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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

[redacted]

FILE: [redacted] Office: NEW YORK, NY Date: AUG 17 2010

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[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.

Thank you,

[redacted]

Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Albania who was found to be 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 admission into the United States by fraud or willful misrepresentation. The applicant is the spouse of a U.S. citizen. He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Excludability, accordingly. *Decision of the District Director,* dated August 18, 2009.

On appeal, counsel for the applicant contends that the District Director failed to engage in a meaningful analysis of the hardship factors established by *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-566 (BIA 1999) and that the applicant's spouse's medical condition constitutes extreme medical hardship. Counsel further asserts that the applicant's spouse is unable to relocate to Albania due to this same medical condition, her potential legal custody for her sister and dangerous country conditions. *Form I-290B, Notice of Appeal or Motion,* filed September 13, 2009.

In support of the appeal, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant and his spouse; medical documentation relating to the applicant's spouse; an online article on epilepsy; a letter of support from the pastor of the applicant's church; employment letters for the applicant and his spouse; financial documentation, including tax returns, W-2 forms, earnings statements and bank statements for the applicant and his spouse; a training completion certificate for the applicant's spouse; a health insurance card for the applicant's spouse; a union membership card for the applicant's spouse; and country conditions materials relating to Albania. The entire record was reviewed and considered in rendering this decision.

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

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of

> clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [redacted] 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.

The record reflects that, on April 14, 2001, the applicant attempted to enter the United States under the Visa Waiver Program using an Italian passport in the name of [redacted] In a sworn statement, taken on the date of his arrival, the applicant admitted to his true identity and testified that he had paid $1,000 for the fraudulent passport. In that the applicant attempted to enter the United States by presenting a passport that did not belong to him, he is inadmissible under section 212(a)(6)(C)(i) of the Act and must seek a section 212(i) waiver of inadmissibility.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission would result in extreme hardship for 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 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 United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez,* 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 (BIA) 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." [redacted] 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. [redacted] 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 BIA 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 BIA 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. 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 BIA 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, varies 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* [redacted] 224 F.3d 1076, 1082 (9th Cir. 2000) [redacted] 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 [redacted] 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 [redacted] 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 AAO now turns to the question of whether the applicant in the present case has established that his spouse would experience extreme hardship if she relocates with him to Albania. On appeal, counsel contends that the applicant's spouse suffers from chronic seizures and that relocation to Albania would result in extreme hardship for her because Albanian hospitals are not equipped to handle someone with her medical needs. Counsel also asserts that the applicant's spouse would be unable to afford medical care in Albania because she would not have health insurance. Counsel further notes that the applicant's spouse has no friends or family in Albania and does not read or speak Albanian.

In an undated statement submitted for the record, the applicant's spouse states that she suffers from epilepsy and will be on medication for the rest of her life. She asserts that she would not be able to receive adequate medical care in Albania for her condition. She also states that she does not speak or understand Albanian and that it would be difficult for her to care for her autistic sister in Albania. In an earlier statement, dated June 16, 2009, the applicant's spouse contends that she would have no home, family or job in Albania, and that she would fear for her personal safety if she relocated there as kidnapping and crime rates are high.

The record on appeal contains extensive evidence establishing that the applicant's spouse was diagnosed with epilepsy at 16 years of age and, since 2000, has had numerous seizures resulting in the loss of consciousness and injury. Medical documentation in the record demonstrates that the applicant's spouse has experienced seizures at home, while riding the bus, at work, and while walking to work. In letters, dated July 10 and September 14, 2009, [redacted], states that the applicant's spouse has seizure disorder with breakthrough seizure, i.e., she has seizures despite being on seizure medication. A June 22, 2009 referral from [redacted] asks that the applicant's spouse be considered for video electroencephalogram monitoring and be given other medical tests, including a test to determine the medication levels in her blood.

The record also contains a Department of State publication, "Country Specific Information for Albania," issued on July 14, 2009, which indicates that "[m]edical facilities and capabilities in Albania are limited beyond rudimentary first aid treatment" and that "[e]mergency and major medical care requiring surgery and hospital care is inadequate due to lack of specialists, diagnostic aids, medical supplies, and prescription drugs." In light of the applicant's history of epilepsy, as established by the record, the AAO finds that the applicant's spouse would not have adequate medical care available to her in Albania. It further notes that the applicant's spouse has no family or cultural ties to Albania, and does not speak or understand Albanian. When the applicant's health condition, her inability to communicate with health care providers in Albania and the limited capabilities of the Albanian health care system are considered in the aggregate, the AAO finds the applicant to have established that relocation to Albania would result in extreme hardship for his spouse.

The record also establishes that the applicant's spouse would suffer extreme hardship if his waiver application is denied and she remains in the United States. The applicant's spouse's seizures, counsel states, prevent her from driving a car and make her completely dependant upon the applicant for transportation and assistance in her daily activities. She also asserts that the applicant's spouse's distress over the applicant's immigration problems is increasing her risk of seizure. Counsel further states that the applicant's spouse's doctor has recommended that she have someone with her at all times and that the applicant, unless he is at work, remains by his spouse's side. With regard to the applicant's spouse's ability to earn a living, counsel contends that she is only able to work part-time as a result of her health and, therefore, does not make enough money to cover her rent, much less her other expenses. Counsel further states that, in the applicant's absence, the applicant's spouse will have to care for her autistic stepsister alone once her stepfather dies.

The applicant's spouse states that the applicant is her best friend and that he supported her during her mother's final illness and death. She asserts that she needs the applicant to help her during and after her seizures.

While the record contains a copy of an interim identification card issued to the applicant's spouse by the New York State Department of Motor Vehicles that indicates she is a nondriver, the AAO does not find any proof in the record to indicate that this restriction makes her completely dependent on the applicant for transportation or assistance with her daily activities. It further finds no documentation that establishes that the applicant's spouse's health prevents her from working on a full-time basis or that she would unable to meet her financial needs through her own employment. The record also fails to provide any documentary evidence of the applicant's and his spouse's expenses, beyond several medical bills issued prior to the date on which the applicant's spouse acquired health insurance through her employment. No documentation has been provided to establish that the applicant's spouse is unable to pay her medical bills since obtaining health care coverage. The record also contains no documentary evidence that establishes the applicant's spouse has a stepsister, that this sibling is autistic or that the applicant's spouse will ultimately be responsible for her. Neither does it support counsel's assertion that the applicant's spouse has been advised to have someone with her at all times. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *A* [redacted] *Matter of Laureano*, 19 I&N Dec. 1 (B[redacted] (BIA 1980).

The record does, however, support counsel's assertion that individuals with seizure disorder are more likely to have seizures under physical or emotional stress. The AAO notes the online article on epilepsy from *MedlinePlus*, U.S. National Library of Medicine and the National Institutes of Health, which reports that emotional stress increases the risk of seizure in a person with epilepsy. It further acknowledges the serious nature of the applicant's spouse's chronic health condition, which medication has not brought under control; the increase in the number of seizures she has experienced in recent years and the documented risks that her seizures pose not only to her health but to her physical safety. It also recognizes the emotional hardship created by the permanent separation of spouses and, therefore, the likely exacerbation of the applicant's spouse's seizure disorder as a result of the applicant's removal. Based on the record before it, the AAO concludes that the applicant's removal would significantly undermine his spouse's health and potentially jeopardize her ability to work and live independently. Accordingly, the AAO finds the applicant to have established that his spouse would experience extreme hardship if she remained in the United States without him.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

The adverse factors in the present case are the applicant's prior misrepresentation for which he now seeks a waiver and his years of unauthorized employment in the United States. The favorable and mitigating factors are the applicant's U.S. citizen spouse; the extreme hardship she would suffer if his waiver application is denied; the applicant's U.S. citizen and lawful permanent resident brothers; the absence of a criminal record and the applicant's volunteer work for his church, as demonstrated by a letter from his pastor.

The AAO finds that, although the immigration violations committed by the applicant were 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(a)(6)(C) 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.

ORDER: The appeal is sustained.