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



**U.S. Citizenship
and Immigration
Services**



H6

DATE: JUL 27 2012

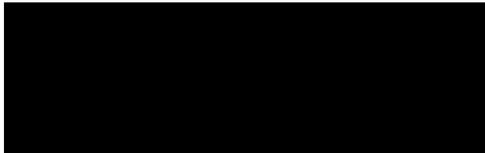
Office: MOSCOW, RUSSIA

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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 APPLICANT:



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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, 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 and a citizen of Russia 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 admission within 10 years of her last departure. The applicant is the spouse of a U.S. citizen. She seeks a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with her spouse.

The director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *See Field Office Director's Decision*, dated March 22, 2010.

On appeal, counsel asserts that the director failed to consider all of the evidence presented. Counsel also submits new evidence for consideration. *See Form I-290B, Notice of Appeal or Motion*, dated April 20, 2010.

The evidence of record includes, but is not limited to: counsel's briefs; statements from the applicant's spouse, family, and friends; letters from the treating physicians of the applicant's spouse; family photographs; financial documents; articles about country conditions and healthcare; and copies of relationship and identification documents.

Section 212(a)(9) states 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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, 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 or is present in the United States without being admitted or paroled.

(iii) Exceptions

....

(II) Asylees – no period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

The record reflects that the applicant entered the United States in 1994 with a B-1/B-2 nonimmigrant visa, which authorized her to remain in the United States for six months. In March 2001, the applicant filed for asylum. The applicant's asylum application was denied and the applicant was granted voluntary departure. After unsuccessful appeals, the applicant departed the United States on May 29, 2009 before the expiration of the voluntary departure order. The AAO finds that the applicant accrued over one year of unlawful presence from April 1, 1997¹ until March 2001. As the applicant accrued unlawful presence of more than one year and is seeking admission within 10 years of her 2009 departure, she is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act. Counsel does not contest the applicant's inadmissibility.

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 other family members can be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily

¹ No period of unlawful presence prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, is counted when determining inadmissibility under section 212(a)(9)(B) of the Act.

eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez*, 21 I&N Dec. 296, 301 (BIA 1996).

In the present case, the record reflects that the applicant is married to a U.S. citizen. The applicant's spouse meets the definition of a qualifying relative.

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 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, 631-32 (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, "[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., 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). 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 AAO now turns to the question of whether the applicant in the present case has established that a qualifying relative would experience extreme hardship as a result of his inadmissibility.

On appeal, counsel states that the applicant submits evidence showing her spouse is experiencing hardship without her. Letters from the applicant's spouse's doctors and friends indicate that he has lost weight, struggles to sleep, experiences numbness in his extremities, and is emotionally exhausted. Counsel asserts that as the applicant's spouse's "mental state declines, his business will suffer, rendering it impossible for [him] provide for himself and his father." The applicant's father-in-law is over 90 years old and lives in an assisted-living facility. Counsel states that the applicant's business in Russia was destroyed in a fire, which may have been arson; this has increased the applicant's spouse's hardship because as a result, he is now more anxious about the applicant's safety and "is incapacitated with fear." Counsel also asserts that it would be a hardship for the applicant's spouse to relocate to Russia because he does not speak Russian, and it would be difficult for him to learn a new language and find employment at his age. Counsel submitted articles on age discrimination and limited employment opportunities for the elderly in Russia, and also on the people's abilities to learn a second language as they grow older.

The applicant's spouse states that being separated from the applicant has caused him "extreme anxiety and extreme depression." He is "having trouble sleeping," "not eating well," and has "lost 16 [pounds]." The applicant's spouse is in his late 60s and has high blood pressure, high cholesterol, and diabetes. He is concerned about "numbness on the bottom of [his] feet and [his] finger tips" and has been referred to a neurologist. He also is concerned about his "declining income." He is having difficulty performing his duties as a real estate broker because of his depression. He is "anxious" about the applicant's safety in Russia. He also states that moving to Russia "would be impossible" because he does not speak Russian and "trying to re-establish a career, not knowing real estate law, finance, principles and practices would also be impossible." The applicant's spouse owns a real estate business, which he has had for about 30 years. He further states that he cannot move to Russia because his physical ailments require him to see his doctors regularly.

In his April 10, 2010 letter, [REDACTED] indicates that the applicant's spouse has hypercholesterolemia, hypertension, and diabetes for which he takes medications. He states that the effect of stress is "a major risk factor for the development of coronary artery disease" and "stress would only worsen [the applicant's spouse's] condition." He also states that "the stress of repeated travel to Russia" would adversely affect his health.

[REDACTED] states the applicant's spouse's cardiologist requested assistance because the applicant's spouse's "ability to perform his occupation took a precipitous drop and his health deteriorated" after the applicant returned to Russia. [REDACTED] diagnosed the applicant's spouse with major depressive disorder and prescribed medications. According to [REDACTED] the applicant's spouse's "life activities are diminished and he has little interest in anything other than his preoccupation of possibly losing the companionship of [the applicant]." The applicant's spouse has begun receiving counseling on a weekly basis.

The applicant's father-in-law states that the applicant's spouse sends him between 1200 and 2400 dollars each month, which covers his expenses above his Social Security income. He also states that the applicant and his son have visited him many times, which he enjoys very much. The applicant submits copies of checks written by her spouse and deposited to her father-in-law's account. The record also contains a letter from the executive director of the assisted living facility confirming that the applicant's father-in-law lives in their facility, describing the care he receives and the costs of their services and fees.

Letters from the applicant's spouse's siblings state that the applicant spouse has been supporting their father financially and without his financial assistance, their father would not be able to stay in the assisted-living facility. They state that their father spent his savings in caring for their mother, who was quadriplegic and lived in a convalescent hospital for the last 26 years of her life. They have financial difficulties of their own and therefore the applicant's father-in-law now relies on the applicant's spouse for financial assistance. They also indicate that they are concerned about the applicant's spouse's emotional, physical, and mental health.

Letters from the applicant's spouse's friends attest to the loving relationship between the applicant and her spouse and the emotional hardship that the applicant's spouse is experiencing resulting from his separation from the applicant. The colleagues of the applicant's spouse describe the industry standards for real estate brokers and the difficulty that the applicant's spouse has had in performing his duties since the applicant's departure.

Having reviewed the preceding evidence, the AAO finds it to establish that the applicant's spouse is experiencing extreme hardship resulting from his separation from the applicant. In reaching this conclusion, we note the applicant's spouse's age, his medical and emotional condition, and his financial responsibility for his elderly father. The record contains evidence that stress caused by their separation coupled with the applicant's spouse's concerns for the applicant's safety in Russia and his financial responsibility for his father have negatively affected his mental health. The record indicates that the applicant's spouse has a history of depression and receiving counseling.

Letters from treating physicians, family, and friends indicate that the applicant's spouse is anxious, and the stress caused by separation from the applicant has caused extreme hardship for the applicant's spouse. The record also indicates that the applicant's spouse's work performance has declined due to stress caused by the separation. Documentary evidence and statements from family and friends corroborate the applicant's spouse's claims of emotional hardship and financial concerns. Furthermore, the applicant's spouse has multiple medical conditions for which he receives ongoing treatments, and his conditions would be negatively affected by his increased stress level.

The AAO also finds the record to establish that the applicant's spouse would experience extreme hardship if he were to relocate to Russia. The AAO notes the applicant's spouse has never lived outside of the United States. He does not speak Russian and it would be difficult for him to become sufficiently proficient in a second language to be able to start a business in Russia at his age. We also note that the applicant's spouse is the sole financial supporter for his elderly father. Furthermore, he has close family ties and an established business in the United States. The AAO concludes that, considering the evidence in the aggregate, the applicant's spouse would experience extreme hardship should he relocate to Russia to be with the applicant.

When the specific hardship factors noted above and the hardships routinely created by the separation of families are considered in the aggregate, the AAO finds that the applicant has established that her spouse would face extreme hardship if the applicant's waiver request is denied. The applicant has established statutory eligibility for a waiver of her inadmissibility under section 212(a)(9)(v) of the Act.

In that the applicant has established that the bar to her admission would result in extreme hardship to a qualifying relative, the AAO now turns to a consideration of whether 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 which are not outweighed by adverse factors. See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether . . . 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, 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 factor in the present case is the applicant's unlawful presence in the United States, for which she now seeks a waiver. The mitigating factors include the applicant's U.S. citizen spouse, the extreme hardship to her spouse if the waiver application is denied, and the applicant's and her spouse's ties to the United States.

The AAO finds that the immigration violation committed by the applicant is serious in nature and cannot be condoned. Nevertheless, when taken together, the mitigating factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.