U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: MAR 2 7 2013 Office: CHICAGO FILE: [redacted]

IN RE: Applicant: [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.

Thank you,

for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Chicago, Illinois. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Montenegro[1] 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 attempting to procure admission to the United States through fraud or misrepresentation. The record reflects that the applicant entered the United States on September 23, 2000 using a fraudulent passport. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act in order to reside in the United States with his U.S. Citizen spouse.

The field office director 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 Ground of Excludability (Form I-601) accordingly. *Decision of the Field Office Director,* dated December 9, 2011.

The record contains the following documentation: briefs submitted by the applicant's attorney in support of the Form I-290B Notice of Appeal or Motion and Form I-601 Application for Waiver of Grounds of Inadmissibility; a statement from the applicant's spouse; financial documentation; a psychosocial assessment for the applicant's spouse; medical documentation for the applicant's spouse; and country conditions information for Montenegro. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (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 indicates that on September 23, 2000, the applicant presented a Slovenian passport and a visa waiver application to a U.S. immigration officer at O'Hare International Airport in Chicago, Illinois in order to gain entry to the United States. Upon secondary inspection, the applicant admitted that his true nationality was Yugoslavian, and the applicant further admitted that he possessed a genuine passport issued to him by the government of Yugoslavia, which he did not present at the time of entry. On appeal, counsel asserts that the applicant made a timely retraction of the misrepresentation that he was a citizen of Slovenia, as he corrected himself after being referred to secondary inspection, and therefore the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act for the willful misrepresentation of a material fact.

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[1] The record indicates that the applicant was born in Montenegro, which was formerly part of Yugoslavia. The Federal Republic of Yugoslavia issued a passport to the applicant on August 11, 1999. In 2003, Yugoslovia changed its name to Serbia and Montenegro. In 2006, Montenegro became an independent state.

The record shows that the applicant misrepresented himself to be a citizen of Slovenia, using a fraudulent Slovenian passport, in an attempt to procure entry to the United States under the Visa Waiver Program. At the time of the applicant's attempted entry, on both the Form I-94W Nonimmigrant Visa Waiver Arrival/Departure Form and the Customs Form 6059B, the applicant entered "Slovenia" as his country of citizenship, and presented himself at the port of entry as a citizen of Slovenia, constituting a willful misrepresentation in an attempt to procure entry to the United States. It was only after the applicant was referred to secondary inspection that the applicant admitted that he was not a citizen of Slovenia, and that his true nationality was Yugoslavia. As such, the applicant's retraction was not made at the first opportunity,[2] but rather was made after the fact that he had been referred to secondary inspection.

Section 291 of the Act, 8 U.S.C. § 1361, states that whenever any person makes an application for admission, the burden of proof shall be upon such person to establish that he is not inadmissible under any provision of this Act. The burden never shifts to the government to prove admissibility during the adjudication of a benefit application, including an application for a waiver. INA § 291; *Matter of Arthur*, 16 I&N Dec. 558 (BIA 1976). The applicant has not met his burden.

Section 212(i) of the Act provides that:

> 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 or, in the case of an alien granted classification under clause (iii) or (iv) of section 204 (a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B), the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

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. The applicant's U.S. citizen wife 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 USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (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 Board provided a list of

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[2] The Foreign Affairs Manual, at 9 FAM 40.63 N4.6 Timely Retraction, states: "Whether a retraction is timely depends on the circumstances of the particular case. In general, it should be made at the first opportunity."

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 Board 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 Board has also held that the common or typical results of 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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 Board 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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1993), (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily

separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

Counsel states that the applicant's spouse will suffer financial hardship if the applicant's waiver application is not approved. The record indicates that the applicant's spouse is employed in the Communications Department at . A letter from the employer of the applicant's spouse, dated August 17, 2010, indicated that her rate of pay at that time was $16.27 per hour. On Form I-864, Affidavit of Support Under Section 213A of the Act, signed by the applicant's spouse on October 7, 2010, the applicant's spouse indicated an annual income of $33,841.60. The record includes a copy of the 2009 federal income tax return for the applicant and his spouse, showing an adjusted gross income of $61,734.00, indicating that a substantial amount of the family's income is derived from the applicant. In a statement dated January 13, 2011, the applicant's spouse states that she is studying for a degree in broadcast journalism at Counsel states that the applicant and his spouse have taken significant loans to finance the applicant's spouse's education at The record does not contain any direct evidence regarding these educational loans. However, the copy of the 2009 federal income tax returns indicates that the applicant's spouse had $15,406.00 billed for qualifying tuition and educational expenses, and a copy of the 2008 federal income tax returns indicates that the applicant's spouse had $14,274.00 billed for qualifying tuition and educational expenses, showing that the applicant's spouse was incurring substantial expenses for her education.

Counsel contends that the applicant's spouse will further suffer from psychological hardship if the applicant's waiver application is not approved. Counsel states that the applicant's spouse has regular appointments with a psychologist to help her cope with the situation regarding the applicant's immigration status. The record includes a psychosocial assessment for the applicant's spouse by a licensed clinical social worker. The assessment concludes that applicant's spouse has a diagnosis of Generalized Anxiety Disorder, and that, in the opinion of the author, the removal of the applicant from the United States will create extreme and irreparable harm to the applicant's spouse.

Counsel further notes that the applicant's spouse suffers from medical conditions, and that she relies upon medical insurance in the United States to treat these conditions. The conditions include symptoms of an ulcer, migraines, and repeated episodes of strep throat. Counsel states that the ulcer condition runs in her family. The record includes medical documentation showing that the applicant's spouse has been treated for severe abdominal pain, epigastric pain, dyspepsia, pyrosis, and abdominal bloating. The psychosocial assessment notes that there is also is a history high blood pressure and thyroid problems in the family of the applicant's spouse.

The financial, psychological, and medical hardships that the applicant's spouse will experience if the applicant's waiver is not approved, when considered individually, do not rise to the level of extreme hardship; however, when these hardships are considered in the aggregate, the hardships are beyond the common results of removal and would rise to the level of extreme hardship if she remained in the United States without the applicant.

The record further indicates that the applicant's spouse would experience hardship were she to relocate to Montenegro to be with the applicant. The applicant's spouse was born in the United States, and has resided in the United States all her life. Although her parents came from Yugoslavia, and are ethnic Albanians, counsel notes that the applicant's spouse does not fluently speak, read, or write either Albanian or Serbian, the two languages used in Montenegro. The applicant's spouse has no immediate family ties to Montenegro, other than the applicant. The record indicates that the parents and grandparents of the applicant's spouse are all naturalized U.S. citizens, and she has two siblings who were born in the United States.

Counsel states that relocating to Montenegro would be detrimental to the ability of the applicant's spouse to obtain medical treatment. The State Department advises that although many physicians in Montenegro are highly trained, hospitals and clinics are generally not equipped or maintained to Western standards, and that Montenegro has only a small number of ambulances, and that, as a consequence, emergency services are generally responsive in only the most severe cases.[3]

The applicant has established that his spouse would suffer hardship beyond the common results of removal if she were to relocate to Montenegro to reside with the applicant.

The AAO thus finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. 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).

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[3] See *Montenegro, Country Specific Information, U.S. Department of State, Medical Facilities and Health Information*, http://travel.state.gov/travel/cis_pa_tw/cis/cis_2974.html#medical, accessed February 11, 2013.

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "balance 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 favorable factors in this matter are the extreme hardships the U.S. citizen spouse would face if the applicant were to reside in Montenegro, regardless of whether she accompanied the applicant or remained in the United States; the applicant's residing in the United States for more than 10 years; and the applicant's apparent lack of a criminal record. The unfavorable factor in this matter is the applicant's misrepresentation to enter the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in her application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The waiver application is approved.