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



DATE: **APR 04 2013**

Office: MOSCOW

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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:

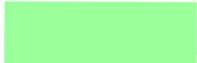
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

[Handwritten signature]

Ron Rosenberg

Acting Chief, Administrative Appeals Office



DISCUSSION: The waiver application 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 of Lithuania 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 readmission within 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and son.

The Field Office Director concluded that the applicant had failed to demonstrate extreme hardship to his U.S. citizen spouse and denied the application accordingly. *See Decision of Field Office Director*, dated May 16, 2012.

On appeal, counsel for the applicant states that the Field Office Director failed to consider in the aggregate the hardships the qualifying spouse would suffer if the waiver application were denied. Counsel also asserts that the Field Office Director imposed an inappropriately high burden of proof on the applicant and relied on boilerplate language rather than conducting a full analysis of the applicant's situation. *Counsel's Brief*.

The record includes, but is not limited to: statements from the applicant and the qualifying spouse; mental health records; medical records; country conditions information; information regarding the qualifying spouse's business; and documentation of the qualifying spouse's loss of Lithuanian citizenship. The entire record was reviewed and considered in rendering a decision on the appeal.

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 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.

In the present case, the record reflects that the applicant entered the United States in August 2000 with a B1/B2 visa. While in the United States, the applicant received an extension of his visa until May 20, 2001. He then remained in the United States without authorization until September 23, 2004. Therefore, the applicant accrued one year or more of unlawful presence and is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for a period of 10 years from his departure from the United States. The applicant does not contest this finding of inadmissibility on appeal.

The record also indicates that on July 22, 2004, the applicant pled guilty to second degree retail fraud in [REDACTED]. However, the Field Office Director determined that the applicant's conviction does not render him inadmissible under section 212(a)(2)(A) of the Act because the maximum sentence for his crime did not exceed imprisonment for one year and the applicant paid a fine rather than being sentenced to imprisonment. See section 212(a)(2)(A)(ii) of the Act.

The applicant is eligible to apply for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act as the spouse of a U.S. citizen. In order to qualify for this waiver, however, he must first prove that the refusal of his admission to the United States would result in extreme hardship to his qualifying relative. Hardship to the applicant or his U.S. citizen son is not directly relevant under the statute and will be considered only insofar as it results in hardship to the applicant's spouse. 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 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. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or U.S. 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 v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (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.

On appeal, counsel asserts that the qualifying spouse has suffered extreme hardship in the applicant's absence and that she would continue to do so if the waiver application were denied. In her statements, the qualifying spouse indicates that she suffers from depression and anxiety which have made her life very difficult. She states that as a result of her mental health issues, she has gained weight and has been losing her hair, she has difficulty concentrating, and she is sad and tearful. She also notes that she has a nodule on her thyroid which must be biopsied regularly in order to determine whether it becomes cancerous. She indicates that her thyroid problem has increased her stress and could worsen her depression. She asserts that although she has been taking medication for her depression for several months, she has not noticed any improvement.

The qualifying spouse also contends that her mental and physical health problems make it difficult for her to run her business and to raise her young son alone. She notes that her business is her only source of income and that she fears she will lose clients due to her poor mental health. She also worries that her son will be negatively affected by witnessing her sadness.

The qualifying spouse states that her mental health improved during a visit to the applicant in Lithuania, but that she cannot visit him often due to her work responsibilities and the cost of travel. She also asserts that her situation would worsen if she were to relocate to Lithuania because she would lose her business in the United States. She fears that she would have trouble finding work in Lithuania because she has lost her citizenship in that country, and she claims that the applicant's income would be insufficient to support the family. The qualifying spouse notes that the applicant lives in a very small apartment in Lithuania that would be too small for them and their son, but that they would not be able to afford a larger home. She also fears that her depression and anxiety would eventually worsen in Lithuania due to the living conditions there, and that she would be unable to receive medical care for her mental health and her thyroid problem.

The AAO finds that the qualifying spouse will suffer extreme hardship if she continues to be separated from the applicant. The record supports the qualifying spouse's claim that she suffers from depression and anxiety which interfere with her daily life. A letter from the qualifying spouse's therapist notes that the qualifying spouse has been diagnosed with "Major Depressive Disorder, moderately severe, recurrent" and that she has required ongoing treatment through psychotherapy and medication. *See Letter from [REDACTED] LCSW*, dated February 23, 2012. The letter also indicates that despite such treatment over a period of several months, the qualifying spouse's symptoms have not improved significantly and "it would stand to reason that reuniting [the qualifying spouse] and her [h]usband would result in the best improvement in her condition." *Id.* Furthermore, the letter states that if the qualifying spouse "continues to be separated from her husband and has to carry on with the family business, manage financial stressors and raise her son on her own, it is highly likely that she will suffer from continued depression and may develop secondary mental and physical health problems as a result." *Id.* The record also contains reports from several of the qualifying spouse's visits to the therapist, all

of which document her ongoing depression and anxiety and the effect of those problems on her life.

Additionally, the record reflects that the qualifying spouse has been undergoing regular examinations, including ultrasounds and fine needle aspiration biopsies, since 2009 for a nodule on her thyroid. *See Letter from [REDACTED] M.D.*, dated January 17, 2012. The mental health records indicate that the qualifying spouse has experienced increased stress due to her thyroid problem. Furthermore, the record reflects that the qualifying spouse is managing her business alone while being a single mother to her young son, both of which are increasing her stress level and depression. If the applicant were present in the United States, he could assist with managing these responsibilities.

The AAO also finds that the qualifying spouse would suffer extreme hardship if she were to relocate to Lithuania. According to the qualifying spouse's doctor, the qualifying spouse must attend regular checkups for her thyroid and she "will require surveillance of this lesion long-term." *See Letter from [REDACTED] M.D.* Departure from the United States would require the qualifying spouse to leave the doctors with whom she has an established treatment program and she may have difficulty obtaining appropriate medical care in Lithuania.

The qualifying spouse would also lose her business and her home if she were to relocate. Furthermore, the qualifying spouse has lived in the United States since 2000 and she lost her Lithuanian citizenship when she became a naturalized U.S. citizen. Readjusting to life in Lithuania after her extended absence, particularly in light of her depression and the fact that she is no longer a citizen of that country, would be very difficult for the qualifying spouse. In the aggregate, the qualifying spouse's mental and physical health concerns, her business and family responsibilities, and her long residence in the United States would create extreme hardship for the qualifying spouse if the waiver application were denied. Therefore, the AAO finds that the applicant has met his burden of demonstrating extreme hardship to a qualifying relative as required under section 212(a)(9)(B)(v) of the Act.

In that the applicant has established that the bars to his 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).

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 favorable factors in this case include the extreme hardship the qualifying spouse would suffer if the applicant's waiver application were denied; the applicant's young U.S. citizen son; and the fact that the applicant could be employed in the United States at the qualifying spouse's business. The unfavorable factors are the applicant's unlawful presence in the United States and his conviction for second degree retail fraud.

Although the applicant's violation of immigration law and his criminal behavior cannot be condoned, the positive factors in this case outweigh the negative factors. 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 his burden and the appeal will be sustained.

ORDER: The appeal is sustained.