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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

DATE: MAR 12 2012 OFFICE: MIAMI, FLORIDA File: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 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,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida. The matter came before the Administrative Appeals Office (AAO) on appeal and the appeal was dismissed. The matter is again before the AAO on motion to reopen. The motion will be granted and the prior decision of the AAO will be reversed. The application will be approved.

The applicant is a native and citizen of the Czech Republic who was found to be inadmissible 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 more than one year and seeking readmission within 10 years of her last departure from the United States. 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 remain in the United States with her U.S. citizen spouse.

The AAO concluded that while the applicant established that extreme hardship would be imposed on a qualifying relative related to separation, the applicant failed to establish that extreme hardship would be imposed on a qualifying relative related to relocation and dismissed the appeal of the applicant's Application for Waiver of Grounds of Inadmissibility (Form I-601). See *Decision of the Administrative Appeals Office*, dated October 2, 2008.

On motion, counsel asserts that the applicant's U.S. citizen spouse will suffer extreme hardship specifically related to relocation. See *Form I-290B*, Notice of Appeal or Motion, dated October 30, 2008 and counsel's supporting brief and letter.

The applicant has supplemented the record with counsel's brief in support of motion; counsel's supplemental letter/brief; documents concerning the disbarment of the applicant's prior counsel; hardship affidavit and related correspondence from the Czech Ministry of Health; supplemental psychological and medical records addressing issues specific to relocation; employment letter and reference letters from patients of the applicant's spouse; and medical records concerning the applicant's mother and father along with affidavits from both.

The record also contains counsel's appeal brief; Forms I-601, I-485 and denials of each; medical and psychological records; birth and marriage records; and Form I-130. The entire record was reviewed and considered in rendering this decision.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

In support of the present motion to reopen, the applicant submits extensive documentary evidence described above which counsel asserts will establish extreme hardship to the applicant's spouse were he to relocate to the Czech Republic. The AAO finds that the applicant has met the requirements of 8 C.F.R. § 103.5(a)(2), and the motion will be granted and the matter reopened.

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 entered the United States as a B2 visitor on November 16, 2003 with authorization to remain in the U.S. until May 14, 2004. On September 5, 2005 the applicant departed the United States and she re-entered the U.S. on September 20, 2005 with an advance parole document. The applicant accrued unlawful presence for a period in excess of one year. As the applicant was unlawfully present in the United States for more than one year and seeks readmission within 10 years of her September 5, 2005 departure she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 USC § 1182(a)(9)(B)(i)(II). The applicant does not dispute her inadmissibility.

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 or her children 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 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 record reflects that the applicant's spouse is a 42-year-old native of South Africa and citizen of the United States. The record shows that the applicant's spouse suffers from Crohn's Disease, a serious gastrointestinal disorder that requires careful management, can be substantially debilitating and even lead to death. The record shows that the applicant's spouse suffers from clinically significant Major Depression and that emotional stress is a major contributing factor to frequent exacerbations of Crohn's Disease. On appeal, the AAO considered these factors cumulatively and found that the evidence was sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship in the event of the applicant's removal. The AAO has reviewed the record and affirms its previous finding in this regard.

Addressing relocation-related hardship, counsel asserts on motion that the same medical and psychological documentary evidence that established extreme hardship to the applicant's spouse in the event of his wife's removal establishes extreme hardship in the event of relocation. Supplemental documents from the same sources have been submitted on motion. Therein , states that if the applicant's spouse relocates to be with his wife there would be significant and severe ramifications which will adversely affect his emotional and physical status, which together could very likely lead to his death. states that relocation to the Czech Republic will deteriorate the applicant's spouse health and the distress of leaving his home, job and family would have a severe impact on his Crohn's Disease. states that Cimzia, a medication that has somewhat improved the applicant's spouse's stool frequency, is unavailable in the Czech Republic. A document obtained by and submitted on motion confirms that Cimzia is not approved and not commercially available in the EU Member States, including the Czech Republic.

The applicant's spouse inquired of the Czech government concerning the requirements to practice medicine were he to relocate. He states, and supporting documentary evidence confirm, that he would have to take the "approbation exam" which is administered only in the Czech language. The record reflects that the applicant's spouse, a native of South Africa and citizen of the United States, does not speak, read, write or understand the Czech language. The applicant's spouse states, and supporting documentary evidence in the record confirms, that Czech is one of the most difficult languages to master. The applicant's spouse states that he does not have the capacity to master a difficult foreign language and gain enough expertise therein to pass a highly technical medical exam in that language. The applicant's spouse states that he has spent many years developing a medical practice in South Florida and in the process has cultivated important and very meaningful relationship with patients, medical colleagues, and people in his local community. Numerous letters have been submitted by individuals attesting to this fact.

The applicant's spouse states that he is extremely distressed over the prospect of leaving his parents behind in the United States and the record reflects both that he is intricately involved in their medical care and that the emotional stress of separation from them will significantly exacerbate his Crohn's Disease and overall health. . states that the

applicant's spouse's mother suffers from a number of medical conditions and that it is imperative to her health that he remains in the U.S. states that the applicant's spouse has aided tremendously with his mother's medical issues and they have spoken several times to coordinate his parents' care. . states that the applicant's spouse's father suffers from a number of serious medical conditions for which his son has played an important role in his care. Affidavits by the applicant's spouse's father and mother confirm their medical conditions and the close involvement of their son in their care. The affidavits also reveal that the two are now in their 70s and believe their health would severely deteriorate were their son to relocate abroad, a fact the record suggests would have a debilitating effect on the applicant's spouse's health.

The AAO has considered cumulatively all assertions of relocation-related hardship including that the applicant's spouse is a native English-speaker from South Africa who has never resided in the Czech Republic and does not speak, read, or understand the Czech language; that the applicant's spouse suffers a serious medical condition, major depression, and that emotional stress frequently and significantly exacerbates his Crohn's disease; the unavailability of a somewhat effective medication in the Czech Republic; his close family ties in the United States – particularly to his elderly mother and father in whose medical care the applicant's spouse is deeply involved and whose physical decline would directly affect his own conditions; the applicant's spouse's medical practice through which he has built close ties to his patients and the local community, and the near impossibility that he would be able to ever practice medicine in the Czech Republic where he would be required to pass a highly technical medical examination in the Czech language. 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 he to relocate to the Czech Republic to be with the applicant. Accordingly, the AAO reverses its previous finding concerning relocation.

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 ties in the United States and community ties; and her lack of criminal history. The unfavorable factors are the applicant's period of unlawful presence.

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 her burden and the application will be approved.

ORDER: The motion is granted, the prior decision of the AAO is reversed, and the application is approved.