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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VIENNA, AUSTRIA Date: APR 8 2009

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) and 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:

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge, Vienna, Austria, and appealed to the Administrative Appeals Office (AAO). The appeal will be sustained.

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission into the United States by fraud or willful misrepresentation. The applicant has a U.S. citizen spouse and lawful permanent resident parents. 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.

The officer-in-charge concluded that the applicant had 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 Officer-in-Charge*, at 4, dated October 7, 2008.[1]

On appeal, counsel asserts that the denial was contrary to law and an abuse of discretion, and the evidence establishes that the applicant's spouse and parents would suffer extreme hardship. *Form I-290B*, received November 3, 2008.

The record includes, but is not limited to, counsel's brief, the applicant's statement, the applicant's spouse's statements, the applicant's spouse's medical records and psychological evaluations, medical records for the applicant's spouse's parents and grandmother, statements from the applicant's spouse's parents and grandmother, the applicant's spouse's financial and educational records, country conditions information on Albania and letters of support. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant attempted to enter the United States on April 4, 2002 by presenting a photo-substituted Dutch passport and was detained. The applicant was paroled into the United States on April 18, 2002, his I-94 expiration date was April 17, 2003 and he filed for asylum on or around March 12, 2003. The applicant withdrew his asylum application before the immigration judge on July 18, 2005. The applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status, on August 26, 2005. The applicant departed the United States on January 26, 2006. The AAO notes that unlawful presence does not accrue while a non-frivolous asylum application is pending as long as the applicant has not worked without authorization while it is pending. In this case, there is no indication that the applicant's asylum application was found to

[1] The AAO notes that the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, was also denied in the same decision. The AAO notes that a separate decision should have been issued for the Form I-212. As there is only one Form I-290B filed with the AAO, it will only review the appeal of the Form I-601 denial. However, the AAO also notes that the record is not clear as to whether the applicant was ever ordered removed, and therefore whether he was required to File the Form I-212, as the immigration judge's order from July 18, 2005 does not state that the applicant was ordered removed.

be frivolous. However, the applicant's Form G-325A, Biographic Information, signed by the applicant on July 26, 2005 reports that he was employed as a cook and then a truck driver beginning in May 2002. Therefore, the applicant began to accrue unlawful presence on April 17, 2003, the date his valid Form I-94 expired, until August 26, 2005, the date he filed his Form I-485, a period totaling more than two years. As a result of the applicant's prior misrepresentation and unlawful presence, the applicant is inadmissible to the United States pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act.[2]

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

> (i) 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.

Section 212(i) of the Act provides 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 alien 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.

Section 212(a)(9)(B) 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-
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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.

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[2] The officer-in-charge states that the applicant was ordered deported on February 16, 2005 and re-entered the United States on June 24, 2005. *Decision of the Officer-in-Charge*, at 3. The AAO notes that based on the record before it, this information appears to be incorrect.

. . . .

(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.

Therefore, the applicant requires waivers under sections 212(i) and 212(a)(9)(B)(v) of the Act. These waivers are dependent first upon a showing that the bar imposes an extreme hardship to the applicant's U.S. citizen spouse or parents. **Hardship to an applicant is not a permissible** consideration except to the extent that such hardship may affect a qualifying relative. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship. These factors include the presence of lawful permanent resident or United States citizen family ties to 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 AAO notes that extreme hardship to a qualifying relative must be established whether the qualifying relative resides in Albania or remains in the United States, as the qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event of residence in Albania. Counsel states that the applicant's spouse suffers from a Major Depressive Disorder, she is following up with her medical doctor, and she has been prescribed Prozac and Zanax; she will not be able to obtain the specialized medical care that she requires in Albania; she resides with her mother-in-law, father-in-law and brother-in-law, and lives very close to her parents; her parents and other extended family members are U.S. citizens and lawful permanent residents; she is a full-time student and will receive her provisional certificate as an elementary school teacher in 2010; she has financial obligations in the United States including a personal loan and credit card debts; and relocating to Albania would result in separation from her loved ones, loss of employment, and inability to meet her financial obligations. *Brief in Support of I-601*, at 2-4, dated September 10, 2008.

The record includes a previous psychological evaluation in which the applicant's spouse describes her difficulties in living with the applicant in Albania, including an austere lifestyle living with the applicant's grandmother, trips to the emergency room for stomach problems, the inability of the

physicians to alleviate her problems, scarce clean water, and scant electricity. *First Psychological Evaluation*, at 3, dated August 17, 2007. Reporting on the results of clinical tests of the applicant's spouse, the evaluation finds her to suffer from the clinical symptoms of depression and anxiety and diagnoses her with Major Depressive Disorder, Single Episode, Moderate. *Id.* at 6-7. The evaluation also reports that the mere thought of permanently living in Albania seems to exacerbate the applicant's spouse's fragile state of mind. *Id.* at 6. The applicant's spouse states that Albania suffers from a shortage of medical doctors, there is poor medical care, she would be forced to live with the applicant's grandmother who resides in a small house and they are only allowed to use water a couple of hours a day, the severe decrease in her standard of living would increase her levels of anxiety and depression, Albania has the highest unemployment rate in the Balkans, the applicant has not been able to find employment in two years, and there are no institutions that offer her an equivalent education. *Applicant's Spouse's Second Statement*, at 5-6, dated December 17, 2007. The applicant's spouse states that she is pursuing a Bachelor's Degree and teaching certificate. *Applicant's Spouse's Third Statement*, at 2. The record reflects that medical facilities and capabilities in Albania are limited beyond rudimentary first aid treatment. *Department of State Country Specific Information, Albania*, at 2, dated June 10, 2008. The record reflects that Albania is one of the poorest countries in Europe. *Department of State Background Note, Albania*, at 3, dated January 2008.

The applicant's spouse states that she sees her parents on a daily basis and she will be leaving behind her parents, brother, grandmother, and aunts and uncles. *Applicant's Spouse's Third Statement*, at 3, undated. Counsel states that that the applicant's spouse is currently taking care of her 77-year-old grandmother who has diabetes, heart problems and a thyroid deficiency; she takes her grandmother to doctor's appointments, monitors her medications; and she is the only person on whom her grandmother relies all of the time. *Additional Materials in Support of Prior I-601 Application*, at 1, dated September 20, 2007. The applicant's spouse's grandmother's nurse practitioner states that the applicant's spouse is needed to help her grandmother with checking her blood sugar, regulating her medication and translating for her. *Letter from* [redacted], dated March 19, 2008. The applicant's grandmother states that the applicant's spouse cares for her better than anyone else and she has lived with the applicant's spouse from the moment she was born. *Applicant's Spouse's Grandmother's Statement*, undated. She details the assistance provided to her by the applicant's spouse. *Id.* The record includes medical records for the applicant's spouse's grandmother. Counsel states that the applicant's spouse is helping her parents, especially her mother who has had an appendectomy and wrist surgery. *Additional Materials in Support of Prior I-601 Application*, at 1. The record includes medical records for the applicant's parents. The record also reflects that the applicant's spouse only speaks a little Albanian. *Applicant's Spouse's First Statement*, at 4, dated September 17, 2007, *Applicant's Uncle's Statement*, at 2, undated. Considering all of the aforementioned factors, the AAO finds that the applicant's spouse would experience extreme hardship upon relocation to Albania.

The second part of the analysis requires the applicant to establish extreme hardship in the event that a qualifying relative remains in the United States. Counsel states that the applicant's spouse has exhibited symptoms of depression and anxiety since the applicant's departure from the United States, including appetite and sleep disturbances, mood swings, grief, feelings of guilt and

hopelessness, and social isolation. *Brief in Support of Appeal*, at 3. The applicant's spouse states that she has cried for countless hours on end, she cannot sleep or eat during the day, life without the applicant is meaningless, she has nightmares, she has become antisocial, and her physical appearance has suffered. *Applicant's Spouse's Third Statement*, at 1-2.

The AAO notes that the record contains three psychological evaluations of the applicant's spouse, two performed by the same psychologist who in each instance found the applicant's spouse to be suffering from Major Depressive Disorder, Single Episode, Moderate, as a result of the applicant's departure. *Second Psychological Evaluation*, at 7, dated March 14, 2008. The second psychologist who evaluated the applicant's spouse found her to be experiencing symptoms such as continual depressed feelings and thoughts, thoughts of death, diminished self-esteem, and impaired concentration and occupational functioning. *Third Psychological Evaluation*, at 3-4, dated July 28, 2008. The AAO notes that the record includes copies of the applicant's spouse's July 25, 2008 prescriptions for Prozac and Zanax. Based on the record, the AAO finds that the applicant's spouse would experience extreme hardship upon remaining in the United States without the applicant.

As the AAO has found extreme hardship to the applicant's spouse, it will not address hardship to the applicant's parents.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. 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 section 212(h)(1)(B) 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-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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 adverse factors in the present case include the applicant's unauthorized stay and employment, and his misrepresentation at the port of entry.

The favorable factors for the applicant include his U.S. citizen spouse and lawful permanent resident parents, the absence of a criminal record, extreme hardship to his spouse, an approved Form I-130, and statements from friends and family attesting to his good character and benefit to the community.

The AAO finds that the violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.