

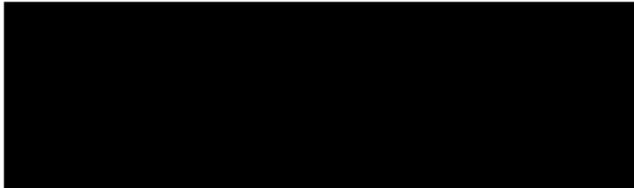
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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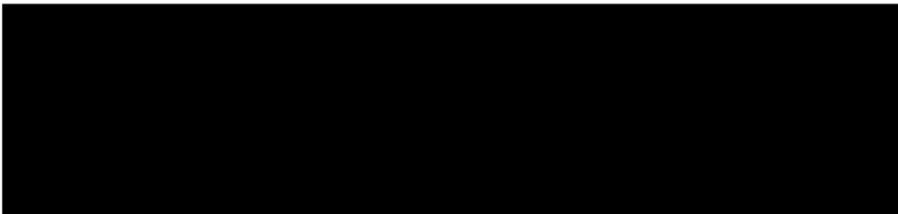
Office: VIENNA, AUSTRIA Date: **NOV 16 2010**

IN RE:



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 PETITIONER:



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.

Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, 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 is a native and citizen of Albania, who conceded that he used a fraudulent passport on April 5, 1999 at John F. Kennedy Airport in New York. He 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 procured admission to the United States through fraud or misrepresentation. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States.

The Field Office Director concluded that the applicant failed to establish that he would endure "extreme hardship," and denied the application accordingly. *See Decision of the Field Office Director* dated February 25, 2010.

On appeal, the applicant's attorney asserted that the applicant's qualifying relative was suffering from emotional and mental hardships as a result of her separation from the applicant. The applicant's attorney additionally requested an expedited adjudication of the appeal, due to the deterioration of the qualifying spouse's mental health. The applicant's attorney also contends that, due to her mental health issues, she is also suffering from financial hardships and unable to continue pursuing her education. In addition, the applicant's attorney indicated that it would be a hardship for the qualifying spouse to relocate to Albania because her immediate family members all live in the United States. Further, the applicant's attorney contends that country conditions in Albania, particularly the lack of available health care to deal with her mental health issues, would also pose a hardship.

The record contains the following evidence, including, but not limited to the four Applications for Waiver of Grounds of Inadmissibility (Form I-601), a Notice of Appeal (Form I-290B), briefs written on behalf of the applicant, affidavits from the qualifying relative, her family and the applicant, reports from mental health professionals and medical records regarding the qualifying relative, a letter from the qualifying relative's academic advisor and transcripts from her university, financial documentation, reference letters from friends, a letter offering the applicant employment and country condition material. The entire record was reviewed and considered in rendering 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.

The record reflects that on or about April 5, 1999, the applicant used a fraudulent photograph substituted passport in order to obtain admission to the United States at John F. Kennedy Airport, New York. This misrepresentation renders the applicant inadmissible under the Act.

Section 212(i) of the Act provides that:

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 or, in the case of an alien granted classification under clause (iii) or (iv) of section 204 (a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B), the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

A waiver of inadmissibility under section 212(i) 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 or parent of the applicant. 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-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) (██████████ 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 the Philippines, 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.

In the present case, the record reflects that the applicant used a fraudulent, photograph substituted passport on April 5, 1999 at John F. Kennedy Airport in New York. The applicant is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for attempting to obtain an immigration benefit to the United States through fraud or misrepresentation.

The applicant’s qualifying relative is his wife, and as aforementioned, his Form I-130 has already been approved.

The evidence provided which specifically relates to the qualifying spouse’s hardship includes several Form I-601s, Form I-290B, briefs written on behalf of the applicant, affidavits from the

qualifying relative, her family and the applicant, reports from mental health professionals and medical records regarding the qualifying relative, a letter from the qualifying relative's academic advisor and transcripts from her university, financial documentation, reference letters from friends, a letter offering the applicant employment and country condition material. The entire record was reviewed and considered in rendering a decision on the appeal.

The AAO finds that the applicant's wife will suffer extreme hardship as a consequence of being separated from the applicant. The applicant's attorney claims that the qualifying spouse is suffering mental health issues as a result of her separation from the applicant. The qualifying spouse has documented that she has a history of anxiety and depression, and that her health has been deteriorating as a result of the stress placed on her, due to the applicant's inadmissibility. [REDACTED] indicated, in a letter dated September 20, 2010, that the applicant's spouse has been experiencing thoughts of suicide and has recently visited the emergency room for "her increased symptoms of anxiety and suicidal thinking." The poor mental health of the applicant's spouse is well-documented through reports and letters from mental health professionals, documentation regarding emergency room visits by the applicant's spouse, prescriptions and letters from friends and family. In addition, the applicant's attorney asserts that the applicant's spouse's mental problems are jeopardizing her university education and scholarship. The applicant's attorney provided letters from the qualifying spouse's school and her transcripts to support the statements regarding the qualifying spouse's educational hardship. In addition, the attorney for the applicant asserts that the applicant's wife would experience financial hardship, should this waiver be denied. To support these contentions, the record contains affidavits indicating that the qualifying spouse is unable to work due to her depression and other mental health concerns. In addition, the record includes a budget report created by the qualifying spouse and proof of expenses for telephone usage and for health care. However, there is no proof documentary proof, such as tax returns, to confirm that the applicant's spouse had an income prior to the deterioration of her mental state or whether she has been receiving assistance from her parents. As such, there is not enough information to demonstrate that the applicant's spouse would suffer financially due to her inadmissibility. Nonetheless, the applicant's attorney has shown that the qualifying spouse is suffering severe emotional and psychological hardships, and that her mental health is worsening as a result of her separation from the applicant. Moreover, the record confirms that the applicant's spouse may suffer from the loss of her scholarship and her education due to her mental trauma related to her husband's inadmissibility. Therefore, the qualifying relative's separation from her husband would cause her to encounter extreme hardship.

The applicant's attorney also sufficiently demonstrated that the qualifying spouse would suffer an extreme hardship in the event that she relocates to Albania. The applicant's attorney provided country condition information that discusses the general problems with the applicant's home country and its lack of adequate mental health facilities and prescription drugs to deal with the applicant spouse's issues. The record was also supplemented by documents detailing the prescription drugs taken by the applicant's spouse for her mental issues. In addition to the emotional and health concerns of the applicant's wife, the applicant's attorney also asserts that it would be difficult for the applicant's spouse to find a job in Albania due to the poverty and the lack of employment opportunities, and that she would suffer financially there. Further, the applicant's attorney indicated that the applicant's income would not support the applicant and his

wife. To support these contentions, proof of the applicant's income and additional country condition materials were submitted.

Moreover, the applicant's attorney also contends that it would be a hardship on the applicant's wife to relocate to Albania because all her immediate family is in the United States, including her parents and siblings. Letters from mental health professionals confirm that the qualifying spouse is very dependant on her family due to her mental issues, and her mother's affidavit even indicates that she has been sleeping with her daughter because of her issues. As a result, it appears that, if the applicant's spouse had to relocate to Albania, she would suffer greatly from the loss of her immediate family. As such, the record reflects that the cumulative effect of the country conditions in the applicant's home country, as well as the emotional, mental and financial hardships his spouse would encounter, should she relocate to Albania, rises to the level of extreme. The AAO thus concludes that were the applicant unable to reside in the United States due to his inadmissibility, his qualifying wife would suffer extreme hardship.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin*, *supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin*, *supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in this matter are the extreme hardships the applicant's United States citizen wife would face if the applicant is not granted this waiver, regardless of whether she accompanied the applicant or remained in the United States, his support from his wife's family in the United States, his ability to find employment in the United States and his apparent lack of a criminal record. The unfavorable factor in this matter is the applicant's use of a fraudulent document to obtain admission to the United States.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

ORDER: The appeal is sustained.