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



U.S. Citizenship
and Immigration
Services

H6

[Redacted]

FILE: [Redacted]

Office: MIAMI, FL

Date:

AUG 20 2010

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 PETITIONER:

[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

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of the Czech Republic 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)(B)(i)(II), for having been unlawfully present in the United States for one year or more. The applicant is the spouse of a U.S. Citizen and the beneficiary of an approved Petition for Alien Relative. She 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 her husband.

The field office director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. *See Decision of the Field Office District* dated May 6, 2009.

On appeal, counsel for the applicant asserts that the applicant's husband would suffer extreme emotional and psychological hardship if he were separated from the applicant or if he relocated to the Czech Republic. Specifically, counsel states that the applicant's husband is suffering from Post Traumatic Stress Disorder (PTSD) and "compromised cardiac health," conditions that would be exacerbated if he were separated from the applicant or relocated to another country. *See Brief in Support of Appeal* at 1-2. Counsel states that the applicant has already started to experience psychological and physical symptoms due to the fear of being separated from his wife and is seeking counseling from the Department of Veterans Affairs to address his ongoing PTSD resulting from his service in Vietnam. *Brief* at 5. Counsel further asserts that the applicant's husband, who is over the age of sixty and has lived his entire life in the United States, would suffer extreme hardship if he relocated to the Czech Republic due to his inability to speak the language, separation from family members in the United States, and difficulty adjusting to conditions there. *Brief* at 6. In support of the appeal counsel submitted letters from a psychologist and a physician who have treated the applicant's husband, an affidavit from the applicant's husband, documentation related to a compensation claim filed with the Department of Veterans Affairs, and information on PTSD. The entire record was reviewed and considered in arriving at a decision on the appeal.

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 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 children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife 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-Morales*, 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 the 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. [REDACTED]* 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. [REDACTED] 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 or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The record reflects that the applicant is a thirty-one year-old native and citizen of the Czech Republic who entered the United States as a visitor for pleasure on June 22, 2001 and remained until 2008, when she traveled to the Czech Republic and returned with an Advance Parole Document. The applicant is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States from December 21, 2001, the date her authorized stay expired, to May 21, 2008, when she filed an application for Adjustment of Status. The record further reflects that the applicant’s husband is a sixty-five year-old native and citizen of the United States whom the applicant married in May 2008. The applicant and her husband currently reside in Miami, Florida.

Counsel asserts that the applicant’s husband is suffering psychological and physical hardship due to the possibility that the applicant may be removed from the United States, and states that this hardship is beyond the type of hardship that would normally result from separation from a spouse because he suffers from PTSD. In support of this assertion, counsel submitted a letter from a psychologist stating that he diagnosed the applicant’s husband in 1991 with PTSD resulting from incidents occurring when he served as a platoon commander during the Vietnam War. *See Letter from [REDACTED] Ph.D.*, dated October 12, 2009. Dr. [REDACTED] states that he recommended behaviorally based psychotherapy and further states,

At the time I worked with Mr. [REDACTED] I urged him to enter long-term psychodynamic psychotherapy as an adjunct to behavior therapy. He demurred, which did not

surprise me. People with Mr. [REDACTED]'s personality are often uncomfortable in a therapeutic relationship The bad news for Mr. [REDACTED] is that like so many individuals who do not resolve the underlying conflicts that lead to the expression of symptoms . . . throughout their lives they are vulnerable to bouts of recurring symptoms. In Mr. [REDACTED]'s case this was a cycle of destructive thoughts and personally problematic behavior.

Dr. [REDACTED] further states that if the applicant were removed from the United States, it is his professional opinion that "given his psychological history, Mr. [REDACTED] would be extraordinarily vulnerable to suffering severe emotional distress in the form of exacerbated symptoms of PTSD." *Letter from [REDACTED]*

A letter from a physician states that the applicant's husband underwent a cardiac assessment and has a history of chest pains, palpitations, and a sleep disorder, and these symptoms appear to be related to his chronic stress and exacerbated by the potential separation from his wife. *Letter from [REDACTED] M.D., F.A.C.C.*, dated October 14, 2009. The letter further states, "Because of Mr. [REDACTED]'s specific cardiac risk factors and the potential stress from a separation from his wife, I strongly recommend efforts to keep this couple together."

Counsel additionally asserts that the applicant's husband would suffer extreme hardship if he relocated to the Czech Republic with the applicant because he is over sixty years old and has lived his entire life in the United States, he would be separated from his two sons in the United States, and he does not speak Czech and has no ties to that country. Counsel additionally states that the applicant's husband would not have access to the same medical and psychological care he receives in the United States, and uprooting his life and relocating there would constitute a major life stressor that would be emotionally and physically detrimental to him. *Brief in Support of Appeal* at 6. The applicant's husband further states that he would be "completely disoriented in a new environment" that he is unfamiliar with, would be far from his sons and the mental health and cardiac care he requires, and would have to leave behind his business ventures that employ more than 400 people in the United States. *Affidavit of [REDACTED]* dated October 20, 2009.

Upon a complete review of the evidence on the record, the AAO finds that the applicant has established that her husband would experience extreme hardship if she is denied admission to the United States. This finding is largely based on evidence submitted with the appeal that documents the emotional and physical distress experienced by the applicant's husband due to the prospect of being separated from the applicant and exacerbated by trauma he has experienced in the past. The evidence indicates that the applicant's husband is suffering from PTSD and that separation from the applicant would exacerbate this condition, causing him psychological and emotional hardship beyond that which would normally result from removal or inadmissibility. The psychological evaluation of the applicant's husband further concludes that he would be susceptible to severe emotional distress if the applicant were removed from the United States.

The record also establishes that if the applicant's husband relocated to the Czech Republic and faced separation from his family members and loss of his business ventures in the United States he would suffer hardship beyond that which is normally experienced by family members as a result of removal

or deportation. The record indicates that the applicant's husband is sixty-five years old and has resided in the United States his entire life, has significant family ties to the United States, and has numerous business ventures from which he earns a considerable income and that employ many people in the United States. When considered in the aggregate and in light of his psychological condition, these factors of hardship to the applicant's husband constitute extreme hardship.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for section 212(h)(1)(B) relief 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). *Matter of Mendez-Moralez*, 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 unlawful presence in the United States from 2001 to 2008 and her unauthorized employment during that time. The favorable factors in the present case are the extreme hardship to the applicant's husband; the applicant's lack of a criminal record or other immigration violations; and her length of residence and ties in the United States.

The AAO finds that the immigration violations committed by the applicant 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.