U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship and Immigration Services

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[redacted]

Date: JUN 14 2012 Office: INDIANAPOLIS, INDIANA 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, Indianapolis, Indiana, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Canada who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year and seeking readmission within three years of his last departure from the United States. The applicant is married to a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 reside in the United States with his spouse.

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated March 30, 2011.

On appeal, the applicant, through counsel, asserts that the Field Office Director "minimizes the level of hardship" that the applicant's wife will endure if the applicant is removed from the United States. *Form I-290B, Notice of Appeal or Motion*, filed April 28, 2011. Counsel also claims that the Field Office Director did not examine the cumulative effect of the hardships that the applicant's wife will suffer either by separating from or relocating with the applicant. *Id.*

The record includes, but is not limited to, counsel's appeal brief, statements from the applicant's wife and mother-in-law, letters of support, psychological and medical documentation for the applicant's wife and mother-in-law, photos, financial documents, and employment documents for the applicant. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

> (B) Aliens Unlawfully Present.-
>
> (i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

> (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 [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 [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.

In the present case, the record reflects that the applicant entered the United States on June 12, 2008, on an L1-B nonimmigrant visa valid until November 29, 2008. In August 2009, the applicant departed the United States, and reentered the United States on August 14, 2009, on an L1-B nonimmigrant visa. The applicant accrued unlawful presence from November 30, 2008, the day after his nonimmigrant visa expired, until August 2009, when he departed the United States. The applicant is attempting to seek admission into the United States within three years of his August 2009 departure. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act being unlawfully present in the United States for a period of more than 180 days but less than one year and seeking admission within 3 years of his last departure from the United States. The applicant does not contest his inadmissibility.

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 can be considered only insofar as it results in hardship to a 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 United States Citizenship and Immigration Services (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 of Immigration Appeals (Board) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. *Supra* at 565. 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).

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.

In his appeal brief dated May 24, 2011, counsel states it would be "extreme emotional hardship for [the applicant's wife] to abandon her mother – who suffers from MS and struggles with reoccurring chronic depression." In a statement dated March 4, 2011, the applicant's wife states she is concerned about her mother, since she and the applicant are her mother's main support. In a statement dated May 23, 2011, [redacted] states the applicant's mother-in-law suffers from multiple sclerosis, asthma, and degenerative disease of her cervical and lumbar spine, and she takes multiple medications for her medical

conditions. [redacted] reports that the applicant's mother-in-law's condition is progressively worsening, and his wife is the only family member assisting her mother. Additionally, in a statement dated March 3, 2011, [redacted] states the applicant's mother-in-law "will intermittently need the care of her daughter," and would benefit from being in the same geographical location. The applicant's wife states her mother and brother are estranged so she is the only person who supports her and assists her with day to day activities. She claims that she drives her mother to her medical appointments, takes care of her home, and runs her errands. Additionally, in a statement dated March 4, 2011, the applicant's mother-in-law states her daughter drives her to see her hospitalized father, at times she is bedridden, her daughter provides her "with a lot of support," and she does not think she "can make it without her." The applicant's wife states she would suffer extreme mental and emotional hardship by leaving her mother alone, and her mother could not join them in Canada, because she is receiving treatment for her medical conditions in the United States. Additionally, she states the stress of the move and extreme weather in Canada will make her mother's multiple sclerosis worse. The record contains articles on the effects of stress and winter temperatures on multiple sclerosis that support the applicant's wife's claim. Additionally, the applicant's mother-in-law states if she moved to Canada, her Social Security disability benefits would end; losing her only income would increase her dependency on the applicant and her daughter. In a mental-health evaluation dated February 24, 2011, licensed social worker [redacted] states that being away from her mother could provoke "clinical depression and increase the risk of alcohol abuse" for the applicant's wife.

Counsel states the applicant's wife has no family ties to Canada. [redacted] reports that the applicant's wife would be unable to work in Canada since she has no status there, and she would be completely dependent on the applicant.

Based on her lack of ties to Canada; her emotional issues; her separation from her family in the United States, including her mother who is suffering from a serious medical condition; and employment issues; the AAO finds that the applicant's wife would suffer extreme hardship if she were to join the applicant in Canada.

Regarding the hardship the applicant's wife would suffer if she were to remain in the United States, counsel states the applicant's wife relies on the applicant for emotional and financial support. [redacted] states if the applicant and his wife are separated "over a long period of time, they will not be able to sustain their marriage in any viable way." Counsel states that prior to meeting the applicant, the applicant's wife had three failed marriages. [redacted] states the applicant's wife has a history of chronic depression, and a separation from the applicant "would precipitate another episode of clinical depression and anxiety, and significantly elevate the chances of [the applicant's wife] resuming heavy alcohol use," which she claims could lead to suicide.

Counsel states the applicant is the primary wage earner in the family and without his income, the applicant's wife "will be unable to survive." The record establishes that in 2009, the applicant's wife's income was approximately $6,640 while the applicant's income was approximately $89,900. Additionally, counsel states that with the applicant's financial support, the applicant's wife is able to spend a significant amount of time caring for her mother. However, if the applicant departs the United

States, his wife will be unable to provide that care. Additionally, the applicant's wife's depression could recur, which would negatively affect the care she provides to her mother. As noted above, the applicant's wife cares for her mother, who is suffering from multiple sclerosis and other conditions. [redacted] reports that the applicant's mother-in-law's symptoms include intermittent control of her bowels, intermittent tremor, and occasionally blurred vision. [redacted] states the applicant's mother-in-law's "condition is getting worse slowly." The applicant's wife claims that she and the applicant agree that her mother will reside with them when "her body gives out because of her MS."

The AAO finds that when the applicant's spouse's hardships are considered in the aggregate, specifically her mental-health issues; having to care for her ill mother alone; and financial issues; the record establishes that the applicant's wife would face extreme hardship if she remained in the United States in his absence. Accordingly, the applicant has established extreme hardship to a qualifying relative under section 212(a)(9)(B)(v) of the Act.

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(h)(1)(B) 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-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 factor in the present case is the applicant's unlawful presence. The favorable and mitigating factors are the applicant's U.S. citizen wife, the extreme hardship to his wife if he were refused admission, the absence of a criminal record, his history of paying taxes, and letters of support.

The AAO finds that, although the immigration violation committed by the applicant is serious and cannot be condoned, when 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.

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. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

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