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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**



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FILE: [REDACTED]

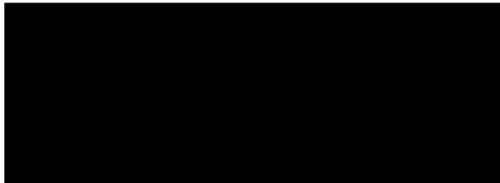
Office: VIENNA

Date: APR 25 2011

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the  
Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:



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,

*Michael Shumway*

f. Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The application for waiver of inadmissibility was denied by the Officer-in-Charge (OIC), 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 Kosovo who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse.

The OIC determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Denial Notice*, dated September 25, 2008.

On appeal, counsel asserts that the denial of the applicant's admission to the United States will result in extreme hardship to his spouse. *Appeal Brief*, dated November 12, 2008.

In support of the waiver application, the record includes, but is not limited to, a psychological evaluation, financial documentation, medical documentation, conviction records, a statement from the applicant's spouse, the applicant's spouse's naturalization certificate, and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime,

the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The record reflects that on June 16, 2005, the applicant was convicted in the Municipal Court in Prishtina, Kosovo of falsification of a document in violation of article 3, paragraph 3 related with paragraph 1 of the Criminal Code of Kosova (KPPK), and ordered to pay a fine (Penal Case No. 1947/2002).

On appeal, counsel notes that [REDACTED] was able to reopen his matter and all charges were dismissed." Counsel contends that the applicant's conviction was "'removed' from the record, in effect, showing that [REDACTED] has not been convicted of any crime." *Appeal Brief*, dated November 12, 2008.

However, the decision to vacate the applicant's conviction for falsification of a document was issued pursuant to a determination that the applicant "fulfilled all terms from the Article 87, Par. 2, sub-Par. 4 and Article 88 of the KPPK (*Provisional Criminal Code of Kosova*) for legal rehabilitation." Municipal Court in Prishtina Decision, dated January 23, 2008. Under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes).

Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in

*Jordan v. De George* concluded:

Whatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.

341 U.S. 223, 232 (1951).

Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest his inadmissibility on appeal.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

. . . .

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

A waiver of inadmissibility under section 212(h) 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, parent, son or daughter of the applicant. Hardship to the applicant 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 relatives 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 of Immigration Appeals 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) (“Mr. Arrieta 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.

On appeal, counsel asserts that the applicant's spouse has substantial family ties in the United States, and all of her family members are U.S. citizens. Counsel states that the applicant's spouse resides with her brother's family and father, and is due to give birth to a child in February 2009. Counsel contends that the applicant's spouse is suffering from Major Depression and Post-Traumatic Stress Disorder, and is at risk for suicide. Counsel contends that the applicant's spouse will not return to Kosovo. Counsel states that the applicant would not be able to financially support his family in Kosovo. Counsel asserts that the applicant's spouse "has severe scars relative to the atrocities that she witnessed as a young lady Kosovo." *Appeal Brief*, dated November 12, 2008.

The applicant's spouse asserts that she is ethnic Albanian and resided in Kosovo during the war. She states that in the summer of 1999, she was rescued with her parents, brother and sister-in-law by U.S. NATO troops and they were brought to the United States as refugees. She states that when she is reminded of Kosovo she feels stressed and depressed. She notes that she returned to Kosovo in the summer of 2004 to overcome her fears of traveling to the country. The applicant's spouse explains that she met the applicant during this visit. She states that she returned to Kosovo in the summer of 2005 to marry the applicant. She indicates that she has since visited Kosovo on three occasions, but traveling to the country "brings back terrible memories, fear and . . . depression." She states that her separation from the applicant causes her emotional distress and travel to visit the applicant is an economic burden for her. *Affidavit of* [REDACTED] dated February 14, 2008.

Counsel has indicated that the applicant's spouse will not return to Kosovo. However, as stated, 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: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. 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.

Upon review of the record, the AAO finds that the applicant's spouse would suffer extreme hardship if she had to relocate to Kosovo. DHS records reflect that the applicant, her parents and siblings entered the United States as refugees in July 1999 from the former Yugoslavia. Refugee status is granted to aliens who have suffered persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42). The applicant has submitted her father's driver's license, reflecting that she resides with him. Thus, the record establishes that the applicant's spouse as close family ties in the United States. The AAO acknowledges that if the applicant's spouse severed these ties by relocating to Kosovo, she would suffer emotional hardship.

The AAO finds that the emotional hardship the applicant's spouse would suffer if she relocated goes beyond norm. The record contains a psychological evaluation from [REDACTED]

Licensed Clinical Psychologist/Neuropsychologist, dated November 7, 2008, which states that the applicant's spouse "is suffering from a combination of Post-traumatic Stress Disorder (PTSD) and Major Depression-Recurrent." [REDACTED] notes that the applicant's spouse relayed during her psychological evaluation that she and her family were living in constant fear during the war in Kosovo. [REDACTED] recounts: "During this time period, deadly paramilitary forces bombed and burned houses and murdered entire families in a systematic house to house campaign that lasted for many days. . . . On a daily basis soldiers would point guns at [her] and her family. Two of her cousins were killed in the war." *Psychological Report*, dated November 7, 2008. The applicant's spouse has explained in detail how returning to Kosovo "brings back terrible memories, fear and . . . depression." *Affidavit of* [REDACTED] dated February 14, 2008.

All elements of hardship to the applicant's spouse, should she relocate to Kosovo to maintain family unity, have been considered in the aggregate. The AAO finds that based upon the applicant's spouse's status a refugee from Kosovo, her diagnoses with PTSD, and her family ties in the United States, she will suffer extreme hardship if she had to relocate with the applicant to Kosovo.

Additionally, the AAO finds that the applicant has established that his spouse would suffer extreme hardship if she remains in the United States separated from him.

The AAO acknowledges that the applicant and his spouse will experience emotional hardship if they are separated as a result of his inadmissibility. In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, referring to the separation of an alien from qualifying relatives, held that "the most important single hardship factor may be the separation of the alien from family living in the United States," and that "[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." (Citations omitted). As stated, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another.

The emotional hardship experienced by the applicant's spouse goes beyond the common hardships associated with inadmissibility because of her diagnosed mental health conditions. As indicated, the applicant's spouse has been diagnosed with Post-traumatic Stress Disorder (PTSD) and Major Depression. According to the psychological evaluation, the applicant's spouse "spoke haltingly about her depression and anxiety. . . . She has been trying to live for four years without her husband and indicated that she barely feels like living." *Psychological Report*, dated November 7, 2008. Moreover, the applicant's spouse's claim that as a refugee, returning to Kosovo to visit the applicant "brings back terrible memories, fear and . . . depression." Accordingly, the AAO gives considerable weight to the emotional hardships the applicant's spouse is suffering as a result of her separation from the applicant.

The AAO has additionally considered the claims of financial hardship associated with separation from the applicant. The record reflects that the applicant's spouse earned \$9.75 an hour for her employment with Mega Marts, LLC. See *Earnings and Deductions Statement*, dated November 1, 2008. The record reflects that at the time of the appeal, the applicant's spouse was pregnant, and due

to deliver on February 20, 2009. *See Letter from* [REDACTED]. The AAO observes that the applicant's spouse should have less financial hardship because she resides with her father and brother. However, the AAO acknowledges that the applicant's spouse will suffer some financial and emotional hardships raising a child as a single parent. The AAO will give the claims of financial hardship to the applicant's spouse some weight in an overall determination of extreme hardship.

All hardships to the applicant's spouse should she remain separated from the applicant have been considered in the aggregate. As explained, the AAO has given considerable weight to the emotional hardships the applicant's spouse is suffering as a result of her separation from the applicant. Based on the foregoing financial and emotional hardships, the applicant has established that his wife will continue to suffer extreme hardship should she remain separated from the applicant.

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). 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 factor in the present case is the applicant's conviction for falsification of a document, a crime involving moral turpitude. The favorable factors in the present case are the extreme hardship to the applicant's U.S. citizen spouse, the passage of five years since his conviction, and the fact that he does not appear to have any other criminal convictions.

The AAO finds that the applicant's criminal conviction 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 factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.