 1999 until filing for adjustment of status in 2003, and his criminal conviction for petit larceny. The AAO notes that the applicant's conviction resulted from his employment with a home health care company and he was originally charged with grand larceny as part of an alleged Medicaid fraud scheme involving the company. A letter from the Office of the Attorney General for the State of New York states that the applicant testified before the grand jury against one individual and the home care company, which resulted in an indictment. *See letter from [REDACTED] Regional Director, Medicaid Fraud Control Unit*, dated December 10, 2008. The letter further states that the applicant has cooperated with the Office of the Attorney General, plans to testify during the upcoming trial, and has appeared to be "genuinely contrite" for any wrongs he has committed.

The favorable factors in the present case are the hardship to the applicant's wife; the applicant's lack of additional immigration violations; his cooperation with the prosecution in the case against his former employers and his apparent regret over his involvement in the matter; and his nearly ten years of residence and stable employment in the United States.

The AAO finds that applicant's violation of the immigration laws 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.