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

H6

[REDACTED]

Date: **MAR 20 2012**

Office: NEW YORK

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,

Maria Feh

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, New York, New York, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is before the AAO on a motion to reopen. The motion to reopen will be granted and the waiver application will be approved.

The record reflects that the applicant, a native and citizen of Israel, entered the United States with a valid B-2 nonimmigrant visa in March 1995, with permission to remain until September 1995. The applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485) on January 18, 2006, based on a concurrently filed Form I-130, Petition for Alien Relative, submitted on the applicant's behalf by his then U.S. citizen spouse, [REDACTED]. In November 2006, the applicant was issued the Form I-512, Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and re-enter the United States. The applicant's Form I-485 was denied on April 3, 2007.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See 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. As such, the applicant accrued unlawful presence from April 1, 1997, the date of the enactment of the unlawful presence provisions, until January 18, 2006, the date of his proper filing of the above-referenced Form I-485. Thus, the applicant is 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. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and children.

The director concluded that extreme hardship to a qualifying relative had not been established and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Director*, dated November 6, 2009.

On appeal, the AAO determined that the applicant had established that his U.S. citizen spouse would experience extreme hardship were she to relocate to Israel to reside with the applicant due to his inadmissibility. However, the AAO concluded that the applicant had failed to establish that his spouse would experience extreme hardship were she to remain in the United States while the applicant relocated abroad due to his inadmissibility. Consequently, the appeal was dismissed. *Decision of the AAO*, dated January 21, 2011.

On motion, counsel for the applicant submits the following: a brief; a Psychological Assessment Summary, dated February 8, 2011; and a letter from the applicant's child's physical therapist. The AAO notes that although counsel references a third exhibit in his brief, specifically, Past Due Notices and Financial Records, said documentation was not submitted by counsel.

Section 212(a)(9) of the Act provides, 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.

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (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 Attorney General [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...

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, parent or child of the applicant. The applicant's U.S. citizen spouse is the only qualifying relative in this case. Hardship to the applicant or the children 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 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 AAO, in its decision dated January 21, 2011, found that the applicant had established extreme hardship to his U.S. citizen spouse were she to relocate abroad to reside with the applicant as a result of his inadmissibility. [REDACTED] at 7. As such, this criterion will not be re-addressed on motion. In the same decision, the AAO concluded that the applicant had failed to establish that his U.S. citizen

spouse would suffer extreme hardship were she to remain in the United States while the applicant relocated abroad due to his inadmissibility. Specifically, the AAO noted that no supporting documentation had been provided in regards to the applicant's spouse's purported emotional and financial hardship were her husband to relocate abroad. In addition, no supporting documentation regarding the applicant's child's medical condition had been submitted by counsel. The AAO concluded that the applicant had failed to establish that the impact of his removal from the United States would result in hardship that is beyond what is experienced by other individuals separated as a result of removal. [REDACTED] at 7.

On motion, counsel addresses the concerns raised by the AAO. To begin, a psychological assessment has been provided by [REDACTED] details that the applicant's spouse suffers from the effects of molestation, domestic abuse, and feelings of depression. Without the active day to day involvement of her husband, [REDACTED] contends that the applicant's spouse would suffer a setback, leading to psychological decompensation, an overwhelming loss and a regression to a lower level of functioning which may render her incapable of adequately performing her parental duties for her four children. [REDACTED] recommends that the applicant's spouse be referred to a psychotherapist specializing in treatment of trauma from sexual, psychological and physical abuse within the structure and active support of her relationship with her husband. In addition, [REDACTED] asserts that the applicant's spouse should educate herself through reading material documenting first-hand accounts of victims of abuse and psycho-educational and parenting literature as well as through regular participation in a support group of victims of abuse. *See Psychological Assessment Summary from [REDACTED]*, dated February 8, 2011.

In addition, a letter has been provided from the applicant's child's, [REDACTED] physical therapist, [REDACTED] [REDACTED] explains that the applicant's child was born with club feet, had corrective surgery when she was two months old and has to wear braces and possibly undergo surgery in the near future. [REDACTED] notes that the applicant plays an integral role in his child's care and rehabilitation as his wife works during the day. [REDACTED] asserts that separating the applicant from his child would have a significant and devastating setback for [REDACTED] rehabilitation potential due to the applicant's involvement both during treatment sessions and while at home. *Letter from [REDACTED]* Finally, the AAO notes that the U.S. Department of State warns U.S. citizens of the travel risks to Israel due to the continuing threat of terrorist attacks. *Travel Warning-Israel, U.S. Department of State*, dated June 22, 2011. On motion, based on a totality of the circumstances, and in light of the fact that the applicant's spouse would be the sole caregiver and provider for four young children were her husband to relocate abroad, the AAO concludes that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were she to remain in the United States while the applicant relocated abroad as a result of his inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Accordingly, on motion the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also

hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. 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 . . . 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, "[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 favorable factors in this matter are the extreme hardships the applicant's U.S. citizen spouse and children would face if the applicant were to reside in Israel, regardless of whether they accompanied the applicant or remained in the United States; community ties; long-term volunteer work for [REDACTED] delivering food packages to needy family; support letters; synagogue membership; and the apparent lack of a criminal record. The unfavorable factor in this matter is the applicant's periods of unlawful presence while in the United States.

The immigration violation committed by the applicant is serious in nature and cannot be condoned. Nonetheless, the AAO finds that on motion, the applicant has established that the favorable factors in his application outweigh the unfavorable factor. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8

U.S.C. § 1361. The applicant has met that burden. Accordingly, the motion to reopen will be granted and the waiver application approved.

ORDER: The motion to reopen is granted. The waiver application is approved. The director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.