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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

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEW YORK, NY Date: JAN 05 2011

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)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ellen C. Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York 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 Albania who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to enter the United States through fraud or the willful misrepresentation of a material fact. The record indicates that the applicant is married to a U.S. citizen. He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States.

The District Director found that the applicant had failed to establish that the bar to his admission would result in extreme hardship for a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *District Director's Decision*, dated March 8, 2010.

On appeal, counsel contends that United States Citizenship and Immigration Services (USCIS) misunderstood the facts presented in the applicant's waiver application and, further, incorrectly applied the extreme hardship standard. Counsel also asserts that USCIS failed to consider that the applicant's use of a fraudulent document in his attempt to enter the United States was prompted by his flight from persecution and should be viewed as a mitigating factor in the exercise of discretion. *Form I-290B, Notice of Appeal or Motion,* dated March 19, 2010.

The record includes, but is not limited to, statements from the applicant, his spouse, his mother-in-law and his sister-in-law; employment letters for the applicant and his spouse; W-2 forms and earnings statements for the applicant and his spouse; tax returns; Social Security statements for the applicant and his spouse; medical statements concerning the applicant's mother- and father-in-law; psychological evaluations of the applicant's spouse; billing and banking statements; a rental agreement; documentation of the healthcare coverage provided through the applicant's spouse's employment; country conditions materials on Albania; and evidence previously submitted in relation to the applicant's asylum application. The entire record was reviewed and all relevant information considered in reaching a decision on the appeal.

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.

The record establishes that the applicant attempted to enter the United States on May 3, 2003 under the Visa Waiver Pilot Program (VWPP) using a counterfeit Italian passport.

Prior to considering the applicant's claim to extreme hardship, the AAO will first consider whether his misrepresentation has been purged by his admission to his true identity during secondary inspection at the port-of-entry. In *Matter of M,* 9 I&N Dec. 118 (BIA 1960), the Board of Immigration Appeals (BIA) held that a respondent who had asserted and then voluntarily retracted his claim to being a lawful permanent resident during the same interview could establish the good moral character necessary for a grant of voluntary departure. The BIA has also found respondents to have "timely retracted" misrepresentations in cases where they used fraudulent documents only *en route* to the United States and did not present them to U.S. officials for admission, but, rather, immediately requested asylum. *See, e.g., Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991); *cf. Matter of Shirdel*, 18 I&N Dec. 33 (BIA 1984). The AAO also notes that the Department of State follows similar reasoning in determining whether a misrepresentation on the part of an overseas visa applicant should result in a finding of inadmissibility under 212(a)(6)(C)(i) of the Act:

> A timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for INA 212(a)(6)(C)(i) inadmissibility. Whether a retraction is timely depends on the circumstances of the particular case. In general, it should be made at the first opportunity. If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview.

Foreign Affairs Manual (FAM), Title 9, Section 40.63, Note 4.6.

In the present matter, the applicant's retraction of his misrepresentation, although it occurred at the port-of-entry, was not timely as it did not occur at the first opportunity. During his primary inspection, the applicant did not state his true identity to the U.S. immigration inspector but, instead, sought admission by presenting a counterfeit Italian passport. He admitted to his true identity and requested asylum only when he was questioned during his secondary inspection. Based on these facts, the applicant is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for having attempted to enter the United States through fraud or the willful misrepresentation of a material fact and must seek a waiver under section 212(i) of the Act.

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.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or

lawfully resident spouse or parent of the applicant. Hardship to the applicant or other family members can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez,* 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals (BIA) stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. *Id.* The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The BIA has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the BIA has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the BIA considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial

hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The AAO now turns to the question of whether the applicant in the present case has established that his U.S. citizen spouse would experience extreme hardship as a result of his inadmissibility.

On appeal, counsel asserts that the applicant's spouse does not speak Albanian. He states that it would be virtually impossible for her to find employment in Albania or to assimilate to its society because of her lack of Albanian language skills, and the pervasive subordination and societal discrimination against women in Albania. Counsel also notes that the life of the applicant's spouse would be placed at risk if she relocated to Albania because of the dangerous conditions there. He further contends that the applicant's spouse would have to leave behind her elderly, sick parents for whom she is the primary caretaker.

In an April 16, 2010 affidavit, the applicant's spouse states that relocation will require her to abandon her parents who are "increasingly overcome by their ailments." She asserts that they will require a caretaker and that she is that caretaker as her sister suffers from a heart condition, has been diagnosed with two forms of cancer and must care for a bipolar daughter and that daughter's children. The applicant's spouse also states that, even if she could speak Albanian, she would not be able to assimilate to a culture in which women are marginalized and still treated like property and would not be able to find employment.

The applicant has also submitted statements from his sister-in-law and mother-in-law regarding the hardships that would result from his removal. In a March 20, 2009 statement, the applicant's sister-in-law states that she has health problems, including breast cancer and a myxoma in her heart, which required open heart surgery. She contends that she is not sure that her parents would be able to handle the removal of the applicant whom they consider to be one of their children and

that they both have heart problems and do not need any added stress. In an April 7, 2010 statement, the applicant's mother-in-law asserts that the denial of the applicant's waiver has had a severe impact on her and her husband's health. She reports that she is 80-years-old, has coronary artery disease and is almost to the point where she needs a caregiver. The applicant's mother-in-law also indicates that her husband is a heart patient who has had six bypasses. She states that while her daughter does not want to be separated from the applicant, her daughter knows that she has elderly parents who are going to need her shortly. She contends that, as long as her daughter is in New York, she can be with them in a short time, but that this would not be possible if she relocated to Albania.

In support of the medical problems being experienced by the applicant's in-laws, the record contains a January 23, 2009 statement from [redacted] who reports that the applicant's father-in-law is a heart patient, and that his and his wife's medical needs may require the assistance of the applicant's spouse. [redacted] indicates that they have required her care in the past and recommends that the applicant's spouse remain available to meet her parents' needs. A handwritten note from [redacted], a nurse practitioner, dated January 20, 2009, states that the applicant's father-in-law has a history of coronary artery disease, hypertension and unstable angina, and that the applicant's mother-in-law suffers from diabetes, heart disease and has a pacemaker. [redacted] asserts that as a result of the applicant's in-laws' precarious state of health, his spouse needs to remain in the United States.

The record also contains a March 29, 2010 medical statement from [redacted] who states that the applicant's mother-in-law is his patient and that she has a history of ischemic heart disease and has had a pacemaker implanted. He reports that the applicant's mother-in-law has significant underlying cardiovascular disease and may be dependent on her daughter to care for her in the near future given her age and health. [redacted] says that he believes the stress of her daughter leaving the United States for Albania would be "difficult for [the applicant's mother-in-law] to deal with." He states that he understands that the applicant's spouse is the only daughter available to care for her mother should she need it. [redacted] also notes that the applicant's father-in-law is one of his practice's long-term cardiac patients. No medical documentation has been submitted to demonstrate that the applicant's sister suffers from any medical condition or that one of her children has mental health problems.

The record also includes a copy of the Department of State's 2009 Human Rights Report: Albania, issued March 11, 2010, which provides an overview of continuing human rights concerns within Albania. The AAO notes that it reports that the 2009 minimum wage in Albania was not sufficient to provide a decent standard of living for a worker and his or her family. However, nothing in the record establishes that the applicant who has gained employment experience in the United States would be limited to minimum wage employment upon return to Albania. Moreover, the overview of human rights conditions in Albania that is provided in the State Department report does not demonstrate what circumstances would affect the applicant's spouse in Albania. General economic or country conditions in an alien's native country do not establish extreme hardship in the absence of

evidence that the conditions would specifically impact the qualifying relative. *Kuciemba v. INS*, 92 F.3d 496 (7th Cir. 1996) (citing *Marquez-Medina v. INS*, 765 F.2d 673, 676 (7th Cir. 1985)).

While the AAO does not find the record to demonstrate that the applicant's spouse would be subjected to human rights abuses if she relocated to Albania, we do observe that she does not speak, read or write Albanian and acknowledge the impact that her inability to communicate would have on her ability to find employment or to integrate into Albanian society and culture. We further acknowledge that she has no ties to Albania, that all members of her family reside in the United States and that both of her elderly parents have serious health problems. While the record does not establish that she is the only child on whom her parents can depend in the event their health worsens, the AAO recognizes the emotional impact on the applicant's spouse of leaving the United States when her parents' health is so fragile. Accordingly, the AAO finds that when these specific hardship factors and those normally created by relocation are considered in the aggregate, the applicant has established that relocation to Albania would result in extreme hardship for his spouse.

To establish that the applicant's spouse would also suffer extreme hardship if the applicant is removed and she remains in the United States, counsel states that the applicant and his spouse have shared and comingled all aspects of their lives and that the applicant's spouse will suffer major psychological trauma if she is separated from the applicant. He asserts that she is already suffering from major mood disturbances, which have become more severe over time as a result of her concern over the applicant's potential removal. In her April 16, 2010 statement, the applicant's spouse also states that her psychological state has declined. She asserts that she is distraught, often tearful beyond her control, subject to unstable moods and that it is difficult for her to concentrate. She states that, even though she has tried to avoid it, she has come to a point where she must begin psychotherapy.

In her March 20, 2009 statement, the applicant's sister-in-law claims that her sister has spent her whole life "living in the shadows of other people's happiness." She states that although her sister could survive a separation from the applicant that his absence would remove part of her "heart and soul." She further asserts that the separation of the applicant and her sister would create a hardship for the entire family and could cause serious health problems for her parents and would create problems with stress for her.

The record contains two psychological evaluations of the applicant's spouse prepared by certified clinical psychopathologist, [redacted]. [redacted] initial evaluation of the applicant's spouse, dated December 19, 2008, finds her to be suffering from Adjustment Disorder with Mixed Anxiety and Depressed Mood as a result of the applicant's immigration problems. He indicates that the applicant's spouse's symptomatology was tested by the Beck Anxiety Inventory (BAI) and Beck Depression Inventory II (BDI-II) and that these tests confirmed the presence of active anxious-distressing thoughts, feelings and reactions. In his second evaluation, dated March 24, 2010, [redacted] reports that two additional psychological inventories were administered to the applicant's spouse to measure her depression and anxiety, the Burns Anxiety Inventory and the Burns Depression Checklist (BDC). [redacted] states that these instruments found the applicant's

spouse to be experiencing aggravated symptoms of depression and anxiety, and concludes that she is suffering from Dysthymic Disorder (chronic, moderate-to-severe depressed mood). The evaluations, however, offer little information regarding the specifics of the applicant's spouse's mental status.

In his 2008 evaluation, [redacted] finds the applicant's spouse to be experiencing a "combined anxious-depressive reactive condition" and to show "typical signs of sadness, anguish, worrisomeness and emotional stress." He also reports that, during the interview, the applicant's spouse described problems with her appetite, sleep, digestion and concentration. The evaluation does not, however, discuss the symptoms reported by the applicant's spouse, their severity or how they were affecting the applicant's spouse's ability to function at the time of the interview. Neither does it indicate what typical signs of sadness, anguish and stress were shown by the applicant's spouse during the course of her interview. Instead, [redacted] reports on the applicant's spouse's symptomatology as measured through the BDI-II and BAI, which, he states, confirms the "presence of active anxious-distressing thoughts, feelings and reactions, including the typical symptoms of emotional stress." Although [redacted] provides a list of such symptoms, he does not specify which of them the applicant's spouse reported experiencing during the tests administered to her.

[redacted] summary of his second interview reports that the applicant's spouse appeared to be "markedly despondent, sad-looking, [and] extremely anguished" and that the "cluster of intense anxious-depressive symptoms" she had first reported during their December 2008 interview were worse. Having made these observations, however, [redacted] does not indicate that he explored the changes in the applicant's spouse's emotional state during the interview or that he sought detail from her as to what aspects of her daily life and behavior were being affected, including her ability to meet her responsibilities at home and at work. Although his diagnosis of Dysthymic Disorder indicates that the applicant's spouse reported problems with her appetite, digestion, sleep, concentration and relaxation at the time of their second interview, there is, again, no discussion in the evaluation that addresses the specifics of these problems or the extent to which they were affecting the applicant's spouse's ability to function. Instead, [redacted] reports the applicant's spouse's scores on the Burns Depression Inventory and the BDC, which, he states, correspond to "even higher ranges of classification compared to [her] 2008 performance." He lists a range of symptoms that would typically be experienced by an individual with such test scores, but does not indicate which are specific to the applicant's spouse.

Based on the discussion provided in the evaluations, the AAO does not find the record to establish that the applicant's spouse would experience extreme emotional hardship in his absence. Neither of the evaluations includes the type of detailed reporting and analysis necessary to support a mental health diagnosis and the applicant's spouse's scores on the BDI-II, BAI, Burns Depression Inventory and the BDC do not offset this deficiency. In the absence of a discussion of the specific health impacts or symptoms reported by the applicant's spouse at the time of her interviews with [redacted] and during the administration of the four psychological tests, including the frequency and severity of these impacts or symptoms, the AAO is unable to determine the extent of the hardship that the applicant's spouse would experience as a result of his removal. Accordingly, the AAO does not

find the record to establish that the applicant's spouse would experience extreme emotional hardship if the applicant is removed.

As the applicant does not contend that his spouse would experience other than emotional hardship in his absence, the AAO concludes that he has not demonstrated that his spouse would experience extreme hardship if his waiver application is denied and she remains in the United States.

Although the record establishes that the applicant's spouse would experience extreme hardship if she relocates to Albania, it does not demonstrate that she would also suffer such hardship if she remains in the United States. Accordingly, the applicant has failed to establish eligibility for a waiver under section 212(i) 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. The AAO will not, therefore, consider counsel's assertions regarding the positive exercise of discretion in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) 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.