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

U.S. Citizenship and Immigration Services

#6

[redacted]

FILE: [redacted] Office: VIENNA, AUSTRIA Date: AUG 2 5 2010

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility 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:

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 $585. 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,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Serbia and Montenegro who 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. The applicant is the spouse of a U.S. citizen. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), so as to immigrate to the United States. The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant filed a timely appeal.

Counsel contends on appeal that the applicant's wife was born in the United States and has a close relationship with her family members, who all live in the United States, and that her family members have a history of cancer so the applicant's wife must have regular screening. Counsel states that the applicant's wife also has migraine headaches for which she takes Imitrex, has been diagnosed with dysthymic disorder and is under the care of a psychologist. He contends that the applicant's wife is concerned about separation from her husband and is having financial difficulties due to supporting herself and her husband. Counsel avers that the applicant's wife will be isolated in Montenegro without family or friends, and will be disadvantaged in finding employment because she does not speak Albanian or Serbian and because her work is in the technology field. Counsel asserts that the applicant's husband has been unable to obtain employment in Montenegro, that the applicant's wife will not have access to medication or cancer screening in Montenegro, and that she will lose her current health insurance, which provides reconstructive surgery.

The AAO will first address the finding of inadmissibility. Inadmissibility for unlawful presence is found under section 212(a)(9)(B) of the Act. That section provides, in part:

> (B) Aliens Unlawfully Present
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or
> >
> > > (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.
> >
> > . . . .

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection on December 3, 1984. On June 28, 1989, he was apprehended and placed in deportation proceedings. On July 6, 1989, the applicant was issued an Order to Show Cause and Notice of Hearing. On October 23, 1989, the applicant was ordered to appear at a master hearing on February 20, 1990. On November 14, 1989, the applicant filed an asylum application. On April 25, 1990, the immigration judge denied the applicant's asylum application and ordered that in lieu of an order of deportation the applicant be granted voluntary departure on or before July 25, 1990, and if he failed to depart that he be deported to Yugoslavia. The applicant filed a Petition for Review with the Board of Immigration Appeals (Board). On August 4, 1994, the Board affirmed the decision of the immigration judge, and ordered that the applicant be permitted to depart from the United States voluntarily within 30 days from the date of the order. On November 14, 1994, the applicant filed a Petition for Review, which was dismissed by the Sixth Circuit Court of Appeals on January 29, 1996. On June 6, 1997, a warrant of removal/deportation was issued. On December 6, 2004, the applicant was deported from the United States.

The applicant began to accrue unlawful presence from April 1, 1997, the date on which the unlawful presence provisions went into effect, until December 6, 2004, when he was deported from the country and triggered the ten-year bar, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

> The Attorney General [now Secretary of Homeland Security] 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 . . . 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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 his children can 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 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).

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 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 Board 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 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 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 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.*

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 Board 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) ([redacted] 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.

In rendering this decision, the AAO will consider all of the evidence in the record including birth certificates, letters, medical records, credit reports, information about cancer, criminal records, a health insurance plan, the U.S. Department of State Consular Information Sheet on Montenegro

(August 14, 2007), and other documentation.

With regard to the applicant's wife remaining in the United States without him, the applicant's wife contends in her letter dated September 23, 2007 that she has a close relationship with her husband, whom she began dating in 1998 and married on December 11, 2004. She indicates that in late 2002 the applicant, with whom she lived, touched her in anger and she called the police. She states that they never had such an incident again and that her husband complied with the terms of his probation and underwent 26 weeks in a domestic violence program. She conveys that she has visited her husband twice in Montenegro and is emotionally connected with him despite their separation.

The oldest sister of the applicant's wife conveyed in her letter dated June 18, 2007 that the applicant has a close relationship with her sister and that he has helped her sister during her recovery after sinus surgery and when she was burdened with her job. The undated letter by the licensed psychologist conveys that the applicant's wife attended 12 therapy sessions since May 30, 2007. She declares that the applicant's wife has dysthymic disorder and that she has been working with her to alleviate her depression, which is caused by separation from the applicant and concern about finances. The letter by [redacted] dated July 25, 2007 conveys that in the past he treated the applicant's wife for depression and that she is now seeing a psychologist.

We note that the record conveys that in 2002 the applicant was convicted of domestic violence against his girlfriend (who is now his wife) in violation of Michigan Compiled Laws § 750.81(2), a misdemeanor punishable by imprisonment for up to 93 days and a fine.[1] The record shows that he completed a mandatory 26-week domestic violence program and a 12-month term of probation, and that the plea or finding of guilt under the Spouse Abuse Act, Michigan Compiled Laws § 769.4a, was set aside and his case was dismissed. The applicant's wife asserted in her August 1, 2007 letter that her husband has learned from his mistakes and is regretful and ashamed. The applicant stated in his letter dated April 24, 2007 that he is ashamed of his act of domestic violence against his wife and has learned from counseling that he should never abuse anyone for any reason.

The hardship factors asserted in the instant case are the financial and emotional impact to the applicant's wife as a result of separation from her husband. The evidence in the record reflects that the applicant's wife was diagnosed with dysthymic disorder and attended therapy sessions with a psychologist due to emotional hardship as a result of separation from her husband. In view of the substantial weight that is given to this type of family separation in the hardship analysis, and in light of the single incident of domestic violence and the remorse expressed by the applicant, we find the applicant has demonstrated that the hardship that his wife will experience as a result of separation is extreme.

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[1] The applicant's offense qualifies for the petty offense exception under section 212(a)(2)(A) of the Act as the maximum term of imprisonment for violation of Michigan Compiled Laws § 750.81(2) is 93 days.

With regard to the applicant's wife joining him to live in Montenegro, [redacted] states in his letter dated February 22, 2005 that the applicant's wife has a family history of cancer: her sisters have had breast cancer and her mother and grandmother have had ovarian cancer. He conveys that the applicant's wife has a history of ovarian cysts. The letter by [redacted] indicates that the applicant has a history of migraines. In a letter dated September 11, 2007, [redacted] the applicant's wife's sister, indicates that she survived breast cancer and had to undergo 7 surgeries, 6 hospitalizations, 8 chemotherapy treatments, 38 radiation treatments, and years of medication to treat breast cancer, and that she will take some medication indefinitely. The oldest sister of the applicant's wife indicates in her letter dated September 9, 2007 that she was diagnosed with breast cancer when she was 44. In her letter dated August 1, 2007, the applicant's spouse indicated that she takes Imitrex for migraine headaches, which cost $225 for nine pills, and that she does not know whether the medication is available in Montenegro. The record reflects that the applicant's wife has a bachelor's degree in computer information systems (programming), and is currently employed with [redacted] as a senior technical customer support representative. In her letter dated August 1, 2007, the applicant's wife conveyed that she does not speak any of the official languages of Montenegro and believes that due to her age (she is 47 years old) and the language barrier she will not be able to obtain employment. The letter by the applicant's brother-in-law dated September 13, 2007 conveyed that of his six siblings the applicant's wife is the only one who completed a bachelor's degree. He declared that his sister's career is very important to her. The letters by the applicant's wife's family members convey they have a close relationship with her. Counsel indicates that the applicant was born and raised in the United States.

Regarding healthcare in Montenegro, the British and Foreign Commonwealth Office conveys that "the health system in Montenegro can suffer from a shortage of medicines and other essentials." The Foreign and Commonwealth Office, Travel and Living Abroad, Travel Advice by Country: Montenegro, July 19, 2010. The U.S. Department of State indicates that "[a]lthough many physicians in Montenegro are highly trained, hospitals and clinics are generally not equipped or maintained to Western standards." U.S. Department of State, Bureau of Consular Affairs, Consular Information Sheet: Montenegro (May 10, 2010). The World Health Organization stated that "[t]he risk of dying from cancer of the uterine cervix is high in Serbia and Montenegro (the fifth highest in European countries. . . . Also, the mortality rate for cancer of other parts of the uterus was high in Serbian and Montenegro women in 2001 and 2002 (the fifth highest among European countries)." World Health Organization, Europe, *Highlights on health in Serbia and Montenegro,* 15-16 (2005). The record contains general information about cancer and a summary of the health insurance plan of the applicant's wife, which plan describes The Women's Health and Cancer Rights Act. Regarding employment in Montenegro, the United Nations stated that "the average waiting for employment in Montenegro is 4 years." United States Development Programme, Progress on Millennium Development Goals in Montenegro. (http://www.undp.org.me/home/mdg/progress.html).

The hardship factors asserted are concern about obtaining employment, having a family history of cancer and concern about whether the quality of healthcare in Montenegro is comparable to the United States, and separation from family members in the United States. We have found that the evidence supports the assertion that the applicant's spouse will be unable to obtain employment in Montenegro due to its high level of unemployment and her lack of knowledge of the Montenegrin and Serbian languages. The record also reflects a history of cancer in the applicant's wife's family, which requires her to have regular screening for cancer. In view of the information by the World

Health Organization, the Foreign and Commonwealth Office, and the U.S. Department of State, we find that the health care in Montenegro that the applicant's wife will have access to will not be comparable to what she now has through her employer. Thus, when the combination of hardship factors is considered in the aggregate, they establish extreme hardship to the applicant's wife if she joined her husband to live in Montenegro.

In *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

> 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).

Id. at 301.

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 are entry into the United States without inspection, unlawful presence, any unauthorized employment, and the criminal conviction in 2002. The favorable factors in the present case are the extreme hardship to the applicant's spouse; the letter by the applicant in which he expresses remorse for his immigration violations and for the assault and battery on his wife in 2002; the letters by the applicant's wife, his family members, and his in-laws commending his character; his completion of probation and a six-month domestic violence program; and the passage of seven years since his criminal conviction for domestic violence. The AAO finds that the crimes committed by the applicant are serious in nature, nevertheless, when taken together, we find 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, the burden of proving eligibility rests with the applicant. *See* section

291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

ORDER: The appeal is sustained.