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

U.S. Citizenship and Immigration Services

HOLBROOK, NY 11741

DATE: AUG 2 8 2013

OFFICE: NEBRASKA SERVICE CENTER

File: A

IN RE:

Applicant:

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:

VANESSA ZWAIK
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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,

Michael Rosenberg

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Nebraska Service Center Director denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native of Germany and citizen of Turkey 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 ten years of his last departure from the United States. The record indicates that the applicant is married to a U.S. citizen. He 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 and stepson.

The Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *See Decision of the Service Center Director,* dated January 18, 2013.

On appeal counsel contends that the decision failed to consider much of the evidence submitted, mischaracterized much of the evidence it did consider, and did not evaluate the qualifying relative's hardship as required under BIA case law. *See Notice of Appeal or Motion* (Form I-290B), received February 14, 2013.

The record contains, but is not limited to: Form I-290B; counsel's appeal brief; various immigration applications and petitions; hardship letters; medical and psychological records; a letter in which employment is offered to the applicant; letters of character reference, support and concern; employment, income, tax, financial and public assistance-related records; country conditions information for Turkey; and marriage, birth and divorce records. The entire record was reviewed and considered in rendering this decision on the appeal.

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-
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> ...
>
> (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.

The record reflects that the applicant was admitted to the United States in August 2000, when he was 15 years old, as a temporary B-2 nonimmigrant. The applicant remained in the United States beyond the period authorized by his visa before departing to Turkey on December 17, 2005. The

applicant accrued unlawful presence from August 1, 2003, the date of his 18th birthday, until December 17, 2005, a period in excess of one year. As the applicant is seeking admission within 10 years of his departure, he was found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The record supports this finding, the applicant does not contest inadmissibility, and the AAO concurs that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

A waiver of inadmissibility under section 212(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. In the present case, the applicant's spouse is the only 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 record reflects that the applicant's spouse is a 29-year-old native and citizen of the United States. She has a 2-year-old son from a prior relationship whom she and the applicant indicate the latter intends to raise as his own. The applicant's spouse states that she first met the applicant in high school, they had an immediate connection despite a language barrier, she taught him English, the two became inseparable and she was devastated when he returned to Turkey for compulsory military service and because his U.S. visa had expired. Both the applicant and the applicant's spouse explain that they discussed marriage before he left the United States but determined that they were too young to undertake such a commitment at that time. The applicant's spouse later married and when that marriage failed, she and the applicant rekindled their relationship via the internet and other means, and ultimately married in Turkey in October 2011. The applicant's spouse indicates that she has been suffering psychological/emotional, medical/physical, and economic hardships while separated from the applicant, hardships that would be greatly alleviated if he is permitted to join her permanently in the United States. Mary W. Schultz, Ph.D., writes that the applicant's spouse has a long history of depression and anxiety, has participated in therapy since age 6, and her treatment included a psychiatric hospitalization at age 19. Dr. Schultz diagnoses the applicant's spouse with major depression and notes that she has been receiving weekly treatment since December 5, 2012. Dr. Schultz states that stresses which would be alleviated by the applicant's presence in the United States, "including social support, financial support, alleviation of the strains of being a single parent would have a significant impact on her ability to recover from depression and her ability to benefit the most from mental health treatment." Frederic A. Mendelsohn, M.D., F.A.A.N., writes that the applicant has been diagnosed with chronic daily headache, cervical and lumbar sprain, fibromyalgia, and clinical depression. Dr. Mendelsohn notes that due to the applicant's spouse's chronic pain, she is unable

to lift, bend, push/pull, twist, or stand for extended periods of time and needs assistance in performing housework and with childcare. Dr. Mendelsohn indicates that the applicant's spouse suffers limited focus and memory secondary to her chronic headaches. He states that the applicant's spouse suffers with chronic depression that is refractory to multiple antidepressant and fibromyalgia medications, and while she is currently taking Cymbalta 60mg, there have been no improvements in her symptoms. Like Dr. Schultz, Dr. Mendelsohn concludes that the applicant's spouse "will benefit from having her husband live with her due to her current medical conditions, as this would help alleviate her financial, housework and child care burdens."

The applicant's spouse indicates that she suffers from a number of medical conditions, including herniated discs and others injuries to her back and neck from falling down a flight of stairs, chronic headaches, lumbar sprain and fibromyalgia, MCL and ACL tears in her right knee which require a surgery she has been postponing until the applicant can assist her during recovery, and severe hearing loss in her left ear and moderate hearing loss in her right year for which she has had multiple unsuccessful surgeries and continues to receive treatment from a physician on a regular basis. Corroborating medical evidence, in addition to that cited, has been submitted for the record. The applicant's spouse states that she lost work as a home health nurse as a result of her physical conditions preventing her from engaging in the heavy physical labor required. She is nearing completion of her bachelor's degree in nursing which will allow her to secure a management position in any number of local hospitals and in which heavy lifting and other physically strenuous tasks would not be required. The applicant's spouse indicates that education-related expenses, the loss of employment, and raising her son without financial support from his biological father have all contributed to the economic hardship she currently endures. The record shows that the applicant's spouse and her son receive public assistance, and she explains that she only earned $10,000 last year and could make ends meet only by draining her entire savings. A written budget and corroborating income and expense records have been submitted.

The applicant's spouse states that if the applicant is permitted to join her, he would assume many of the physical tasks she now undertakes at great risk to her health, such as lifting her son into his crib and carrying groceries, she could have the physical therapy and knee surgery she requires knowing that he would care for her and her son during recovery, and he could work and contribute financially to the household. The applicant's uncle, Serdar Oney, with whom the applicant lived during his time in the United States, writes that he is the owner and operator of S.O.S. Performance Auto Inc., DBA Airport Shell, and that the applicant learned to work on automobiles in his shop and is a very knowledgeable mechanic. Mr. Oney has submitted a letter guaranteeing that he will employ the applicant upon his admission to the United States, and given the close relationship and history demonstrated in the record between the two, as well as the relationship between Mr. Oney and the applicant's spouse as described in her letters, his, and the applicant's, the AAO finds no reason to question the veracity of this employment offer.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant's spouse, including the emotional and physical impacts of separation; her significant diagnosed psychological and medical conditions and recommendations by her trusted physicians that the applicant's presence in the United States would alleviate much of the emotional and physical stresses related to these conditions; her significant economic difficulties, loss of work,

reliance on public assistance, and the likelihood that the applicant's admission to the United States and guaranteed employment would result in the alleviation of much of these economic stresses. In the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. citizen spouse has and would continue to suffer extreme hardship due to separation from the applicant.

Addressing the hardship that she would experience upon relocation, the applicant's spouse indicates that she was born and raised in the United States where she enjoys close family ties to her mother, father, stepmother, grandparents, siblings and 2-year-old son, all of whom live on the same street as her. She explains that in addition to her own family, she has developed close ties to the applicant's family in New York, including his uncle Serdar, aunt Ayse and their child who is close in age to her own son. The applicant's spouse states that she has never resided in Turkey, cannot speak the Turkish language and due to severe hearing disabilities in both ears would be unable to learn to speak or understand Turkish. She explains that when visiting the applicant in Turkey, she suffered a ruptured ear drum which resulted in a very frightening experience at a hospital where she was unable to communicate with medical personnel about her health history and symptoms as a result of the language barrier and her inability to hear. The applicant's spouse states that all of her ties are on Long Island, including her entire family, school, apartment, job, and trusted physicians who have been treating her for years. She indicates that her chronic hearing conditions require ongoing medical treatment including seeing a physician every few weeks to clean the inside of her ear canal which lacks certain structure and makes her more susceptible to ear infections. The applicant's spouse also receives weekly psychological therapy, and she has been advised to have both knee surgery and physical therapy. She states that she currently enjoys employer-provided health insurance in the United States for these conditions, benefits she would lose upon relocation to Turkey. The applicant's spouse expresses concern that in Turkey, she would no longer have access to regular medical treatment by trusted physicians long familiar with her significant conditions, and has already experienced frightening difficulties in accessing emergency medical care there. She also expresses concern about relocating to a predominantly Muslim country as she is a devout Lutheran and lifelong member of her local church.

The applicant's spouse indicates that relocation would result in the loss of her current employment as a nurse in the United States, as well as the loss of the more lucrative and less physically demanding employment she is on the verge of obtaining upon completion of her bachelor's degree program in a matter a months. She maintains that her 2-year-old son's biological father has made no effort to have a relationship with their son, Jesse, provides no financial or emotional support, but will likely not allow her to take the boy to Turkey. As the record contains no court order or agreement preventing the applicant's spouse from taking her child overseas, and as the father has played no role in Jesse's life, the AAO finds the assertion overly speculative and has insufficient basis to find that he would challenge the relocation in court, or, if he did, that a court would find in his favor. The applicant's spouse has further expressed concern for her safety in Turkey, where country conditions articles submitted for the record show that in February 2013, a suicide bomber's attack on the U.S. Embassy in Ankara resulted in the death of a security guard, and an American woman from Staten Island, New York has been missing in Turkey since January 2013. The AAO has also reviewed the U.S. State Department's *Security Message for U.S. Citizens*, dated June 12, 2013. Therein, U.S. citizens are warned that "there is a continuing risk of terrorist attacks

on U.S. diplomatic, consular, and military facilities in Turkey. The U.S. Embassy has received an increased number of reports indicating terrorist organizations are targeting these facilities."[1]

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse, including her adjustment to a country in which she has never resided, with a culture very different from her own, in which she would be part of a religious minority for the first time in her life, and where she cannot speak or understand the language and suffers from a significant physical disability that makes learning a foreign language nearly impossible; her lifelong residence in the United States, particularly in the same area where she was born and where she enjoys close family ties with her 2-year-old son, her mother, father, stepmother, grandparents, and siblings, all of whom live on the same street; her close ties to the applicant's family members in New York, and her close church, work and community ties after a lifetime in the area; her significant psychological and medical conditions and loss of access to and treatment from trusted physicians in the United States; the loss of employment in the United States, employment-provided benefits including health insurance, and the loss of opportunity to secure more lucrative and less physically demanding employment that she is on the verge of securing upon completion of her bachelor's degree program; her existing financial obligations and inability to meet these if residing in a country where she cannot speak or understand the language and would be unable to secure gainful employment; and her stated safety, economic and health-related concerns regarding Turkey. Considered in the aggregate, the AAO finds the evidence sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate to Turkey to be with the applicant.

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

[1] http://turkey.usembassy.gov/sm_061213.html.

> 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 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 significant family and community ties to the United States as demonstrated by attestations by others to his good moral character and essential presence in the community; his ties to the applicant's spouse's family; that his period of unlawful presence in the United States followed being sent by his parents as a minor to live with his uncle and attend high school; and his lack of any criminal record. The unfavorable factors are the applicant's immigration violations, which include a 2 ½ year period of unlawful presence after his 18th birthday, and possible unauthorized employment in the United States. 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 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 appeal is sustained.