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



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

H6

DATE: JUL 31 2012

Office: MOSCOW, RUSSIA

FILE: [REDACTED]

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 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,

A handwritten signature in cursive script, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility was denied by the 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 admitted into the United States with a K1 non-immigrant fiancée visa on September 28, 2001. She 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 for more than one year and seeking admission within ten years of her departure from the United States. The applicant is married to a U.S. citizen, and she is the beneficiary of an approved Form I-130, Petition for Alien Relative (Form I-130). 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 live in the United States with her spouse and child.

In a decision dated June 17, 2010, the director concluded the applicant had failed to establish that her U.S. citizen spouse would experience extreme hardship if the applicant were denied admission into the United States. The waiver application was denied accordingly.

Counsel asserts on appeal that the applicant's husband is experiencing extreme emotional hardship in the United States due to his separation from the applicant and that he would experience extreme financial and emotional hardship if he moved to Ukraine to be with her. In support of these assertions, counsel submits letters from the applicant and her husband; psychological evaluations and medical evidence; financial documents; country-conditions reports; and letters from family, friends and their congressional representative. The entire record was reviewed and considered in rendering a decision on the appeal

Section 212(a)(9)(B) of the Act provides in pertinent part:

(i) [A]ny 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.

On September 28, 2001, the applicant was admitted into the United States with a K1 non-immigrant fiancée visa, valid through December 27, 2001. The applicant married her fiancé, however her Form I-485, Application to Register Permanent Resident or Adjust Status (Form I-485) was denied on September 9, 2003, for failure to appear for her interview. The applicant departed the United States on two occasions. She was paroled into the country on March 16, 2003, pursuant to a grant of advance parole valid through March 15, 2004, and on October 10, 2004, pursuant to a grant of advance parole valid through October 9, 2005. The applicant divorced her first husband, and on October 21, 2005, she filed a Form I-485 based on her current

marriage. The Form I-485 application was denied on August 22, 2006, pursuant to section 245(d) of the Act, 8 U.S.C. § 1255(d).¹ On March 6, 2007, her motion to reopen and reconsider also was denied. The applicant filed a third Form I-485 application on June 19, 2007, which was denied on February 3, 2008. She departed the United States on April 14, 2010, and she has remained outside of the country since that time.

Accrual of unlawful presence stops on the date an application for adjustment of status is properly filed, meaning it was fully executed, signed, and the applicant paid the proper fee to USCIS. The accrual of unlawful presence is tolled until the application is denied. *See Memorandum from Donald Neufeld, Act. Assoc. Dir., Domestic Operations, Lori Scialabba, Assoc. Dir., Refugee, Asylum and International Operations, Pearl Chang, Acting Chief, Office of Policy and Strategy, U.S. Citizenship and Immigration Service, to Field Leadership, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,"* dated May 6, 2009. Filing a motion to reopen or reconsider does not stop the accrual of unlawful presence. *Id.* An alien who has been paroled into the country does not accrue unlawful presence as long as the parole lasts. *Id.* An alien who leaves the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act does not make a departure from the United States within the meaning of section 212(a)(9)(B)(i)(II) of the Act. *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).

The record establishes the applicant was unlawfully present in the United States for over a year after her last Form I-485 application was denied on from September 10, 2003 to October 2004, August 23, 2006 to June 18, 2007, and February 4, 2008 to April 13, 2010. Inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, which is triggered upon departure, remains in force until the alien has been absent from the United States for ten years. The applicant was unlawfully present in the United States for more than a year and she has remained outside of the country for less than ten years. She is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act. Counsel does not contest the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

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

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

¹ Section 245(d) of the Act provides that:

The Attorney General [now Secretary, Department of Homeland Security, "Secretary"] may not adjust, under subsection (a), the status of an alien lawfully admitted to the United States for permanent residence on a conditional basis under section 216. The [Secretary] may not adjust, under subsection (a), the status of a nonimmigrant alien described in section 101(a)(15)(K) except to that of an alien lawfully admitted to the United States on a conditional basis under section 216 as a result of the marriage of the nonimmigrant . . . to the citizen who filed the petition to accord that alien's nonimmigrant status under section 101(a)(15)(K).

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.

Section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (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*, 22 I&N Dec. 560, 565 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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, 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).

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 her qualifying relative under section 212(a)(9)(B)(v) of the Act. The record contains references to hardship the applicant's child would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's child as a factor to be considered in assessing extreme hardship under section 212(a)(9)(B)(v) of the Act. Accordingly, hardship to the child will be considered only to the extent that it causes the applicant's spouse to experience hardship.

The applicant's husband states in an affidavit that he has a close and loving relationship with the applicant and their U.S. citizen daughter. The applicant's husband is a native of the United States, and he has many close relatives and friends in this country. He helps his siblings care for his mother, whose health is declining, and he visits his mother at least once a month. The applicant's husband has never been to the Ukraine, and he has become depressed due to the applicant's immigration situation and the possibility of his family's separation or relocation to Ukraine. He sees a therapist regularly, however he continues to "experience feelings of depression, fatigue, insomnia and anxiety to varying degrees on a daily basis." He is the sole financial provider for his family, and he worries he will be unable to find work in Ukraine due to his lack of language and cultural skills and the poor economy. He has worked as a product designer for the majority of his working career, and he also worries he will be unable to resume this type of work in the United States if he moves away for ten years. Additionally, he is concerned that their daughter will have inferior educational opportunities and medical care in Ukraine, and that she will suffer if she remains in the United States, separated from the applicant.

The applicant adds in her affidavit that her husband relies on her for emotional support, her Ukrainian family and friends are unable to help them financially and with housing, her husband would feel socially isolated in Ukraine, and if their daughter remained in the United States, her husband would face pressures of being a single working father.

Letters from friends, relatives and a congressional representative attest to the validity of the applicant's marriage, the couple's commitment to a future together, and the hardships the applicant's husband would experience if the applicant's waiver application were denied.

Medical evidence reflects that between February and October 2008 the applicant's husband participated in twenty-five psychotherapy sessions for stress and depression related to applicant's immigration situation and the possibility that she would be unable to remain in the United States. A significant history of depression was noted by his therapist, and anti-depressant medication was recommended and prescribed by his primary physician. One therapist expresses concerns that the applicant's husband could now be "at serious risk of a life threatening depressive episode." Between February and May 2009, the applicant's husband required weekly mental health treatment and medication for suicidal ideation and "symptoms including tearfulness, emotionality, depressed mood, and feelings of excessive guilt about his ability to adequately care for his family" related to "unemployment, his wife's immigration status, and his mother's deteriorating health." Although the applicant's husband obtained employment in May 2009, he continues to receive therapy and medication for depression and anxiety, and his therapist notes it is difficult for him "to make it through a day without becoming visibly upset," and that his symptoms are "directly related to his separation from his family and fears that the delay in reunification may become extensive." Concerns that his ability to complete basic activities of daily living are noted. The applicant's husband's doctor expresses fears that "without his family, he will continue to deteriorate" despite medication and counseling; his therapist states that reunification with his family "would decrease his anxiety and depressive symptoms; allowing him to return to a healthy emotional state."

Financial evidence in the record establishes that the applicant's husband has worked in product design since 1994 and in management capacities since 2005. The record also reflects that he earns a lucrative salary, he sends money to support his family in Ukraine, and that he has a \$10,000 student loan. In addition, the record contains country-conditions evidence discussing poor economic and healthcare conditions in Ukraine.

Upon review, the AAO finds the evidence in the record, when considered in the aggregate, establishes the applicant's husband is experiencing hardship in the United States that rises above the common results of removal or inadmissibility. The applicant's husband has a history of depression, and he requires medication and weekly therapy for anxiety and depression related to his separation from the applicant and their child. Medical evidence reflects concerns regarding his ability to complete basic daily activities and the deterioration of his condition despite medication and counseling. Specifically, one counselor fears that without the presence of his family, he is at risk of a life threatening depressive episode. These factors, when considered in the aggregate, establish that the hardship the applicant's husband is suffering in the United States goes beyond the common results of inadmissibility, and rises to the level of extreme hardship.

The cumulative evidence in the record also establishes the applicant's husband would experience hardship that rises beyond the common results of removal or inadmissibility if he relocated to Ukraine. The applicant's husband is a native of the United States, his family and friends are in

this country, and he does not speak or have familiarity with the language or culture in Ukraine. The applicant's husband has a history of depression and anxiety requiring therapy and medication. A U.S. Department of State country report reflects that medical care is inferior to that of the United States, and that U.S. health insurance is not accepted in Ukraine. See http://travel.state.gov/travel/cis_pa_tw/cis/cis_1053.html. The report reflects further that English is not widely used in Ukraine. The applicant's husband has been employed in the product production field in the United States for over eighteen years, and he has worked in management positions for over seven years. He would lose his employment and lucrative salary if he moved to Ukraine, and he fears that due to his lack of language skills and the poor economy, he would be unable to find employment to support his family. When considered in the aggregate, the evidence establishes the applicant's husband would experience hardship that rises beyond the common results of removal or inadmissibility if the applicant were denied admission into the country and he relocated to Ukraine.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. 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) of the Act relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the inadmissibility 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 s/he is excluded and/or 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-Moralez*, *supra*. The AAO must:

[B]alance 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 unfavorable factors in this matter are the applicant's accrual of unlawful presence in the United States. The favorable factors are the hardship the applicant's husband would face if the applicant is denied admission into the United States, her U.S. citizen daughter, her lack of other immigration violations, and the lack of a criminal record.

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

Upon review of the totality of the evidence, the AAO finds that the applicant has established extreme hardship to her U.S. citizen husband, as required under section 212(a)(9)(B)(v) of the Act. It has also been established that the applicant merits a favorable exercise of discretion. The applicant has therefore met her burden of proving eligibility for a waiver of her ground of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act. Accordingly, the Form I-601 appeal will be sustained.

ORDER: The appeal is sustained.