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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**

tlr

FILE:

Office: NEWARK, NJ

Date: **SEP 22 2009**

IN RE:

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:

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.

A handwritten signature in cursive script, appearing to read "John F. Grissom".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native of the former Yugoslavia and a citizen of Serbia 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 seeking to procure admission to the United States by fraud or willful misrepresentation. The applicant's spouse and two children are U.S. citizens. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The district 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 Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, at 4, dated February 28, 2007.

On appeal, counsel asserts that the district director erred as a matter of law and fact and did not take into consideration the evidence submitted. *Form I-290B*, received March 30, 2007.

The record includes, but is not limited to, counsel's brief, a psychiatric evaluation of the applicant's spouse, the applicant's spouse's statements, medical records for the applicant, financial documents for the applicant and his spouse, a medical letter and records for the applicant's son and country conditions information. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that on May 16, 1999, the applicant sought admission to the United States with a Slovenian photo-substituted passport. Based on the applicant's misrepresentation, he is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act.

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.

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.

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(6)(C)(i) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member, in this matter, the applicant's spouse. Hardship to the applicant or his two children is not a permissible consideration in a 212(i) waiver proceeding except to the extent that such hardship may affect the qualifying relative. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The AAO notes counsel's claims that the applicant's case is distinguishable from the cases cited by the district director in his decision. *Brief in Support of Appeal*, at 7-9, dated March 28, 2007. It finds the district director to have cited these cases to establish general principles for determining extreme hardship, not as examples of cases involving facts similar to those in the present case. The AAO will adjudicate the applicant's appeal based on the relevant case law.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals (BIA) deems relevant in determining whether an alien has established extreme hardship. These factors include the presence of lawful permanent resident or U.S. citizen family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse must be established whether she resides in Serbia or in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that she resides in Kosovo, which since their departures has declared its independence from Serbia. Counsel states that the applicant fled his country because of war and requested asylum; he was granted temporary protected status, which reflects the credibility of his asylum claim; Serbia has very poor economic and political conditions; he is sick and has no prospect of finding a job; his spouse would not be able to find employment; and his life would be threatened. *Brief in Support of Appeal*, at 7-9. The applicant's spouse states that separating her sons from their friends in the United States would cause them emotional distress, especially her older son who is not in good health; it would be hard for her children to adjust and they do not know any other country but the United States; her children only speak English; her older son is under the constant care of doctors and his health would be in serious danger as medical facilities were destroyed during the war in Kosovo, and there is a shortage of medical staff and medicine; the applicant is under a doctor's care, he has been admitted to the hospital several times, he suffered a heart attack at 36 due to the stress and persecution he endured by the Serbian government and authorities; she is sure that the applicant's

health conditions would deteriorate to the point that he would have another heart attack if he returned to Kosovo, which would cause emotional distress to her and the children; Kosovo is a dangerous place, all of their lives would be in serious jeopardy and she and the applicant left Kosovo because their lives were in danger. *Applicant's Spouse's Statement*, at 34, dated February 16, 2007. The record includes prescription records for the applicant related to cholesterol, blood pressure and heart conditions. It also includes copies of prescriptions for the applicant's older child, as well as a medical letter from the doctor treating him for asthma.

While the AAO notes that the hardships claimed by counsel and the applicant's spouse affect the applicant and his older son, neither of whom are qualifying relatives, it also observes that the record establishes that the applicant's spouse is from the former Yugoslavia (Kosovo) and, in 1998, was granted asylum in the United States. *Applicant's Spouse's Form I-94*, dated March 6, 1998. As such, the AAO finds that her return to Kosovo would constitute extreme hardship.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his spouse remains in the United States. Counsel states that a joint title and joint deed of the house, and pay stubs for the applicant and his spouse were submitted; the evidence proves loss due to sale of home or business; the applicant's spouse would have to sell her house or lose it; the applicant's spouse makes \$1,400 per month after taxes, the mortgage payment is \$2,956 monthly plus \$4,000 insurance per year; the applicant's spouse cannot pay the mortgage with her income; and without the help of the applicant, the applicant's spouse will have a decreased standard of living and could easily become a public charge. *Brief in Support of Appeal*, at 6-7. While the AAO notes counsel's claims regarding the financial hardship that would face the applicant's spouse if he were to be excluded, it does not find the record to document a monthly mortgage payment of \$2,956 or that the applicant's spouse would be required to pay \$4,000 in home insurance per year. Neither does the record offer documentary evidence of the recurring expenses of the applicant's household. Moreover, the record does not establish that the applicant's spouse would be unable to obtain employment if he returned to Kosovo and, thereby, financially assist his spouse from outside the United States.

Counsel states that the applicant's son is sick and needs special medical attention, which is an additional monetary expense; a sick child presents a special burden on both parents, but if it rests on one parent then this factor may result in extreme hardship to that parent; the applicant's son's conditions are chronic, this son has suffered from this illness since he was born; and the applicant's spouse's income does not give her the ability to pay someone else to care for her child. *Id.* at 7. Counsel states that the applicant's spouse would have to quit her job to care for her minor children who need constant supervision; the applicant works night shifts and his spouse works day shifts and they take turns watching the children; the applicant's spouse cannot afford to pay a babysitter to care for the children; she would lose her home and be forced to file for bankruptcy; and she is sick and currently receiving treatment due to the uncertainty of the applicant's immigration status. *Id.* at 7, 10.

The applicant's spouse states that she has known the applicant for more than two decades; separation would cause her emotional distress that would result in her seeking medical treatment; her sons are very close to their father and they would experience emotional distress upon separation; she could

not pay her mortgage, taxes and other household expenses on her own; she would definitely lose her house or be forced to file for bankruptcy; one of her sons suffers from asthma and has had severe attacks since he was one year old; this son takes medication and is under constant medical care, and he needs someone to watch him constantly since his asthma attacks are unpredictable; she works the day shift and the applicant works the night shift and they take turns watching him; she will be forced to quit her job in order to care for her son and would be forced to ask for welfare benefits; and both of her sons are minors and she would not be able to pay a babysitter. *Applicant's Spouse's Statement*, at 2-3. In an undated letter, the applicant's older son's physician states that the applicant's older son has been suffering from asthma since the age of one, he remains under constant medical care, he has required hospital care on several occasions, and it is in the best interest of the child to have undivided care from both parents. *Letter from [REDACTED]* undated.

The applicant's spouse was seen by a psychiatrist who states that the applicant's spouse has developed post traumatic stress disorder, adjustment disorder with depressed mood and panic disorder due to her extremely hard and complicated family situations; all of these disorders are stress related and can cause serious health problems; the mental syndromes are consequential to tremendous fear, insecurity and feeling of helplessness due to the applicant's immigration problem; any further worsening of her family situation can provoke deterioration of the applicant's spouse's health and the health of her children; individuals suffering from stress disorders experience insomnia and other sleeping problems, as well as abdominal discomfort, constipation or diarrhea; the main characteristic of a depressive mood is that the patient becomes overwhelmed with sadness and cannot function on a rational basis. *Psychiatric Evaluation*, at 2-3, dated March 27, 2007. The AAO notes that the submitted evaluation is based on one interview with the applicant's spouse and that it lacks the specificity and detail normally associated with such reports. Accordingly, its findings appear speculative and are of diminished value to a finding of extreme hardship.

Considering the applicant's spouse's grant of asylum from the former Yugoslavia; the emotional impact on the applicant's spouse of having the applicant returned to the country from which she fled; the normal financial hardships created by removal; and the problems of being a single parent for two young children, one of whom suffers from asthma and requires frequent medical care, the AAO finds that the applicant has established that his spouse would suffer extreme hardship if she were to reside in the United States without him.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. 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 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).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). 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 main adverse factor in the present case is the applicant’s misrepresentation.

The favorable factors include the presence of the U.S. citizen spouse and children, his older son’s medical condition, the lack of a criminal record, and extreme hardship to his spouse.

The AAO finds that the applicant’s immigration violation is serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.