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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

H5

FILE: [REDACTED]

Office: VIENNA

Date: **AUG 12 2010**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i), and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Vienna, Austria, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application will be approved.

The applicant, a native and citizen of Albania, 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 attempted to procure entry to the United States by fraud or willful misrepresentation, and under section 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. The applicant sought waivers of inadmissibility pursuant to sections 212(i) of the Act, 8 U.S.C. § 1182(i), and 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to be able to return to the United States to reside with his U.S. citizen spouse.

The officer in charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the Officer in Charge*, dated December 10, 2007.

In support of the appeal, counsel for the applicant submits a brief, dated February 14, 2008, and supporting evidence. In addition, supplemental documentation in support of the instant appeal was received by the AAO on March 24, 2010. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (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:

- (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(a)(9)(B) of the Act provides, in pertinent part:

Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(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.

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (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 Attorney General [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...

Regarding the applicant's grounds of inadmissibility, the record establishes that the applicant attempted to procure entry to the United States in October 1999 by presenting a fraudulent passport containing temporary evidence of lawful admission for permanent residence (Form I-551). The applicant subsequently applied for asylum; his request for asylum was denied in July 2001 and he was ordered removed. *See Order of the Immigration Judge*, dated July 26, 2001. The applicant appealed the decision and said appeal was dismissed in February 2003. *See Order*, dated February 12, 2003. The applicant did not depart the United States until May 2006. *See Warrant of Removal/Deportation*, dated May 19, 2006. The officer in charge correctly found the applicant to be inadmissible to the United States pursuant to section 212(a)(6)(C) of the Act, for having attempted to procure entry to the United States by fraud or willful misrepresentation, and under section 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for more than one year. The applicant does not contest the officer in charge's findings of inadmissibility.

Waiver of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act are 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 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 U.S. citizen spouse 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).

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 [REDACTED]*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of [REDACTED]* 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.

The applicant's U.S. citizen spouse asserts that she will suffer emotional, professional and financial hardship were she to reside in the United States while the applicant remains abroad due to his inadmissibility. In a declaration she states that she would suffer extreme emotional hardship due to long-term separation from her mother¹, her sibling, her nieces, an aunt and cousins, her community, her friends, her church, and her long-term gainful employment as an elementary school teacher. She further contends that were she to relocate abroad, her North Carolina teaching license would be terminated and her track towards becoming a career certified teacher would be negatively disrupted. As she explains in her affidavit, her employment must be 100% full-time for at least four years consecutively in the same school system in order to attain career teacher status; otherwise, she would have to start all over again as a first year teacher. Furthermore, the applicant's spouse details that she suffers from numerous medical conditions, including anxiety, depression, obsessive compulsive disorder, chronic sinusitis, allergies, cervical instability and severe cervical stenosis and is receiving treatment for said conditions, and a relocation abroad would cause her hardship as she would not receive the same standard of care, the care would be cost-prohibitive due to a lack of health insurance, and moreover, she would not receive treatment by physicians familiar with her conditions. Moreover, the applicant's spouse asserts that she would suffer in Albania as she does not speak, understand, read or write the Albanian language, and would thus be unable to obtain gainful employment. Even if she were able to obtain employment, she notes that wages are low and she would suffer from a decreased quality of living. *Affidavit of [REDACTED]*, dated November 23, 2006.

In support of the hardships referenced, extensive medical and mental health documentation has been submitted for the applicant's spouse and her mother. As noted by the applicant's spouse's psychiatrist since 1992, Dr. [REDACTED], the applicant's spouse suffers from obsessive compulsive disorder, generalized anxiety disorder and major depression and is on numerous medications to treat said disorders. Dr. [REDACTED] contends that going to Albania is not an option for the applicant's spouse as she

¹ The record establishes that the applicant's spouse's mother resides with her daughter and depends on her for her daily care as she suffers from numerous medical conditions. As noted by the applicant's spouse, her mother is a "67 year-old wheelchair bound, homebound, shut-in who is on oxygen 24 hrs. a day, 7 days a week, and uses a nebulizer 3 times a day..." *Letter from [REDACTED]* dated January 1, 2010. The applicant's spouse further explains that her mother depends on her for all daily tasks, including getting dressed, going to the bathroom, taking medications and insulin, exercising, getting to, in and out of the tub and bathing, as well as being pushed anywhere in the wheelchair, washing clothes and towels and driving anywhere she needs go to. The applicant's spouse concludes that were she to relocate abroad, she would be abandoning her mother, leaving her at home with no one to care for her and alternatively, her mother is in no shape to relocate abroad due to her extensive medical issues and the need for continued care and therapy. *Supra* at 4, 6.

“becomes extremely unbalanced and unable to function without the continued delicate balance of treatment and therapy. It is important for her [the applicant’s spouse] to stay in an environment that is stable and that she is accustomed to....” *Letter from* [REDACTED] *PA*, dated April 30, 2007. In addition, letters have been provided from numerous treating physicians confirming the applicant’s spouse’s surgical addressment of her left foot to address several conditions and the need for continued treatment with injections and physical therapy and her severe allergies that require on-going immunotherapy and regular adjustments of medications. Moreover, Patient Prescription Records have been provided, outlining the medications prescribed to the applicant’s spouse to address her medical and mental health conditions. Further, evidence of the applicant’s spouse’s strong ties to the United States has been provided, in the form of numerous letters from her long-term employer, attesting to the applicant’s spouse’s expertise and proficiency in the workplace, friends and family members.

The record reflects that the applicant’s U.S. citizen spouse would be forced to relocate to a country to which she is not familiar. She would be unable to communicate as she does not speak the language. She would have to leave her support network of family, friends, her community, her church, and her long-term gainful employment, thereby causing her career and professional disruption. She would also be concerned about the substandard economy and its impact on her quality of living and her medical and mental health care in Albania, due to long-term separation from the physicians and psychiatrist familiar with her conditions and treatment and who are able to detect changes in her medical conditions, the substandard quality of care², and the lack of insurance while in Albania. It has thus been established that the applicant’s spouse would suffer extreme hardship were she to relocate abroad to reside with the applicant due to his inadmissibility.

Extreme hardship to a qualifying relative must also be established in the event that he or she remains in the United States while the applicant resides abroad due to his inadmissibility. With respect to this criteria, the applicant’s spouse asserts that she will suffer emotional, physical and financial hardship were her spouse to reside abroad. To begin, the applicant’s spouse contends that due to her spouse’s relocation abroad, she is experiencing great difficulty concentrating on daily tasks, sleeping regularly,

²The U.S. Department of State notes the following regarding the economy and medical care in Albania, in pertinent part:

Albania's per capita income is among the lowest in Europe.

Medical facilities and capabilities in Albania are limited beyond rudimentary first aid treatment. Emergency and major medical care requiring surgery and hospital care is inadequate due to lack of specialists, diagnostic aids, medical supplies, and prescription drugs. Travelers with previously diagnosed medical conditions may wish to consult their physicians before travel. As prescription drugs may be unavailable locally, travelers may also wish to bring extra supplies of required medications.

and maintaining positive and stable emotional health.³ *Supra* at 3. In addition, the record establishes that prior to departing the United States, the applicant played a critical role in supporting the household by maintaining gainful employment as a co-manager of a family restaurant. Due to his absence, the applicant's spouse is experiencing financial hardship. Finally, as detailed above, the applicant's mother is experiencing numerous life-threatening conditions and is completely dependent on her daughter. The applicant's spouse contends that she needs her husband to return to the United States to help with the physical and emotional care of the applicant's spouse's mother while at the same time, providing support to her, on a day to day basis. *Supra* at 7.

Based on the totality of the circumstances, were the applicant unable to reside in the United States due to her inadmissibility, the applicant's spouse would suffer extreme emotional, physical and financial hardship.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Moreover, it has been established that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate abroad to reside with the applicant. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. 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 . . . 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).

³ The applicant's spouse's psychiatrist notes that the separation from her spouse has been "all encompassing...." *Id.* at 1. She further states that the hope of a short duration of separation is what mostly has allowed the applicant's spouse to function. *Id.* at 1.

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 favorable factors in this matter are the extreme hardships the applicant’s U.S. citizen spouse and her mother would face if the applicant were to remain in Albania, regardless of whether they accompanied the applicant or remained in the United States, the applicant’s apparent lack of a criminal record, support letters, community involvement, the payment of taxes, and the passage of more than ten years since the applicant’s attempted entry to the United States by fraud or willful misrepresentation. The unfavorable factors in this matter are the applicant’s attempted entry to the United States by fraud or willful misrepresentation and periods of unlawful presence and employment while in the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary’s discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.⁴

ORDER: The appeal is sustained. The waiver application is approved.

⁴ The AAO notes that the applicant’s Form I-212 Application for Permission to Reapply for Admission was denied in the same decision. The officer in charge shall reopen the denial and review the I-212 in light of the approval of the Form I-601