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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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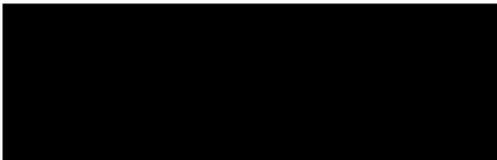


H6

FILE: [REDACTED] Office: MOSCOW Date: DEC 10 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:



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
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting 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 Ukraine 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 a period of one year or more. The applicant is married to a U.S. Citizen and is the beneficiary of an approved petition for alien relative. He 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 return to the United States and reside with his wife.

The acting field office 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 Acting Field Office Director*, dated March 18, 2010.

On appeal, counsel for the applicant asserts that the applicant's wife is suffering extreme hardship since the applicant's departure from the United States, including emotional and psychological hardship resulting from their separation and financial hardship due to loss of the applicant's income and having to support him the Ukraine. Counsel's Brief in Support of Appeal at 2-3. Counsel further claims that the applicant's wife would suffer extreme hardship if she relocated to Ukraine because she would have to sever her ties to and abandon her employment in the United States and would have difficulty finding employment in the Ukraine and readjusting to conditions there after ten years in the United States. *Brief* at 2-4. Counsel further states that the applicant's wife lost her pension in Ukraine after becoming a U.S. Citizen because Ukraine does not recognize dual citizenship, and she would have no means to support herself and the applicant if she relocated to Ukraine because she is past the retirement age there. *Brief* at 3. In support of the waiver application and appeal counsel submitted a declaration from the applicant's wife, documents concerning the home purchased by the applicant and his wife in 2003, a letter from the applicant's wife's employer, records of remittances sent to the applicant by his wife, letters from the applicant's wife's physician and psychiatrist, and information on conditions in Ukraine. The entire record was reviewed and considered in rendering this decision.

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.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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).

Although 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. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta 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 and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The record reflects that the applicant is a forty-nine year-old native and citizen of Ukraine who resided in the United States from March 2000, when he entered without inspection, to November 2005, when he returned to Ukraine. He is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for a period of one year or more. The record further reflects that the applicant’s wife is a fifty-eight year-old native of Ukraine and citizen of the United States. The applicant currently resides in Khust, Ukraine his wife resides in Philadelphia, Pennsylvania.

The applicant’s wife has resided in the United States since March 2000, when she entered as a Lawful Permanent Resident through the diversity visa lottery program, and has been a U.S. Citizen since 2005. Evidence on the record indicates that she purchased a home in 2003 and has been employed in a meat plant producing hotdogs since March 2000. She states that her adult son lives with her in Philadelphia and she has no more ties to Ukraine. Counsel further claims that the applicant’s wife lost her pension in the Ukraine because she became a U.S. Citizen and submits documentation from the U.S. State Department stating that Ukraine does not recognize

dual citizenship to support this assertion. The applicant's wife further states that she would not be able to work in Ukraine because she is over the retirement age and she and the applicant would not have access to adequate medical care there because they would not have medical insurance and would not be able to afford medical care, and the level of medical care there is below the level of western standards. *Declaration of* [REDACTED] dated January 15, 2010. The record contains information on access to medical care issued by the U.S. Department of State, which states, in pertinent part:

The Embassy recommends **that ill or infirm persons not travel to Ukraine**. Elderly travelers and those with existing health problems may be at risk due to inadequate medical facilities. . . . No hospitals in Ukraine accept American health insurance plans for payment, and the level of medical care is not equal to that found in American hospitals. (Some facilities are adequate for basic services. Basic medical supplies are available; however, you must bring your own prescription medicine). If you are hospitalized, you, or your friends and family, must supply bandages, medication, and food. The Embassy also recommends that you obtain private medical evacuation insurance prior to traveling to Ukraine. You may be asked to pay in cash for medical services and hospitalization before you are treated.

Medical evacuation often remains the best way to secure Western medical care. This option, however, is very expensive and can take at least several hours or longer to arrange. You should buy medical evacuation insurance prior to travel or have access to substantial lines of credit to cover the cost of medical evacuation Serious medical problems requiring hospitalization and/or medical evacuation to other European countries can cost from \$25,000 to \$50,000, and to the U.S. as much as \$70,000 or more. *U.S. Department of State, Bureau of Consular Affairs, Ukraine – Country Specific Information*, April 8, 2010.

The applicant's wife has resided in the United States since March 2000, has purchased a home, and has maintained employment with the same company for over ten years. Letters from her physician and psychiatrist state that she is suffering from anxiety and major depression as well as hypertension. She is fifty eight years old and states that she is past the retirement age in Ukraine and is therefore unable to obtain employment there, and she further states that due to her naturalization in the United States, she has lost her Ukrainian pension and would have no way to support herself if she relocated to Ukraine. In light of her ties to the United States and lack of ties to Ukraine and her age and length of residence on the United States, it appears that the financial and emotional hardship that would result if the applicant's wife relocated to Ukraine would amount to extreme hardship. These hardships, including abandoning her employment and home in the United States, having to readjust to social and economic conditions in Ukraine, and seeking medical care and employment there, would result in hardship beyond the common results of removal or inadmissibility for the applicant's wife.

The applicant's wife states that she is suffering emotional and financial hardship due to separation from the applicant, and further states that she is paying the mortgage on their home

and sending money to the applicant in Ukraine from her salary of \$375 per week as well as overtime. She states,

I earn a salary that allowed me to save some money. I now use these savings to help support Yaroslav in the Ukraine. . . At the same time I am also financially supporting Yaroslav in the Ukraine with repairing the house he is living in because of the floods in the Ukraine which damaged the house. This has made it very difficult for me to have any savings.

The record contains a letter from the applicant's wife's employer stating that she earns \$11.35 per hour and a receipt for remittances to the applicant totaling \$2850 from August 2007 to September 2009.

The applicant's wife states that she and the applicant are getting old and that being separated from the applicant has "taken a severe toll on [her] physical and mental health." She states that her conditions have deteriorated since the applicant's departure and she suffers from depression and anxiety and feels "distracted because of Yaroslav's absence."

A letter from the applicant's wife's physician states that she has been a patient of his for several years and has been treated for gastritis, hypertension, and more recently for a major depressive disorder "resulting in anxiety, near-panic attacks and various somatic symptoms." *Letter from* [REDACTED] dated April 26, 2010. He states that she was treated with antidepressants and other medications with little relief and was referred for evaluation and treatment to [REDACTED] and reports that her symptoms are rooted in her "emotional trauma" and her huge financial and emotional burden since the applicant departed the United States. *Letter from* [REDACTED] dated April 26, 2010. [REDACTED] states that the applicant's wife has been treated with antidepressants, anxiolytic medications, and sleep medications but her symptoms persist due to her personal problems and she is under continuous medical observation and treatment. *Letter from* [REDACTED] dated April 27, 2010.

The applicant's wife states that she is suffering emotional and financial hardship and has used her savings to support the applicant in Ukraine and pay her mortgage and living expenses. The record indicates that the applicant's wife has a mortgage on her home in the amount of approximately \$59,000, though the record does not indicate the amount of her monthly payment. The record further indicates that she earns \$11.35 per hour in a meat plant and sends money to the applicant in Ukraine. Additional documentation states that she is under treatment for anxiety and depression because of separation from the applicant and the resulting financial strain, but her symptoms have persisted. The evidence on the record establishes that the applicant's wife is experiencing emotional and psychological hardship because of separation from her husband and the financial pressure of supporting herself and the applicant and this amounts to hardship beyond the common results of inadmissibility or removal and rises to the level of extreme hardship if she remains in the United States without the applicant.

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 violations, including his unlawful entry in March 2000 and his unlawful presence in the United States until November 2005. The favorable factors in the present case are the hardship to the applicant's wife and the applicant's lack of a criminal record or additional immigration violations.

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.