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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

DATE: MAY 07 2014

Office: DETROIT

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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

for Handwritten signature of Ron Rosenberg in black ink.

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Detroit, Michigan. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion is granted and the prior decision of the AAO is withdrawn.

The applicant is a native and citizen of India 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 child.

The field office director found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated May 14, 2013.

On appeal, the AAO determined that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative. The appeal was subsequently dismissed. *Decision of the AAO*, dated November 18, 2013.

On motion, counsel for the applicant submits the following: a brief; affidavits from the applicant and his spouse; immigration documents issued to the applicant; mental health documentation; support letters on behalf of the applicant; and financial documents. The entire record was reviewed and considered in rendering this decision.

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-
 - (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year...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 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...

In regard to the field office director's finding of inadmissibility for unlawful presence, the record establishes that the applicant entered the United States with a valid C1/D nonimmigrant visa in October 2003 and remained beyond the period of authorized stay. The applicant did not depart the United States until March 2008. The applicant is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year.

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. The applicant's U.S. citizen spouse is the only qualifying relative in this case. Hardship to the applicant or their child, born in 2012, 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-Morales*, 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 v. I.N.S.*, 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.

In regard to remaining in the United States while the applicant relocated abroad as a result of his inadmissibility, the AAO found on appeal that with respect to the medical hardship referenced, the documentation submitted failed to specify the applicant's spouse's medical condition, the short and long-term treatment plan, the severity of the situation and what hardships the applicant's spouse would experience were her husband unable to assist her with the care of their child. As for the emotional hardship referenced, the record failed to establish that said hardships were beyond the normal hardships associated when a spouse relocates abroad due to inadmissibility. Finally, with respect to the applicant's spouse's assertions that she would experience financial hardship were her husband to relocate abroad, no documentation had been provided on appeal establishing the applicant's spouse's expenses and assets and liabilities to establish that the applicant's relocation

would cause his wife financial hardship. Nor had it been established that the applicant's spouse would be unable to properly care for herself and her child while continuing her work as a physician. Alternatively, it had not been established that the applicant would be unable to obtain gainful employment abroad that would permit him to assist his wife financially should the need arise. Finally, the AAO noted that the applicant's spouse had a support network in the United States, including her parents and sibling, and it had not been established that the applicant's spouse's relatives would be unable to provide needed assistance to the applicant's spouse. *Supra* at 5.

On motion, counsel has addressed the issues raised by the AAO. To begin, in a declaration the applicant's spouse details that she is going through turmoil and anguish knowing that she and her child may be separated from the applicant for a ten-year period. She explains that as a physician, her career will be in jeopardy if she shows any evidence of mental or physical anguish. She contends that at times she has been so distraught at the idea of her husband relocating abroad that she has had to fight back tears while at work. The applicant's spouse further asserts that she has no support to help take care of her daughter as her parents are old and suffer from many ailments and the rest of her family does not live close by. Moreover, the applicant's spouse maintains that she and the applicant work part-time to ensure that one of them is with their daughter as much as possible and a change in that arrangement would cause her and her child hardship. *Declaration from Alina Lukose*, dated December 16, 2013.

In support, counsel re-submits an evaluation from [REDACTED] Ph.D. Dr. [REDACTED] states that the applicant's spouse's anxiety and depression are a direct result of the circumstances surrounding her husband's case. Were he to relocate abroad while she remains in the United States, Dr. [REDACTED] concludes that the applicant's spouse will slip into a protracted depression. *See Affidavit from [REDACTED] Ph.D.*, dated June 7, 2013. The applicant's spouse's pastors also have provided letters on motion outlining the hardships the applicant's spouse and child would face were the applicant to relocate abroad, including emotional turmoil and day to day hardships. *See Letter from [REDACTED] Worship and Counseling Pastor*, [REDACTED] dated December 12, 2013 and *Letter from [REDACTED]* dated December 11, 2013. Moreover, numerous letters have been provided from the applicant's friends outlining the hardships the applicant's family will face without the applicant's daily presence. Finally, counsel has submitted financial documentation establishing the applicant's and his spouse's income and expenses and noting that due to business losses, the applicant's spouse may not be able to cover all the family expenses without her husband's financial support. It has thus been established on motion that the applicant's spouse would experience extreme hardship were she to remain in the United States while her husband relocates abroad as a result of his inadmissibility.

In regard to the applicant's spouse relocating abroad to reside with the applicant due to his inadmissibility, on appeal the AAO found that the applicant's spouse would experience extreme hardship. *Supra* at 5-6. As such, this criterion will not be addressed on motion.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established on motion that his U.S. citizen spouse would suffer extreme hardship were

the applicant unable to reside in the United States. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship for purposes of a waiver. 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).

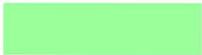
In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal 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-Morales, 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 matter are the extreme hardship the applicant's U.S. citizen spouse and child would face if the applicant were to relocate to India, regardless of whether they accompanied the applicant or stayed in the United States; community ties; support letters from the church and friends; the payment of taxes; the apparent lack of a criminal record; financial contributions to the church; and the applicant's obtainment of an F-1 Visa and lawful entry after having accrued unlawful presence in the United States. The unfavorable factors in this matter are the applicant's periods of unlawful presence in the United States.

Although the violations committed by the applicant are serious in nature, the AAO finds that the applicant has established that the favorable factors in her application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

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NON-PRECEDENT DECISION

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In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The motion will be granted and the prior decision of the AAO will be withdrawn.