

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3100
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

113



FILE:



Office: VIENNA, AUSTRIA

Date: SEP 21 2007

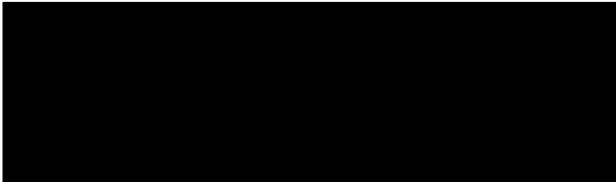
IN RE:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v)
of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v).

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the United States Citizenship and Immigration Services (USCIS) Officer-in-Charge (OIC), Vienna, Austria and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Albania who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for a period of more than 180 days but less than one year. He 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 U.S. citizen spouse.

The record reflects that the applicant entered the United States without inspection on or about June 27, 1999. The applicant filed an affirmative application for asylum on October 25, 1999. On June 15, 2000, the applicant was referred to the immigration court in Boston, Massachusetts for removal proceedings. The applicant's application for asylum and withholding of removal was denied on July 23, 2001 by an immigration judge and the applicant was ordered removed. The applicant filed a timely appeal with the Board of Immigration Appeals (BIA). The BIA affirmed, without opinion, the decision of the immigration judge on January 7, 2003. There is no evidence in the record showing that the applicant appealed the decision of the BIA.

The applicant remained in the United States and married his current spouse, [REDACTED] on July 25, 2003. The applicant's spouse filed a Petition for Alien Relative (Form I-130) on the applicant's behalf on October 6, 2003. The petition was approved on April 20, 2004. The applicant filed an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212) on June 14, 2004. The application was approved on December 10, 2004.

The applicant filed an Application for Stay of Deportation or Removal (Form I-246) on September 17, 2003. On May 6, 2004, the applicant was granted a stay of removal through November 5, 2004. On November 4, 2004, the applicant's counsel requested another stay of removal, and a stay was granted through May 18, 2005. On May 2, 2005, the applicant's counsel requested another stay of removal, and a stay was granted through November 18, 2005.

Counsel has indicated that the applicant departed the United States on November 18, 2005. He subsequently applied for an immigrant visa at the U.S. Embassy in Tirana, Albania. The applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) in conjunction with his application for an immigrant visa.

The OIC concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. *Decision of OIC*, dated June 20, 2006.

On appeal, counsel asserts that the applicant's spouse "refuses to be separated from [the applicant] for an indeterminate length of time," and has thus chosen to join him in Albania. *Brief of Counsel*, dated August 16, 2006. Counsel contends "their absence from the U.S. puts at risk their livelihoods," which consist of a restaurant the applicant owns and manages and his spouse's position as Vice President and minority owner of her father's cellular phone business. *Id.* Counsel states that if the applicant and his spouse remain in Albania,

they will “likely lose their respective businesses . . . [and] their newly acquired home.” Counsel maintains that because applicant’s spouse does not speak Albanian, “it is unlikely that she would ever be able to find gainful employment in Albania.” *Id.* He asserts that the applicant has been unable to find employment in Albania since returning there, and has been compelled to live with his mother and other family members in cramped quarters. *Id.*

The record contains statements and affidavits from the applicant, his spouse and her parents; declarations from the applicant’s relatives in Albania; financial and incorporation documents for MC Wireless; financial documents for [REDACTED]; documentation showing income and business information for [REDACTED] Maine and Franklin County, Maine; and country conditions reports and articles for Albania. The entire record has been reviewed in rendering a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(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, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien’s departure of 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 [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.

The OIC found that the applicant was unlawfully present in the United States for more than 180 days but less than one year, but does not specify in her decision the period or periods of presence she determined were unlawful. The OIC’s determination notwithstanding, the record reflects that the applicant was unlawfully present in the United States for a period in excess of one year. The record shows that the applicant’s removal

order was final as of January 7, 2003, the date the BIA made a decision on his appeal. The applicant remained in the United States for a period in excess of one year before voluntarily departing on November 18, 2005. The AAO notes that the applicant was granted a stay of removal on May 6, 2004, a stay that was extended through the applicant's departure on November 18, 2005. However, the AAO is aware of no legal precedent supporting the proposition that a stay of removal tolls unlawful presence and does need to address the issue here because the applicant accrued more than one year of unlawful presence from the date the BIA dismissed his appeal to the date the stay was granted. The AAO finds, therefore, that the applicant was unlawfully present in the United States for one year or more and is seeking admission within 10 years of the date of his last departure. The applicant is inadmissible under section 212(a)(9)(B)(i)(II).

A waiver of inadmissibility under sections 212(a)(9)(B)(v) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's U.S. citizen wife is the only qualifying relative. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(a)(9)(B)(v) of the Act; *see also Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

Matter of O-J-O, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

U. S. courts have stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted).

Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request. In this case, counsel asserts on appeal that the applicant has maintained that she is unwilling to be separated from her husband, and has consequently departed the United States to reside with him in Albania.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's wife faces extreme hardship if he is refused admission.

The applicant has asserted that if he is denied admission, and his spouse relocates to Albania, they will experience financial hardship as he will be forced to close the restaurant he owns and the applicant's spouse will no longer earn the income she derives from managing her father's business, in which she is a part owner and serves as Vice President. However, the applicant has presented insufficient evidence to substantiate these claims. The record contains no tax or other financial documents for the applicant and his spouse showing their employment or income prior to their departure from the United States. The applicant has not submitted any evidence beyond simple assertions demonstrating that he owns the restaurant [REDACTED]. There are references in the record to the lease for the building in which the restaurant operates, but the applicant has not submitted a copy of the lease. None of the payroll and other financial documents for the restaurant submitted by the applicant bear the applicant's name.

Even accepting that the applicant owns a restaurant, there is no evidence in the record indicating that the restaurant has closed, or that the applicant has sold it, in spite of the fact that both the applicant and his spouse have left the United States. In his brief dated August 16, 2006, nearly one year after the applicant's departure, counsel merely echoes the speculation found in statements by the applicant and his spouse submitted previously that without the applicant's spouse to manage it, his business "will still have to close its doors." Likewise, the applicant has not submitted evidence beyond the assertions of his spouse and her father that she manages and partly owns a cellular phone business, and earned \$600 per month prior to leaving the United States.

While the assertions made by the applicant, his spouse and her parents are relevant and have been taken into consideration, little weight can be afforded them in the absence of specific supporting evidence. *See Matter of Kwan*, 14 I & N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Also, without documentary evidence to support the claims made by counsel, his assertions will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19

I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO acknowledges the evidence submitted showing that economic conditions in Albania are poor, and that the applicant's spouse does not speak Albanian or have other family ties there. Nevertheless, the AAO finds that there is insufficient evidence to show that the situation faced by the applicant and his spouse is an atypical result of removal or inadmissibility and it does not rise to the level of extreme hardship based on the record. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relatives, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under sections 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.