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



U.S. Citizenship
and Immigration
Services

H2

[REDACTED]

FILE:

[REDACTED]

Office: BOSTON (HARTFORD)

Date: **APR 23 2009**

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), 8 U.S.C. section 1182(i)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Boston, Massachusetts and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of Yugoslavia and citizen of Montenegro who was found inadmissible to the United States under 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 procured admission to the United States by fraud or willful misrepresentation. The applicant is the beneficiary of an approved Petition for Alien Relative (I-130) filed by his U.S. citizen spouse and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with his spouse and his lawful permanent resident parents.

The record reflects that the applicant arrived at John F. Kennedy airport on March 14, 1996. He sought admission to the United States by presenting a Croatian passport in the name of [REDACTED]. The passport contained what appeared to be a B-2 nonimmigrant visa with an expiration date of March 15, 1996. During secondary inspection, the applicant admitted that the passport was not his. The applicant's Yugoslavian passport, which contained an apparently counterfeit U.S. visa, was discovered during a search of his belongings. The applicant was taken into custody and placed in exclusion proceedings. The applicant requested asylum. On June 28, 1996, the Immigration Judge issued a decision in which he found that the applicant was excludable under section 212(a)(7)(A)(ii) of the Act as an immigrant not in possession of a valid entry document, but not excludable under section 212(a)(6)(C)(i) because no evidence was presented to show "whether or not the Croatian passport would have allowed [the applicant] to enter the United States." *Matter of Siljkovic*, A74 974 476, Oral Decision of Immigration Judge at 3 (June 28, 1996). The Immigration Judge granted the applicant's request for asylum. *Id.* at 28.

The Immigration and Naturalization Service (INS) appealed the Immigration Judge's ruling to the Board of Immigration Appeals (BIA). On May 21, 1997, the BIA issued a decision vacating the decision of the Immigration Judge. The BIA held that the applicant was excludable under 212(a)(6)(C)(i) of the Act as the "elements of fraud or misrepresentation . . . were established by the applicant's testimony . . . that he first presented a Croatian passport to the immigration inspectors, that this passport was not validly issued to him and that he presented this passport with the hope of being admitted to the United States." *In re Siljkovic*, A74 974 476, slip op. at 2 (BIA May 21, 1997). The BIA further held that the Immigration Judge had incorrectly granted asylum to the applicant and ordered that the applicant be deported to Montenegro. *Id.* at 4.

On August 2, 1999, the BIA, citing recent legislation implementing the obligations of the United States under Article 3 of the United Nations Convention Against Torture, reopened the applicant's proceedings because "at the time of the [applicant's] hearing and appeal in the instant case, this Board and the Immigration Judge lacked the jurisdiction to entertain a request for protection under the Convention Against Torture." *In re Siljkovic*, A74 974 476, slip op. at 2 (BIA August 2, 1999) At 2. The BIA stated that it was remanding "the record to the Immigration Court to provide the

[applicant] an opportunity to apply for protection under Article 2 of the Convention Against Torture.” *Id.*

On November 8, 2001, the Immigration Judge issued a “Final Order” on which it is indicated that the applicant had been ordered excluded and deported from the United States under section “212(a)(7)(A)(i)(I) only.” It further stated, “INS NOT PURSUING sec. 212(a)(6)(C)(i) Appl[icant] will not need 212(i) waiver in order to adjust status.” The order also indicated, “[r]elief pursuant to ART 3 CAT knowingly & voluntarily withdrawn with prejudice.”

On July 31, 2000, the applicant married his spouse, [REDACTED], then a lawful permanent resident, in the United States. On January 29, 2001, the applicant’s spouse filed a Petition for Alien Relative (Form I-130) naming the applicant as beneficiary. The petition was denied on March 2, 2005. The applicant’s spouse became a naturalized U.S. citizen on February 17, 2005. She filed another Form I-130 on June 4, 2002, and the petition was approved on June 22, 2005. The applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485) on June 2, 2005 and an Application for Waiver of Ground of Excludability (Form I-601) on November 28, 2004.

On June 11, 2005, the District Director issued a decision denying the applicant’s Form I-601. The District Director found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act. *Decision of District Director*, dated June 11, 2005, at 1. The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. *Id.* at 5.

On appeal, counsel asserts that the applicant is not inadmissible under section 212(a)(6)(C)(i) of Act, and therefore not required to obtain a waiver pursuant to 212(i) of the Act, because the Immigration Judge’s ruling of November 8, 2001 was not appealed and is therefore binding on USCIS. *Brief of Counsel*, dated August 5, 2005, at 1. Counsel observes that the AAO has held in previous decisions that it is bound by orders issued by immigration judges. *Id.* at 6-7. Counsel further contends that USCIS is precluded by collateral estoppel from finding the applicant inadmissible under section 212(a)(6)(C)(i) of the Act because it (as the INS) was a party to the proceedings before the Immigration Judge and had a full and fair opportunity to litigate the issue of inadmissibility. *Id.* (citing *Matter of Fedorenko*, 19 I&N Dec. 57, 61 (BIA 1984)).

Counsel asserts that even were the Immigration Judge’s decision not binding on USCIS, the District Director erred in applying the “exceptional and extremely unusual hardship” standard in determining that the applicant had not established extreme hardship to his spouse. *Id.* at 8. Counsel further contends that certain factual findings made by the District Director were incorrect. *Id.* at 10. In particular, counsel indicates that the District Director’s erred in finding that the applicant’s spouse could support herself and her children in the applicant’s absence because she earned the “bulk” of her family’s income in 2001. *Id.* at 10. Counsel asserts that the evidence shows that the applicant’s spouse earned approximately \$21,059 in 2001, as compared to the \$32,658 earned by the applicant in that year. *Id.* at 10-11. Counsel further asserts that this and other evidence shows that the applicant has always been the primary wage earner of the family. *Id.* Counsel contends that there is

no evidence to support the District Director's findings that other family members will be able to support the applicant's spouse. *Id.* at 11. Counsel summarizes the hardship factors presented by the applicant and asserts that the applicant has met the standard in section 212(i) of the Act. *Id.* at 4-6, 11-12.

In support of the waiver application, the applicant has submitted, in addition to other evidence, an affidavit dated July 27, 2005 from the applicant's spouse; identity documents for members of the applicant's family and his in-laws; a letter dated June 21, 2005 from [REDACTED] indicating that he provided care for the applicant's spouse related to a pregnancy that ended in miscarriage; and tax records for the year 2001. The entire record was considered in rendering 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.

A misrepresentation made in connection with an application for admission to the United States is material either if the alien is excludable on the true facts or if the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded. *See Matter of S- and B-C-*, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

Counsel has asserted that USCIS is bound by the Immigration Judge's finding that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act. The AAO disagrees. Pursuant to section 103(a)(1) of the Act, a "determination and ruling by the Attorney General with respect to all questions of law [is] controlling" in the administration and enforcement of the Act by USCIS. The AAO finds, however, that the Immigration Judge, to the extent his order can be interpreted as containing a finding that the applicant is not inadmissible under section 212(a)(6)(C)(i), exceeded his authority by contradicting the BIA ruling of May 21, 1997 that the applicant is inadmissible on that ground.

As indicated above, the BIA reopened the applicant's proceedings and remanded his case to the immigration court for the sole purpose of allowing the applicant an opportunity to apply for protection under Article 3 of the Convention Against Torture. There is no indication that the BIA intended to disturb its prior rulings concerning excludability in reopening the applicant's proceedings for that limited purpose. Furthermore, the BIA's decision of August 2, 1999 lists section 212(a)(6)(C)(i) as one of the grounds for which the applicant is excludable. As the issue of the applicant's inadmissibility under section 212(a)(6)(C)(i) was not a question before the Immigration Judge on November 8, 2001, but an issue that had been litigated previously and was the subject of a final order by the BIA, counsel's argument concerning collateral estoppel is without merit. The AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) for having

attempted to procure admission to the United States through fraud or material misrepresentation of a material fact.

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 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 and his children is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The qualifying relatives are the applicant's U.S. citizen spouse and his lawful permanent resident parents. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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).

U.S. courts have stated, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[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.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) (“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 therefore be given appropriate weight in the assessment of hardship factors in the present case.

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

In her affidavit, the applicant’s spouse asserts that she is a native of Kosovo, but came to the United States in 1996 with her parents and two sisters. *Affidavit of Applicant’s Spouse*, dated July 27, 2005, at ¶ 2. She states that her entire immediate family is in the United States. *Id.* at ¶ 9. She indicates that the applicant’s parents, his sisters [REDACTED] and [REDACTED] and his brother [REDACTED] also reside in the United States. *Id.* at ¶ 10.

The applicant’s spouse states that she and the applicant own a house and make monthly mortgage payments of \$2,978. *Id.* at ¶ 4. She also indicates that they rent the upper portion of their home for \$1,100 per month. *Id.* She also states that the applicant’s elderly parents are retired and live with them. *Id.*

The applicant’s spouse states that she has not been employed since the birth of her son [REDACTED] in 2004, and that she is now physically unable to work because of hernia surgery. *Id.* at ¶ 5. She indicates that even when she was working, the applicant was the major source of income for their family and for his parents. *Id.* at ¶ 6. She states that the applicant is a part owner of [REDACTED] in Stamford, Connecticut, and that they expect his income of \$35,000 per year to increase as the company continues to perform well. *Id.* at ¶ 8.

The applicant’s spouse asserts that if the waiver is not granted, she will lose the sole financial support for her family and be forced to sell her home or face foreclosure. *Id.* at ¶ 11. She states that her family will have no place to live. *Id.* She states that if she relocates to Montenegro with the applicant, they will lose their interest in the carpet cleaning company and be separated from their family. *Id.* She states that she had “great fear” of living in Montenegro and that the applicant would have no prospects of earning a living there. *Id.* at ¶ 12.

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 or parents face extreme hardship if the applicant is not granted a waiver of inadmissibility.

The AAO acknowledges that the applicant's spouse and parents will experience emotional hardship if they choose to relocate to Montenegro and are separated from other immediate family members, or if they choose to remain in the United States and are separated from the applicant, but the applicant has failed to show that this hardship, when combined with other demonstrated hardship factors, will be extreme. The applicant has not adequately addressed the question of whether he or his spouse has extended family ties in Montenegro. The applicant has also failed to submit independent evidence to substantiate most of his spouse's assertions, and he has not explained why such evidence is unavailable. The applicant has submitted no tax or financial records showing his and his spouse's income and expenses since 2001, no business or other records showing that he is the part owner of a carpet cleaning company, no medical records showing that his spouse had surgery for a hernia and is incapable of working, no mortgage or other documentation showing that they own a house, and no recent country conditions information for Montenegro showing that he will be unable to obtain employment or otherwise experience hardship there. The applicant has submitted no affidavits or statements from his parents concerning any hardship they will experience if the waiver application is denied. 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)). Likewise, without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO acknowledges the significance of family separation as a hardship factor, but concludes that the hardship demonstrated by the evidence in the record is the common result of removal or inadmissibility. 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.

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(i) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

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