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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**

#4

Date: **AUG 20 2012**

Office: **ROME, ITALY**

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATIONS:

Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i); and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Rome, Italy, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Albania 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 attempting to procure admission to the United States through fraud or the willful misrepresentation of a material fact; and 212(a)(9)(B)(i)(II) of 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 and seeking readmission within ten years of his last departure from the United States. The record indicates that the applicant is married to a U.S. citizen and the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to sections 212(i) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(i) and 1182(9)(B)(v), in order to reside in the United States with his spouse.

The Field Office Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated March 22, 2010. In the same decision, the Field Office Director also denied the applicant's Application for Permission to Reapply for Admission after Deportation or Removal (Form I-212) solely based on the denial of the Form I-601. On or about April 27, 2010, the applicant, through counsel, appealed the Field Office Director's decision. On June 17, 2010, the Field Office Director determined that the applicant's appeal was untimely, accepted the appeal as a motion to reconsider, and denied the application in a new decision.

On appeal, the applicant, through counsel, asserts that the Field Office Director erred in failing to give proper weight to the submitted evidence and failed to consider all the relevant hardship factors. *Form I-290B, Notice of Appeal or Motion*, filed July 14, 2010. Counsel also claims that the Field Office Director was inconsistent with other United States Citizenship and Immigration Services (USCIS) decisions regarding extreme hardship, and he submits two AAO decisions in support of his claim. The AAO notes that both of the cases relied on by counsel are unpublished decisions, and therefore, not binding on any court or the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of the Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary, with concurrence of the Attorney General, are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.10. Counsel also submits new evidence of hardship on appeal.

The record includes, but is not limited to, counsel's appeal briefs, statements from the applicant's wife, a psychological evaluation for the applicant's wife, a money transfer receipt, school records for the applicant's wife, telephone records, country-conditions documents on Albania, two unpublished AAO decisions, and documents pertaining to the applicant's removal proceeding. The entire record was reviewed and considered in arriving at 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.

....

- (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

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

- (1) The [Secretary] may, in the discretion of the [Secretary], 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 resident spouse or parent of such an alien.

Section 212(a)(9) of the Act provides, in pertinent part, that:

(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 (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, 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.

....

- (iii) Exceptions.-

....

(II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

.....
(v) Waiver.-The [Secretary] 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 to the satisfaction of the [Secretary] 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.

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 of Immigration Appeals (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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In the present case, the record indicates that on July 24, 2001, the applicant attempted to enter the United States by presenting a counterfeit Belgian passport. The applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On June 19, 2003, an immigration judge denied the applicant’s asylum application and ordered the applicant removed from the United States. The applicant, through counsel, appealed the immigration judge’s decision with the Board. On September 2, 2004, the Board dismissed the applicant’s appeal. On September 24, 2004, the applicant, through counsel, filed a petition for review with the Second Circuit Court of Appeals (Second Circuit). On May 8, 2006, the Second Circuit denied the applicant’s petition for review. On March 6, 2007, the applicant was removed from the United States. Based on the applicant’s misrepresentation, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant does not dispute this finding.

However, the AAO finds that the applicant is not inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. Under section 212(a)(9)(B)(iii)(II) of the Act, no period of time in which the applicant has a bona fide asylum application pending shall be taken into account in determining the period of unlawful presence in the United States, unless the applicant was employed without authorization. The record does not establish that the applicant was employed without authorization, and his asylum application was pending until May 8, 2006, when the Second Circuit denied his petition for review. Therefore, the applicant does not have unlawful presence in the United States for a period of more than one year. Additionally, even though the applicant was unlawfully present in the United States for a period of more than 180 days but less than one year, he is not seeking admission into the United States within 3 years of his last departure from the United States. Therefore, he is not inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act.

A waiver of inadmissibility under section 212(i) of the Act is dependent first 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 can be considered only insofar as it

results in hardship to a qualifying relative. The applicant's wife 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-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

In counsel's appeal brief dated June 28, 2010, he states that Albania lacks an adequate healthcare system, and the applicant's wife will be unable to receive treatment for her psychiatric and medical conditions. In a psychological evaluation dated August 3, 2009, [REDACTED] diagnosed the applicant's wife with suspected bipolar II disorder, generalized anxiety disorder, residual post-traumatic stress disorder symptoms, and personality disorder. Additionally, counsel claims that the applicant's wife has no ties to Albania, the conditions in Albania are not stable, she will be unable to find any employment, she "will be exposed to crime" and police protection is limited. The record contains country-conditions documents that support counsel's claims. In a statement dated September 8, 2009, the applicant's wife states when she was in Albania in July 2007, she became "violently ill," vomiting and having asthma attacks, and had to return to the United States. In a statement dated January 10, 2009, she claims that she suffered "an acute case of food poisoning" and she is afraid that if she returned to Albania, she will suffer from the same health issues.

Based on her safety concerns in Albania, her minimal ties to Albania, her separation from her family in the United States, her severe mental health issues and possible disruption of her treatment, her previous medical issues in Albania, and her limited employment prospects, the AAO finds that the applicant's wife would suffer extreme hardship if she were to join the applicant in Albania.

Regarding the hardship caused by their separation, the applicant's wife states that when the applicant was first removed from the United States, her life was in "shambles," she was depressed, unable to eat and losing weight. Further, she claims that when she returned to the United States from Albania after their marriage, she again became depressed, lost weight, began losing her hair, and she had to drop out of school because she could not concentrate. She states that she speaks to the applicant on the telephone daily and is billed up to \$500 monthly for phone charges. The record contains telephone records in support of the applicant's wife's claim. She states her life without the applicant is "meaningless." As noted above, Dr. [REDACTED] diagnosed the applicant's wife with suspected bipolar II disorder, generalized anxiety disorder, residual post-traumatic stress disorder symptoms, and personality disorder. [REDACTED] reports that the applicant's wife has a history of physical and verbal abuse by her father and started showing signs of depression at 14 years old. He claims that the marriage to the applicant has helped stabilize the applicant's wife, giving her "the first genuine, supportive, and empathic relationship in her life." However, since the applicant's removal, the applicant's wife's mental functioning has deteriorated, and her continued separation from the applicant could result in psychiatric hospitalization. Additionally, the applicant's wife states she sends the applicant money in Albania when she can afford to, and the record establishes that on September 9, 2009, she transferred \$1250 to him. The record also establishes that the applicant's wife is attending cosmetology school in the United States.

The AAO finds that when the applicant's spouse's hardships are considered in the aggregate, specifically her emotional, health and financial issues, the record establishes that the applicant's wife would face extreme hardship if she remained in the United States in his absence. Accordingly, the applicant has established extreme hardship to a qualifying relative under section 212(i) of the Act.

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-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance 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 include the applicant's misrepresentation and his unlawful presence. Additionally, the record establishes that on May 5, 2010, the applicant attempted to enter El Salvador with a forged Bulgarian passport and an international arrest warrant was issued for him, which is a negative factor. The favorable and mitigating factors are the applicant's efforts to legalize his status in the United States, his U.S. citizen wife and the extreme hardship to her if he were refused admission.

The AAO finds that, although the immigration violations committed by the applicant are serious and cannot be condoned, when 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

The AAO notes that the Field Office Director denied the applicant's Form I-212 in the same decision. The Form I-212 was denied solely based on the denial of the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility under section 212(i) of the Act, it will withdraw the Field Office Director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the [Secretary] has consented to the aliens' reapplying for admission.

On June 19, 2003, the applicant was ordered removed from the United States. As such, he is inadmissible under section 212(a)(9)(A) of the Act and must request permission to reapply for admission.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be granted as a matter of discretion.

ORDER: The appeal is sustained.