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U.S. Department of Homeland Security  
20 Massachusetts Avenue NW, Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

#3

[REDACTED]

FILE:

[REDACTED]

Office: VIENNA, AUSTRIA

Date:

APR 07 2008

IN RE:

Applicant:

[REDACTED]

APPLICATIONS:

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), and Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[REDACTED]

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 Acting Officer-In-Charge (OIC), Vienna, Austria, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Montenegro (formerly Yugoslavia) 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 her last departure from the United States, and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for entering the United States with a Slovenian passport in someone else's name. The record reflects that the applicant is the spouse of a naturalized United States citizen and that she 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), and section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with her husband and United States citizen son.

The Acting OIC found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Acting Officer-In-Charge Decision*, dated September 9, 2005.

On appeal, the applicant, through counsel, contends that the "application for waiver of inadmissibility was denied by the USCIS office despite of [sic] the fact that the qualifying relative (U.S. Citizen spouse) did submit ample evidence to demonstrate that he will suffer great actual injury if the bar is not removed...." *Form I-290B*, dated October 1, 2005.

The record includes, but is not limited to, counsel's brief, a statement from the applicant's husband, a letter from [REDACTED], regarding the applicant's husband's medical conditions, and a psychological evaluation of the applicant's husband by [REDACTED]. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

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, voluntarily departed the United States (whether or not pursuant to section 244(e)) 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 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.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

(i) In general.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

....

(iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides, in pertinent part, that:

(1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien....

The AAO notes that the record contains several references to the hardship that the applicant's United States citizen son will suffer if the applicant were denied admission into the United States. Sections 212(a)(9)(B)(v) and 212(i) of the Act provide that a waiver of inadmissibility under sections 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Act are applicable solely where the applicant establishes extreme hardship to her citizen

or lawfully resident spouse or parent. Unlike a waiver under section 212(h) of the Act, Congress does not mention extreme hardship to United States citizen or lawful permanent resident children. In the present case, the applicant's spouse is the only qualifying relative, and hardship to the applicant's son will not be considered, except as it may cause hardship to the applicant's spouse.

In the present application, the record indicates that on August 20, 2000, the applicant married [REDACTED], a lawful permanent resident of the United States, in Serbia. On November 28, 2000, the applicant entered the United States by presenting a Slovenian passport in someone else's name. On April 24, 2001, the applicant's husband filed a Form I-130 on behalf of the applicant. On June 11, 2002, the applicant's Form I-130 was approved. On September 28, 2002, the applicant's son, Arjan, was born in Michigan. On November 11, 2003, the applicant departed the United States and returned to Montenegro. On August 18, 2004, the applicant's husband became a United States citizen. On December 16, 2004, the applicant filed a visa application, which was denied because the applicant was inadmissible to the United States. On January 5, 2005, the applicant filed a Form I-601. On September 9, 2005, the Acting OIC denied the applicant's Form I-601, finding that the applicant entered the United States by presenting a Slovenian passport in someone else's name, she accrued more than 365 days of unlawful presence, and she failed to establish extreme hardship would be imposed on her spouse. The Acting OIC stated the applicant accrued unlawful presence from November 2000 until November 2003. The applicant is attempting to seek admission into the United States within 10 years of her November 11, 2003 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Additionally, the applicant is seeking a section 212(i) waiver of the bar to admission resulting from a violation of section 212(a)(6)(C) of the Act. Waivers under sections 212(i) and 212(a)(9)(B)(v) of the Act are dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the alien herself experiences upon removal is irrelevant to section 212(i) and section 212(a)(9)(B)(v) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's husband. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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.

The applicant, through counsel, asserts that the applicant's United States citizen spouse "discuss[ed] in his statement the difficulty he is facing as a result of separation from his wife because he did not want to live without his wife and son and he has a home that he could not share with anyone. Also the Petitioner desired

that his son be raised and educated in the United States for a lot more opportunities will present itself than living in Serbia.” *Counsel’s Brief*, page 2, dated October 25, 2005. The applicant’s husband states he “get[s] very depressed at times when [he] think[s] about [his] wife and not seeing [his] son for the first years of his life.... [He] want[s] his son to have both parents in his life, grow up with the right education, and have great opportunities that America has to offer that [he doesn’t] think he will have where he is. [His] wife does not have the means to provide for herself and [his] son where she is.” *Statement from [REDACTED]* dated March 22, 2005. The AAO notes that the applicant has not established that she has no transferable skills that would aid her in obtaining a job in Montenegro. Additionally, the applicant has not demonstrated that her son, who is 5 years old, is having difficulties rising to the level of extreme hardship in adjusting to the culture of Montenegro. Dr. [REDACTED] diagnosed the applicant’s husband with being “severely depressed, secondary to separation from his wife and child. He is suffering from depression, high level of anxiety, impaired thought processes and diminished capacity to function on a daily basis.... [REDACTED] is also concerned that he might loose [sic] his job due to his extreme exhaustion and tiredness he feels during the day, from lack of sleep.” *Psychological evaluation by [REDACTED]*, dated October 1, 2005.

[REDACTED] D., states the applicant’s husband “has decreased heel and toe walking. He has pain inhibition weakness of hip muscles. This patient has low back pain radiating to his left lower extremity for two years which is beginning to get worse. He did have restricted straight leg raising test. There is decreased range [sic] of motion in the lumbar spine. This patient has an antalgic gait. He will be treated here in the United States for his lumbar myofascial ligamentous strain with left sciatica. He will be receiving physical therapy and injection therapy treatment. He may also require lumbar surgery.... Due to [REDACTED] symptomatology and clinical examination, I feel that it is in his best interest and it is required by his medical condition that his wife and son come back to the United States where they can live as one family and give Mr. [REDACTED] the support and care he needs as well as letting his son grow up in the country in which he was born.” *Letter from [REDACTED], Physical Medicine and Rehabilitation*, November 3, 2005. The AAO notes that there was no documentation submitted establishing that the applicant’s husband could not receive treatment for his medical conditions in Montenegro, and there is no indication that the applicant’s husband has to remain in the United States to receive his medical treatments. Additionally, the AAO notes that after the applicant gave birth to her son, she was diagnosed with Lupus, and the applicant and her husband decided that she should return to Montenegro to receive medical treatment for her Lupus. *See Psychological evaluation by [REDACTED] D., supra.*

The AAO finds that, based on his emotional and psychological problems, the applicant has demonstrated extreme hardship to her husband if he remains in the United States without the applicant; however, it has not been established that the applicant’s husband could not join the applicant in Montenegro, which is his native country. Since the applicant’s husband’s depression is primarily caused by their separation, if the applicant’s husband moves to Montenegro then the depression would presumably no longer be an issue. The applicant’s husband would not be alone in Montenegro, since the applicant and her family reside there. *See Psychological evaluation by [REDACTED] supra* (“[T]hey decided for his wife to go back to Montenegro and get the necessary help and also have [the applicant’s] mother help them out with taking care of and raising the child.”). The AAO notes that the applicant’s husband failed to provide any evidence that he could not obtain a job in Montenegro or evidence that he could not receive medical treatment in Montenegro for his depression and medical conditions. Additionally, the applicant’s husband is a native of the former

Yugoslavia, who spent his formative years there, and it has not been demonstrated that the applicant and her husband have no family ties in Montenegro.

In limiting the availability of the waiver to cases of “extreme hardship,” Congress provided that a waiver is not available in every case where a qualifying family relationship exists. The AAO recognizes that the applicant’s husband will endure, and has endured, hardship as a result of separation from the applicant; however, he has not demonstrated extreme hardship if he were to return to Montenegro.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant’s spouse caused by the applicant’s inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act, the burden of proving eligibility remains entirely 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.