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U.S. Citizenship
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FILE:

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Office: CHICAGO

Date:

JAN 08 2010

IN RE:

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APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the
Immigration and Nationality Act (INA), 8 U.S.C. § 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).

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The District Director, Chicago, Illinois denied the instant waiver application, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant was born in Yugoslavia and is a citizen of Montenegro.¹ The applicant is the spouse of a U.S. citizen, the father of two U.S. citizen sons,² and the beneficiary of an approved Form I-130 petition.³ The applicant was found inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(6)(C)(i).

The applicant seeks a waiver of inadmissibility in order to reside in the United States with his wife and son. The district director found that the applicant had failed to establish that denial of the waiver application would result in extreme hardship to his U.S. citizen spouse, and denied the waiver application accordingly.

On appeal counsel contended that the applicant, because he was a minor when he entered the United States pursuant to a misrepresentation, is not inadmissible. Counsel contended, in the alternative, that the evidence shows that the applicant's wife will suffer extreme hardship if the waiver application is denied. Counsel also contended that USCIS failed to consider the hardship that denial of the waiver application would cause to the applicant's children.

The AAO will first discuss inadmissibility. Section 212(a)(6)(C)(i) of the Act provides:

In general.—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 contains a Slovenian passport issued in the name of _____ That passport contains a Form I-94W Visa Waiver Departure Record. It shows an entry on June 28, 1999 with permission to remain in the United States until September 27, 1999.

¹ On his Form I-589 Application for Asylum the applicant indicated that he was born a Yugoslav national but is now a Montenegrin national. Although an in-depth discussion of the history of the region is beyond the scope of this decision, the AAO notes that Montenegro seceded from Yugoslavia and became a sovereign nation during 2006.

² The record contains the birth certificate of one son, born October 4, 2003. On appeal, counsel stated that the applicant has a second son, born May 3, 2006. Although no evidence of the existence of that second son was submitted, the AAO notes that whether the applicant has one son or two, while relevant to the hardship his absence would cause his wife, is not a crucial consideration.

³ The record shows that the applicant's wife filed a previous Form I-130 Petition for Alien Relative for the applicant, which petition was denied. The Form I-130 upon which the instant proceeding is based is the Form I-130 filed on March 29, 2005 and approved on November 10, 2005.

In a notarized statement to which the applicant swore on April 27, 2005, the applicant stated that he entered the United States on June 28, 1999 by presenting a Slovenian passport that contained his photograph but was not issued to him, and that although he is not Slovenian he entered pursuant to the Visa Waiver Pilot Program.

In *Matter of S- and B-C-*, 9 I&N Dec. 436, 446 - 449 (BIA 1960; AG 1961), the Board of Immigration Appeals defined the elements of a material misrepresentation, as follows:

A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well result in proper determination that he be excluded.

In the instant case, the applicant misrepresented his identity and nationality in order to be admitted pursuant to the Visa Waiver Pilot Program. Citizens of Slovenia are able to be admitted pursuant to that program. Citizens of Montenegro are not. The applicant's misrepresentation in order to be admitted into the United States was therefore material.

On appeal, counsel argued that the applicant cannot be found to have committed misrepresentation because he was "a minor child" at the time of his entry. The applicant's birth certificate states that the applicant was born on August 18, 1981. The applicant's misrepresentations and entry were on June 28, 1999. The AAO notes that the applicant was within two months of his 18th birthday on that date.

Speaking of misrepresentation under section 212(a)(6)(C)(i) of the Act, counsel stated,

It is clear under the [the Act] and [other] [F]ederal law that a child under the age of 18 lacks the mental competence in order to form the "mens rea" required to be guilty of such an offense. There remains long[-]standing precedent that such a child cannot possibly form the intent to commit fraud.

Section 212(a)(6)(C)(i) of the Act provides no exception for minors. Although counsel provided citations for more abstract principles, he provided no example of the long-standing precedent that he asserted exempts minors from inadmissibility under section 212(a)(6)(C)(i). The applicant personally presented the fraudulent passport in order to gain entry into the United States. The circumstances within which the applicant made his misrepresentation suggest that the applicant's misrepresentation was willful, and the record contains no evidence to suggest, to the contrary, that it was unintentional or involuntary. The AAO finds that the applicant's misrepresentation was willful and that no exception for minors exists under section 212(a)(6)(C)(i) of the Act.

The AAO finds that the applicant knowingly presented fraudulent documentation and knowingly misrepresented material facts to gain entry into the United States, committed fraud or misrepresentation as contemplated in section 212(a)(6)(C)(i) of the Act, and is inadmissible pursuant to that subsection. The balance of this decision will pertain to whether waiver of that inadmissibility is available and whether the applicant has demonstrated that waiver of that inadmissibility, if available, should be granted.

Section 212(i)(1) of the Act provides, in pertinent part:

The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent 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. Counsel argued, on appeal, that hardship to the applicant's children must also be considered. The language of the statute, however, makes clear that hardship to the applicant or his child is not directly relevant and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's wife is the only qualifying relative in this case. 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 nonexclusive list of factors relevant to determining whether an alien 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. The BIA has held:

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).

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 record contains an undated letter from the applicant's wife that appears to have been submitted in response to a request for evidence (RFE) issued on April 19, 2005. In that letter the applicant's wife stated that she and the applicant then had one son, that she and the child need the applicant financially and emotionally, and that they would face "astronomical" hardship if he were absent. She stated that without the applicant's income contribution she would be unable to pay all of her expenses.

The record contains an undated letter from the applicant's wife that was submitted with the appeal brief, which was received April 10, 2007. In that letter the applicant's wife stated that she was then completing prerequisites so that she could apply to pharmacy school in the fall. She stated that she and her husband each watch the children when the other is at work or school, and that if the applicant is removed from the United States she would be unable to continue her education.

The applicant's wife further noted the atrocities that occurred during the war in Bosnia,⁴ and stated that if the applicant were removed from the United States she would have to return there or to Montenegro to live. Although she made no concrete representations pertinent to the current situation in that region, she stated that she fears that such atrocities may occur again in the future and, therefore, fears returning to the region.

The record contains the applicant's and the applicant's wife's joint Form 1040 U.S. Individual Income Tax Returns for 2002, 2003, and 2004.

The 2002 return shows that the applicant and his wife had total income of \$10,903 during that year. A Schedule C shows that \$2,762 of that amount came from the applicant's wife's cleaning service. The return shows that the remaining \$8,141 consisted of Line 7, Wages, salaries, tips, *etc.* No Form W-2 Wage and Tax Statements, which would have shown who earned the remaining income, were provided, and the provenance of the remaining income is unknown to the AAO.

The 2003 return shows that the applicant and his wife had total income of \$20,029 during that year. Schedules C show that \$2,472 of that amount came from the applicant's wife's cleaning service and that \$1,523 came from the applicant working in construction. The return shows that the remaining \$16,034 consisted of Line 7, Wages, salaries, tips, *etc.* No W-2 forms, which would have shown

⁴ The applicant's wife stated, in her G-325A Biographic Information form, that she was born in Bosnia. Bosnia is also a former constituent state of Yugoslavia.

who earned the remaining income, were provided, and the provenance of the remaining income is unknown to the AAO.

The 2004 return shows that the applicant and his wife had total income of \$29,202 during that year. A Schedule C shows that \$1,185 of that amount came from the applicant's construction work. The return shows that the remaining \$28,016 consisted of Line 7, Wages, salaries, tips, *etc.* No Form W-2 Wage and Tax Statements, which would have shown who earned the remaining income, were provided, and the provenance of the remaining income is unknown to the AAO.

The record contains an employment verification letter dated November 9, 2005. That letter states that the applicant's wife had been employed at a Walgreen's drug store in Chicago since October 6, 2000, and was then employed there as a senior pharmacy technician. The applicant's wife's employment clearly accounts for a portion of the unexplained income on the 2002, 2003, and 2004 tax returns, and may account for all of it.

The record contains printouts of web content pertinent to the former Yugoslavia from websites maintained by the U.S. Department of State, the British Broadcasting Corporation, and Amnesty International. That information in that web content was current in 2002.⁵

In the brief filed on appeal counsel stated that the decision of denial had incorrectly focused solely on the financial hardship that the applicant's absence would cause, and not correctly considered its emotional impact. He stated that the applicant's wife is a refugee in the United States and ". . . fears returning to her home country"

The Form I-130 waiver application states that the applicant's wife was born in Bosnia. The Form I-485 states that her last foreign address was in Bosnia, from her birth in June of 1983 until April of 1992. The applicant's wife stated, in one of her undated letters, that she fears returning with her husband to Serbia and Montenegro. The record contains no evidence, however, to support the assertion that the applicant's wife was ever accorded refugee status.

To demonstrate that the applicant's absence would cause extreme hardship to his wife, the applicant must show that, if he is absent from the United States and his wife remains in the United States, with or without their children, she will suffer extreme hardship. The applicant must also demonstrate that if he leaves and his wife joins him to live in Bosnia or Montenegro, that will cause her extreme hardship. The AAO will first consider the scenario of the applicant being removed and his wife remaining in the United States.

Counsel stated, in the appeal brief, that the applicant's wife is no longer working and is "fully reliant" on the applicant's income. Counsel referred to a statement by the applicant's wife as evidence of that assertion. The AAO notes that, although the applicant's wife stated that she is going to school full-time, she did not state that she is no longer employed. Counsel's assertions are

⁵ This web content was submitted to support the applicant's asylum application, rather than his waiver application.

not evidence, *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980), and are insufficient to sustain the burden of proof in this matter. The record contains insufficient evidence to demonstrate that the applicant's wife is unemployed.

Counsel and the applicant's wife have asserted, in very general terms, that the applicant's wife will suffer financially, be unable to pay her bills, and be unable to continue in school if the applicant is removed from the United States. The record, however, does not contain an accounting of the income of the applicant or the income of the applicant's wife. In fact, the tax returns submitted are the only evidence that corroborates the assertions that the applicant has earned any income in the United States. The 2002 tax return does not show that the applicant earned any salary or wages during that year. The 2003 and 2004 returns show that the applicant earned at least \$1,523 and \$1,185 during those years, respectively. The record contains no evidence of any other income the applicant may have earned during those years and no evidence of any income the applicant may have earned during prior or subsequent years.

Counsel has not discussed whether the applicant or the applicant's wife has relatives who would render some type of assistance in the event that the applicant is removed. A G-325A that the applicant's wife signed on June 8, 2002 indicates that her mother was then living in Chicago, which is very near the current address of the applicant and his wife in Hillside, Illinois. Whether the applicant's wife's mother is still living in Chicago is unknown to the AAO.

With the little detailed evidence submitted, the AAO is unable to find that, if the applicant is removed from the United States, his wife will suffer financial hardship which, when combined with the other hardship factors in this case, will rise to the level of extreme hardship.

Another hardship factor discussed by counsel is the emotional hardship that would result to the applicant's wife from the applicant's removal. The applicant's wife has stated that she would suffer emotional hardship, but has not demonstrated, nor even alleged, that her hardship would be greater than the hardship expected in a typical case of removal of a spouse. The record contains no evidence from mental health professionals showing that the applicant's emotional hardship would be unusually profound or that she would not recover from it.

In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "*extreme hardship*," Congress made plain that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

Separation from one's spouse or child is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the standard in INA § 212(i), the hardship must be greater than the normal, expected hardship involved in such cases.

The evidence in the record does not demonstrate that, if the applicant is removed from the United States and his wife remains in the United States, she will suffer emotional hardship which, when combined with the other hardship factors in this case, will rise to the level of extreme hardship.

The applicant's wife has stated that, because she would be unable to attend school, work full-time, and care for her children if the applicant is removed she would be forced, in that event, to leave school. The claimed financial hardship was discussed above. The remaining hardship factors are the logistical hardship of being obliged to care for the children without the applicant's assistance and the educational hardship of being obliged to leave school. As was noted above, whether, in the event of the applicant's removal, the applicant's wife's relatives or friends or professional child care providers would be able to help her care for her children has not been discussed. Without adequate discussion of the available options the AAO cannot find that, if the applicant is removed and his wife remains in the United States, his wife will suffer hardship of this type which, when combined with the other hardship factors in this case, will rise to the level of extreme hardship.

Considering all of the evidence in the record, and all of the hardship factors raised by counsel and the applicant's wife, the AAO finds that the evidence in the record does not demonstrate that, if the applicant is removed and the applicant's wife remains in the United States, she will suffer hardship which will rise to the level of extreme hardship.

The remaining scenario to consider is that of the applicant being removed to Montenegro and his wife and children joining him there. The applicant's wife stated that she is afraid to return to the region where she was born because of events that transpired there in the past and her belief that such atrocities may occur again in the future. In one of her letters, she implied that even though the Balkans are currently considered safe, she does not believe it to be true. She provided no evidence in support of that belief. Further, as a native and former resident of Bosnia, the basis of her asserted fear of violence, present or future, in Montenegro is unstated.

Given the dearth of evidence of any reasonable expectation of harm in Montenegro, now or in the future, to the applicant's wife or the children, the AAO cannot find, based merely on the applicant's wife's assertion that she fears it, that relocating in Montenegro would cause the applicant's wife extreme hardship.

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 wife faces extreme hardship if the applicant is removed from the United States, whether or not she joins him. Rather, the record suggests that she will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties that typically arise when a spouse is removed from the United States.

The applicant apparently has loving and devoted family members who are concerned about the prospect of his departure from the United States. Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). “[O]nly in cases of great actual or prospective injury . . . will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under INA § 212(i), 8 U.S.C. § 1186(i) and that waiver is therefore unavailable. Because the applicant has been found statutorily ineligible, the AAO need not address whether the applicant merits 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. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.