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

U.S. Citizenship and Immigration Services

[redacted]

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DATE: JUL 0 2 2012 OFFICE: VIENNA, AUSTRIA File: [redacted]

IN RE: Applicant: [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 APPLICANT:

[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
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Macedonia who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality 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 and seeking readmission within 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

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 for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director,* dated March 19, 2010.

On appeal, counsel asserts that the "denial is clearly erroneous and constitutes an abuse of discretion." *See* Form I-290B, *Notice of Motion or Appeal*, received April 19, 2010.

The record contains but is not limited to: Form I-290B and counsel's brief and supplemental letters; various immigration applications and petitions; a hardship affidavit; an income tax return; medical and psychological records; country conditions print-outs; an internet article; and family photos, birth, marriage and divorce records. The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(9) of the Act provides:

> (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 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record reflects that the applicant was issued a C1/D1 visa on November 27, 2002 to work for [redacted]. He arrived in the United States on December 12, 2002 and was admitted in C1 status until January 10, 2003 with the expectation that he would join the ship on December 13, 2002. The applicant did not join the ship and instead joined friends in Florida. The applicant remained in the United States until he voluntarily departed to Macedonia on or about October 20, 2008. The applicant accrued unlawful presence from January 2003 until October 2008, a period in excess of one year. As the applicant is seeking admission within 10 years of his departure, he is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.[1]

A waiver of inadmissibility under section 212(9)(B)(v) of the Act is dependent on a showing that the bar to admission would impose 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 can be considered only insofar as it results in hardship to the qualifying relative. The applicant's spouse 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-Moralez*, 21 I&N Dec. 296, 301 (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 removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common

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[1] The AAO notes that the applicant may also be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by willful misrepresentation if he intended to immigrate to the United States: (1) when he submitted his C1/D1 visa application; (2) during his nonimmigrant visa interview; and/or (3) when he was admitted temporarily into the United States with the expectation he would join the Carnival Cruise ship as he indicated he would. Nevertheless, because the applicant is inadmissible under section 212(a)(9)(B) of the Act and demonstrating eligibility for a waiver under section 212(a)(9)(B)(v) also satisfies the requirements for a waiver of inadmissibility for willful misrepresentation under section 212(i), the AAO will not determine whether the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act.

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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The applicant's U.S. citizen spouse is a 39-year-old native of [redacted] and citizen of the United States. The applicant's spouse accompanied her husband to [redacted] in about October 2008 and counsel asserts that she remained there until July 2010 when she returned to the United States. Counsel contends that the applicant's spouse would suffer extreme financial hardship in the United States because she would have to support her husband in [redacted] The applicant's spouse indicates that the applicant has been unable to find work there since 2008 and lives with his retired father and unemployed mother in their home. Counsel asserts that it would also be costly for the applicant's spouse to visit the applicant in [redacted] and to communicate with him from the United States.

[redacted] writes that he interviewed the applicant's spouse on December 16, 2010 and she reported that depression started in [redacted] and has exacerbated since her return, she saw a psychiatrist twice in [redacted] and took medication which was ineffective, she is having difficulty sleeping, she described her mood as very depressed and angry, and she claims to have lost twenty pounds in three months. [redacted] diagnoses the applicant's spouse with adjustment disorder with depressed mood, finds that her depression and irritability are due to separation from her husband, and recommends she seek psychiatric/psychological treatment to better manage her emotional reaction to her current life situation. [redacted] indicates that on January 20, 2011 she interviewed the applicant's spouse who reported seeing [redacted] once in addition to her two psychiatrist visits in [redacted] indicated that the applicant's spouse has difficulty sleeping, decreased appetite, and increase in anxiety, anger and frustration related to her husband's inadmissibility. [redacted] diagnoses the applicant's spouse with adjustment disorder with mixed anxiety and depressed mood and recommends counseling, therapy and service to develop coping skills to more effectively manage her symptoms. In an undated letter, [redacted] DO asserts that the applicant's spouse is suffering from depression and anxiety due to the absence of her husband and that reuniting with him would be beneficial to her mental health and well-being. [redacted] writes on April 4, 2011 that the applicant's spouse has been a client since January 2011, is seeking counseling services to deal with her mental health symptoms and has been referred for psychiatric services due to her difficulty managing such symptoms. [redacted] recommends individual counseling for the applicant's spouse on at least a quarterly basis.

The applicant's spouse expresses a strong desire to have children and the record shows that despite undergoing in vitro fertilization treatments, which resulted in at least one pregnancy, she has suffered three miscarriages with the applicant including two in [redacted] She explains that she will be unable to get pregnant if separated from her husband for the remainder of his ten-year inadmissibility, a scenario with which psychological reports show the applicant's spouse has great difficulty coping and which exacerbates her depression and anxiety. [redacted] indicates that the applicant's spouse had surgery to remove a cyst from her ovary and for endometriosis in 2006 and reported having three miscarriages – one in the United States in 2005, and two in 2010 following in vitro fertilization in [redacted] Medical records confirm the 2006 procedures and January 2010 miscarriage and show that since returning to the United States, the applicant's spouse has undergone a lumpectomy on her right breast, requiring regular mammography and biopsies when indicated.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant's spouse including her emotional/psychological and physical/medical conditions as well as her economic circumstances. Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship due to separation from the applicant.

Addressing relocation, the applicant's spouse states that despite her efforts she can no longer adapt to [redacted] life after residing in the United States for sixteen years. She maintains that she needs to be in the United States to care for her parents who do not speak English and rely on her to

be their interpreter. While the applicant's spouse was in [redacted] for nine months with her husband, her mother and father met with psychologist, [redacted], on July 29, 2009. [redacted] writes that both are troubled by issues related to the applicant's inadmissibility, that their daughter's absence has made day-to-day life much more difficult, and that they are experiencing economic difficulties due to loss of the financial support she previously provided, as well as symptoms of depression, anxiety, fatigue, lethargy, and significant weight loss by the father. [redacted] diagnoses both parents with major depressive disorder, recommends counseling, and contends that ongoing separation from the applicant's spouse will exacerbate their clinical symptomatology.

The applicant's spouse asserts and country conditions reports confirm that [redacted] unemployment rate is about 32%. She indicates that despite great effort to secure employment, neither she nor the applicant could find work in [redacted]. Employment rejection letters have been submitted for the record. The applicant's spouse explains that while in [redacted], she and the applicant lived with his parents in their one bedroom apartment under conditions far below those to which she had grown accustomed in the United States. Counsel asserts that the entire family lives on the applicant's father's pension which is the equivalent of less than $250 USD per month.

Counsel asserts and country conditions documents confirm that healthcare [redacted] is not up to western standards, which counsel contends would cause great hardship to the applicant's spouse in the likely event she were to require specialized medical care for any of her conditions described in detail above. The applicant's spouse states that the medical care [redacted] is inadequate and she suffered depression there which worsened the longer she remained. [redacted] diagnoses the applicant's spouse in an April 27, 2010 letter with adjustment disorder, and writes that her symptoms include among others, persistent sleeping disorders and vegetative distony which could lead to the development of psychosomatic illness. [redacted] contends that the applicant's spouse miscarried in November 2009 "under the influence of continuous exposure to stress," and strongly recommends that she change her living environment "because the patient is unable to adjust to this environment, due to the cultural difference."

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse including that she has lived in the United States for more than 16 years and found it impossible to readjust to life [redacted] her close family ties in the United States – particularly her parents who rely on her in a number of ways; her significant physical/medical conditions and the fact that healthcare and medical facility standards [redacted] are below those in the west; the emotional/psychological conditions she developed in [redacted] and continues to suffer in the United States; and economic and employment concerns for [redacted] Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate to [redacted]

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors

evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

> We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra,* is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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)

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The

equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in the present case include extreme hardship to the applicant's U.S. citizen spouse as a result of the applicant's inadmissibility; the applicant's extended family and community ties to the United States; attestations by others to his good moral character; and his payment of taxes and apparent lack of a criminal record. The unfavorable factors are the applicant's immigration violations including his failure to comply with the terms of his C1 visa, his approximately six years of unlawful presence and periods of unauthorized employment in the United States.

Although the applicant's violations of immigration law are significant and cannot be condoned, the positive factors in this case outweigh the negative factors. Therefore, the AAO finds that a favorable exercise of discretion is warranted.

In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

ORDER: The appeal is sustained. The application is approved.