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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: FRANKFURT, GERMANY Date: OCT 27 2008

IN RE: [redacted]

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).

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 Officer in Charge (OIC), Frankfurt, Germany, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native of Yugoslavia and citizen of Kosovo. The applicant 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 after April 1, 1997. 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 7, 1999. On June 8, 2000, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). The applicant also filed an Application for Temporary Protected Status (Form I-821) on the same date, and this application was approved on September 19, 2000. On July 26, 2000, the application was referred to an immigration judge in removal proceedings. On January 23, 2002, the immigration judge denied the applicant's application and granted him voluntary departure until March 25, 2002 with an alternative order of removal if he failed to depart. The applicant appealed the judge's ruling to the Board of Immigration Appeals (BIA). On July 10, 2002, the applicant and his spouse were married in the United States. On September 22, 2003, the BIA affirmed the decision of the immigration judge and granted the applicant voluntary departure within 30 days of the date of the order. The BIA stated that in the event the applicant failed to depart in the time provided, he would be removed as provided for in the immigration judge's decision. The applicant was subsequently granted an extension to the deadline for his departure to November 20, 2003. On November 20, 2003, the applicant was issued a Warning to Alien Ordered Removed or Deported (Form I-294) notifying him that he was subject to removal. The record reflects that the applicant lacked appropriate travel documents allowing him to travel to Kosovo, then under the administration of the United Nations. On October 30, 2004, after receiving the appropriate travel documents from the United Nations, the applicant departed to Kosovo.

The applicant is the beneficiary of a Petition for Alien Relative (Form I-130) filed by his spouse on August 12, 2002 and approved on March 22, 2004. The applicant is also the beneficiary of a Petition for Alien Fiancé(e) filed by his spouse on October 30, 2003 and approved on February 10, 2004. On January 13, 2005, the applicant filed an Application for Immigrant Visa (DS-230) at the U.S. Embassy in Skopje, Macedonia. The applicant subsequently filed an Application for Waiver of Grounds of Excludability (Form I-601) and an Application for Permission to Reapply for Admission into the United States after Deportation or Removal on or about February 7, 2005.

The OIC found that the applicant was unlawfully present in the United States for a period of approximately three years after being "ordered" to depart by the immigration judge. *Decision of OIC Denying Form I-601 Application*, dated February 16, 2006. The 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 waiver application accordingly. *Id.* The OIC denied the Form I-212 application on the same basis. *Decision of OIC Denying Form I-212 Application*, dated February 16, 2006.

On appeal, counsel asserts that the OIC erred in finding that the extreme hardship suffered by the applicant's spouse is ordinary and manageable. *Appeal Brief*, dated March 14, 2006 at 1. Counsel also contends that the

OIC erred in determining that the "severe, debilitating medical and emotional hardship" suffered by the applicant's spouse during the period she lived in Kosovo was a mere "inconvenience." *Id.* Counsel also asserts that the decision contains erroneous facts, such as the assertion that the applicant is a citizen of Mexico and that the applicant's spouse failed to submit any evidence that she suffers from depression. *Id.* Counsel observes that the applicant submitted a copy of his spouse's prescription for Zoloft, an anti-depressant. *Id.* Counsel states that the applicant has continued to "battle depression and seek treatment from [redacted]" *Id.* at 2. Counsel contends that the OIC falsely claimed that the applicant refused to depart from the United States and was unlawfully present in the United States for a period of approximately three years. *Id.* Counsel states that the applicant was ordered to depart the United States on September 22, 2003, but that he was unable to do so because he lacked an appropriate travel document allowing him to travel to Kosovo. *Id.* Counsel indicates that the applicant was denied a passport by the government of Serbia and Montenegro, and was only able to travel after officials of Immigration and Customs Enforcement obtained the appropriate United Nations travel document. *Id.* Counsel contends that the OIC's use of inaccurate information and apparent failure to comprehensively review the applicant's file constitutes a violation of the applicant's right to due process. *Id.* at 2-4. Counsel asserts that the OIC ignored the evidence that the applicant's spouse suffers from depression, and that she suffered hardship from the language barrier, lack of employment opportunities, lack of electricity, water and heat, and obstacles to obtaining medical treatment while in Kosovo. *Id.* at 5.

The record contains, among other documents, affidavits and letters from the applicant's spouse dated November 25, 2007, September 4, 2007, August 20, 2007, July 21, 2007, May 19, 2007, May 11, 2007, April 1, 2007, February 24, 2007, December 9, 2006, March 11, 2006, March 3, 2006, June 2, 2005 and December 6, 2005; an undated and unsigned affidavit from the applicant; letters from the applicant dated August 26, 2008, December 18, 2007 and January 26, 2004; a letter dated November 22, 2007 and an undated letter from the applicant's sister-in-law [redacted]; a letter dated November 25, 2007 from the applicant's brother-in-law [redacted]; a letter dated November 24, 2007 from the applicant's spouse's son [redacted] a copy of a prescription for Zoloft for the applicant's spouse dated August 31, 2004 signed by [redacted]; a handwritten note dated June 5, 2005 from [redacted] indicating that the applicant's spouse is under treatment for anxiety; a letter dated March 9, 2006 from [redacted], stating that the applicant is a patient under treatment for severe depression at the East Towne Clinic of the University of Wisconsin Hospital; a letter from [redacted] of the South Side Clinic of Access Community Health Centers in Madison, Wisconsin indicating that the applicant "struggles with anxiety and depression which is exacerbated by the prolonged absence of" the applicant; copies of the 2005 tax return, tax return transcript, and W-2 forms for the applicant and his spouse; copies of medical bills; a medical report from [redacted] of Kosovo; a statement dated December 18, 2004 signed by numerous individuals attesting to the applicant's employment in the United States and his good character; a letter dated December 21, 2004 from members of the "Monona Grove Optimist Club" attesting to the applicant's employment in the United States and his good character; a letter dated December 20, 2004 from [redacted] attesting to the applicant's good character; a letter dated December 22, 2004 from [redacted] attesting to the applicant's employment in the United States and his good character; and a letter dated December 22, 2004 from [redacted] indicating that the applicant and his spouse resided in an apartment he managed for 12 months and were excellent tenants. The entire record has been reviewed in rendering a decision on appeal.

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

(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 Secretary, 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 reflects that the applicant entered the United States without inspection on or about June 7, 1999 and remained in the United States unlawfully until applying for asylum on June 8, 2000. The applicant's asylum application was ultimately denied by the BIA on September 22, 2003 and the applicant was granted voluntary departure. Section 212(a)(9)(iii) of Act provides that no period of time in which an alien has a bona fide application for asylum pending shall be taken into account in determining the period of unlawful presence. Periods of stay pursuant to a grant of voluntary departure are also not taken into account by USCIS in determining the period of unlawful presence. However, no such exception exists for periods of time after which an alien is permitted to voluntarily depart the United States, and the AAO cannot create an exception in spite of the applicant's claimed inability to obtain travel documents allowing him to return to Kosovo during the period approved for his voluntary departure. Regardless, the applicant had previously accrued unlawful presence from June 7, 1999 to June 8, 2000, a period in excess of one year. The applicant also accrued unlawful presence from November 20, 2003 to October 30, 2004. The applicant is now seeking admission to the United States. Therefore, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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. The applicant's U.S. citizen spouse 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; s*ee also Matter of Mendez-Moralez,* 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).

In addition, the Ninth Circuit Court of Appeals in reversing the denial of suspension of deportation to the petitioner in *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[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." (Citations omitted), *see also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) ("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 be given appropriate weight in the assessment of hardship factors in the present case.

An analysis under *Matter of Cervantes-Gonzalez* is generally 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.

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 spouse faces extreme hardship if the applicant is not granted a waiver of inadmissibility.

The AAO acknowledges that the applicant's spouse suffers depression as a consequence of her separation from the applicant, but it has not been demonstrated that this hardship, when combined with other hardship factors, rises to the level of extreme hardship. In their statements, [redacted] and [redacted] indicate that the applicant's spouse is receiving treatment for anxiety and depression related to her separation from the applicant, but they do not elaborate sufficiently on the severity of her condition or the impact this condition has on her ability to function normally. The record reflects that the applicant's spouse maintains employment in spite of her condition. The applicant's spouse has asserted that she is able to work only part-time as a consequence of her depression, but she has submitted no evidence to support this claim. 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)).

The applicant's spouse has asserted that she is experiencing financial hardship because she must support the applicant in Kosovo, and emotional hardship because her roommate will not allow her mentally ill adult son to live with them, but she has not submitted sufficient evidence to support these claims. Although the record reflects that the applicant was employed while living in the United States, there is no evidence that separately shows his income while he was living in the United States. The applicant has asserted that he is unable to find employment in Kosovo, and is thus dependent on his spouse, but he has submitted no documentary evidence concerning employment conditions in Kosovo or evidence showing remittances sent by his spouse to him in Kosovo. Likewise, the applicant's spouse has failed to provide specific information concerning her current income and living expenses, or to submit documentary evidence of her financial circumstances as they compare to circumstances prior to the applicant's departure. The record reflects that the applicant's spouse did not claim her son [redacted] as a dependent on her 2005 tax return and that he is receiving government assistance for his disability, including housing assistance. The applicant has not provided a reasonable explanation for the failure to produce documentary evidence that supports his application. Based on the evidence in the record, the AAO is unable to determine if, and to what extent, the applicant's spouse is experiencing financial hardship that can only be alleviated by allowing the applicant to return to the United States.

The OIC properly considered the fact that the applicant was in removal proceedings at the time of his marriage in 2002, a factor indicating the applicant's spouse's reasonable expectations concerning the possibility that she would be separated from the applicant or required to relocate to another country to remain with him. In *Cervantes-Gonzalez*, the court found this to be a relevant factor in rejecting the extreme hardship claim of the respondent's wife. *See* 22 I. & N. Dec. at 566-67 ("the respondent's wife knew that the respondent was in deportation proceedings at the time they were married . . . [which] goes to the respondent's wife's expectations at the time they were wed . . . [and] undermine[s] the respondent's argument that his wife will suffer extreme hardship if he is deported."). Counsel's claim that the OIC's decision is based on the mistaken belief that the applicant is a citizen of Mexico is itself based on a misreading of the decision. The references to Mexico in the decision are part of a summary of the facts presented in the *Cervantes-Gonzalez* case, not a reference to the applicant or his spouse. The AAO has also considered the hardship of family separation in this case, but notes that the Ninth Circuit in both *Salcido-Salcido* and *Cerrillo-Perez* considered the hardship of separating parents from minor dependent children, not the hardship involved in separating two recently married adults.

Although the applicant's spouse's depression is a significant hardship factor, the applicant has not submitted sufficient evidence demonstrating that this factor combined with other hardship factors constitutes extreme hardship. The AAO concludes that the hardship described by the applicant is the common 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.

The AAO acknowledges that the applicant's spouse did and would suffer extreme hardship in Kosovo as a consequence of her medical condition, language and cultural barriers, lack of family ties, and abandonment of

her employment in the United States. However, as stated above, the applicant has failed to demonstrate that his spouse suffers extreme hardship in the United States.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, 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 has failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief under section 212(a)(9)(B)(v) of the Act, no purpose would be served in discussing whether he merits a waiver as a matter of discretion or should be granted permission to reapply for admission after removal as a matter of discretion under section 212(a)(9)(A)(iii) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) 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.