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

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: VIENNA, AUSTRIA Date: APR 05 2010

IN RE: [redacted]

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

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Vienna, Austria. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native of the former Yugoslavia and a citizen of Montenegro. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) for having been convicted of Crimes Involving Moral Turpitude (CIMT); section 212(a)(6)(C) for having attempted to obtain an immigration benefit through fraud or willful misrepresentation; and section 212(a)(9)(B)(i)(II) for seeking admission after having been unlawfully present in the United States for more than one year. The applicant is the spouse of a U.S. citizen and the father of a U.S. citizen. The applicant seeks waivers of inadmissibility pursuant to sections 212(a)(9)(B)(v), 212(h) and 212(i) of the Act, 8 U.S.C. § 1182(h) in order to remain in the United States.

The Officer in Charge (OIC) concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on August 1, 2007.

On appeal, counsel for the applicant asserts the OIC's decision was contrary to law and that the applicant has established that his spouse would experience extreme hardship if he is refused admission.

Section 212(a)(2)(A) of the Act states in pertinent part:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

> (h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> . . . .
>
> > (1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

The record indicates that the applicant was convicted of Falsifying Documents, § 207 of the Criminal Law of the Republic of Montenegro, in 1996. Forgery or falsification of public documents is a CIMT. *Matter of M*, 9 I. & N. Dec. 132 (BIA 1960). The applicant does not contest this finding.

The maximum term of imprisonment for the statute under which the applicant was convicted is five years, even though his term of imprisonment was three months, and therefore it does not qualify for the petty offense exception in section 212(a)(2)(A)(ii)(II) of the Act.

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.

The record contains a March 2, 2000 sworn statement taken from the applicant in which he testifies that he entered the United States on June 29, 1999 using a fraudulent Albanian passport. Although in a written statement given in connection with his 2006 immigrant visa interview, the applicant contends that he used the fraudulent passport to enter Canada, not the United States, and was then driven from Toronto to Michigan, the record fails to support this claim. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See 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)). In that the applicant swore under oath that he used a fraudulent document to enter the United States, the AAO finds the applicant to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for having sought an immigration benefit through the willful misrepresentation of a material fact.

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-
> >
> > . . . .
> >
> > (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.

The record indicates that the applicant was ordered removed in absentia from the United States by an immigration judge on May 2, 2002, but did not depart the United States until he was removed on December 29, 2005. Accordingly, the applicant accrued unlawful presence from May 3, 2002, the day after he was ordered removed, until his December 29, 2005 departure from the United States. In that the applicant is seeking admission within ten years of his 2005 removal, he is 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 sections 212(a)(9)(B)(v) and 212(i) 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. A waiver of inadmissibility under section 212(h) expands the definition of qualifying relatives to include U.S. citizen and lawful resident children of the applicant. Hardship to the applicant is not directly relevant to the determination of extreme hardship under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. Although the AAO notes that the applicant is the father of a U.S. citizen child, a qualifying relative for the purposes of a section 212(h) waiver, he must establish his eligibility for a waiver based on extreme hardship to his spouse as she is his only qualifying relative under the more restrictive requirements of sections 212(a)(9)(B)(v) and 212(i) of the Act. Hardship to the applicant's child will, therefore, be considered only to the extent that it results in hardship to his spouse. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted.

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).

The AAO notes that the applicant must establish extreme hardship to a qualifying relative whether he or she relocates with the applicant or remains in the United States, as a qualifying relative is not required to reside outside the United States based on the denial of the applicant's waiver request.

The record includes, but is not limited to, briefs from counsel; statements from family members and a friend of the applicant's spouse; a statement from [redacted] with attached notes, concerning the applicant's spouse; a psychological evaluation of the applicant's spouse by [redacted]; a copy of Emergency Room report for the applicant's spouse; a statement from [redacted] Perinatal Assessment Center, University of Michigan Hospitals regarding the applicant's spouse pregnancy; a copy of a medical document relating to the applicant's daughter; a statement regarding the applicant's spouse from [redacted]; copies of a business registration form and other documents related to the U.S. business previously operated by the applicant's spouse; various articles on Montenegro, the treatment of Albanians by Montenegrans and medical conditions such as Hantaviruses; copies of utility statements, bills, banks statements, a foreclosure notice, late/termination collection notice, hospital bills and tax records; a copy of the section on Montenegro from Country Reports on Human Rights Practices – 2006, issued by the U.S. Department of State; a copy of the section on Montengegro from the CIA World Factbook; birth certificates for the applicant, his spouse and their child; and translated court records pertaining to the applicant's convictions.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

On appeal, counsel asserts that the applicant's spouse suffers from Major Depressive Disorder, has a history of psychiatric problems and is dealing with a high-risk pregnancy where serious complications have been diagnosed. Counsel states that whether the applicant's spouse remains in the United States or joins the applicant she will experience extreme hardship. Counsel also asserts that the applicant's spouse is experiencing extreme financial hardship, that her home is in foreclosure and she has been unable to meet her other financial obligations as well.

The record contains medical documention of the applicant's spouse's mental health and the recently developed complications with her pregnancy. The record also contains sufficient documentation to indicate that the applicant's spouse is experiencing significant financial hardship, including foreclosure notices and collection letters. Based on its review of the record, the AAO finds sufficient evidence to establish that the applicant's spouse has serious mental health issues, and that relocating to Montenegro at this time, due to the nature of her pregnancy and mental health would constitute an extreme hardship for her. In addition, the documentation in the record indicates that these same factors, as well as the applicant's spouse's financial situation, would result in extreme

hardship for her if her separation from the applicant continues. Accordingly, the applicant has established that a qualifying relative would experience extreme hardship if he is excluded.

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, 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).

In this case, the negative factors include the applicant's unlawful presence and employment in the United States, his use of a fraudulent passport to enter the United States, his conviction for having falsified a passport, and his failure to comply with a removal order issued by an immigration judge. The positive factors in this case include the presence of the applicant's U.S. citizen spouse and child in the United States, the extreme hardship that would be experienced by his spouse if he were to be excluded from the United States, the letters of support from his spouse's family attesting to his character and dependability, and the absence of a criminal record in the United States. Although the AAO does not condone the applicant's violations under the Act or the criminal activity that led to his conviction, it concludes that the favorable factors in his case outweigh the unfavorable such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

The AAO notes that the Officer in Charge denied the applicant's Form I-212, Application to Reapply for Admission Into the United States After Deportation or Removal, as a matter of discretion, based on her denial of the Form I-601. In light of the applicant's successful appeal, the Officer in Charge shall reopen the Form I-212 and consider it on its merits.

ORDER: The appeal is sustained. The Officer in Charge will reopen the Form I-212 and consider it on its merits.