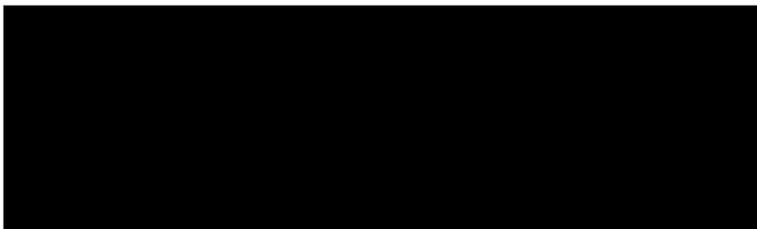


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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



H5

Date: OCT 20 2011

Office: VIENNA, AUSTRIA

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 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)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Vienna, Austria. The matter 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 was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (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 again seeking admission within ten years of his last departure from the United States. He was also found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for procuring admission to the United States through fraud or misrepresentation. The applicant is married to a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse and family.

In a decision dated January 22, 2010, the Field Office Director found that the applicant failed to establish that his qualifying relative would experience extreme hardship as a consequence of his inadmissibility. The application was denied accordingly. *See Decision of the Field Office Director* dated January 22, 2010.

On appeal, the applicant's attorney provided a brief in support of the applicant's waiver application. The applicant's attorney asserted that the qualifying spouse is suffering emotional, psychological and financial hardships as a result of her separation from the applicant. He also states that the applicant and qualifying spouse's children are suffering medical and emotional hardships due to the separation from the applicant, which is adversely affecting the qualifying spouse. Further, the applicant's attorney indicates that the qualifying spouse has close family ties to the United States, including four young United States citizen children, her siblings and parents. The qualifying spouse also provided a letter, which stated that she is experiencing medical issues and that her husband's absence poses a hardship to her.

The record contains letters and an affidavit from the qualifying spouse, letters from the qualifying spouse's doctors, letters from the qualifying spouse's siblings, letters from the applicant and qualifying spouse's children's doctors, briefs written on behalf of the applicant's attorney, a psychological report, some medical records for the qualifying spouse, documentation regarding the qualifying spouse's medications, a declaration from the applicant, an Approved Petition for Alien Relative (Form I-130), a marriage certificate, birth certificates for the qualifying spouse and children, a letter from the qualifying spouse's parents, a letter from the qualifying spouse's church, proof of the qualifying spouse's trip to Albania, financial documentation, country condition materials and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(B) 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) The Attorney General [now Secretary of Homeland Security] 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 . . . 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.

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.

Section 212(i) of the Act provides:

(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 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 [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.

A waiver of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) 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. Hardship to the applicant or his child 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).

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 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.

The applicant applied for asylum when he entered the United States, and was thereafter placed in removal proceedings after his case was referred to the immigration court. The record indicates that the applicant entered the United States through the use of fraudulent documents in 1996. The applicant was thereafter granted voluntary departure until July 30, 1998, yet remained in the United States. On July 16, 2008, the applicant was deported to Albania. As such, the applicant accrued unlawful presence from April 1, 1997, the date of the enactment of the unlawful presence provisions, until July 16, 2008, a period in excess of one year.¹ In applying for an immigrant visa, the applicant is seeking admission within ten years of his departure from the United States. The applicant has not disputed his inadmissibility. Therefore, as a result of the applicant's unlawful presence and prior misrepresentation, he is inadmissible to the United States under sections 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Act.

The documentation submitted relating to the potential hardships facing the applicant's spouse includes letters and an affidavit from the qualifying spouse, letters from the qualifying spouse's doctors, letters from the qualifying spouse's siblings, letters from the applicant and qualifying spouse's children's doctors, briefs written on behalf of the applicant's attorney, a psychological report, some medical records for the qualifying spouse, documentation regarding the qualifying spouse's medications, a declaration from the applicant, birth certificates for the children, a letter from the qualifying spouse's parents, a letter from the qualifying spouse's church, proof of the qualifying spouse's trip to Albania, financial documentation and country condition materials. The entire record was reviewed and considered in rendering a decision on the appeal.

As previously stated, the applicant's attorney asserted that the qualifying spouse is suffering emotional, psychological and financial hardships as a result of her separation from the applicant. He also states that the applicant and qualifying spouse's children are suffering medical and emotional hardships due to the separation from the applicant, which is also adversely affecting the qualifying spouse. Further, the applicant's attorney indicates that the qualifying spouse has close family ties to the United States, including four young United States citizen children, her siblings and parents. The qualifying spouse also provided a letter, which stated that she is experiencing medical issues and that her husband's absence poses a hardship to her.

The applicant's attorney indicated that the qualifying spouse is suffering from emotional and psychological issues due to her separation from the applicant. To support these contentions, the

¹ The applicant misrepresented his identity and nationality, testifying that he was a native and citizen of Yugoslavia (Kosovo) and submitting a fraudulent Yugoslavian birth certificate. Since he failed to make a bona fide asylum claim, the time during which his asylum application was pending has been counted as unlawful presence. See INA 212(a)(9)(B)(iii)(II).

record contains letters from the qualifying spouse, doctor's letters regarding the qualifying spouse, letters from the qualifying spouse's family, other medical documentation and a psychological evaluation. The evidence indicates that the qualifying spouse has been treated by multiple health professionals for her depression and anxiety, and that she is also taking various medications to treat her symptoms. Additionally, the qualifying spouse has had a history of post-partum depression, and the psychologist's current diagnosis of her is Major Depressive Disorder. Further, the psychologist indicates that she has experienced suicidal ideation, significant weight loss, nightmares and antisocial behavior. Furthermore, a letter from the qualifying spouse's orthopedist confirms the qualifying spouse's assertions regarding her medical issues. The orthopedist indicates that the qualifying spouse is suffering from neck and back pain, and requires back surgery for a herniated disk. The doctor also states that she cannot lift her children, do domestic or any manual work. As such, it appears that the psychological, emotional and medical issues that the qualifying spouse is experiencing constitute hardship beyond the common results of removal.

The applicant's attorney also contends that the qualifying spouse is suffering financial hardships due to her separation from the applicant. The record contains letters from the qualifying spouse and her family members, some banking information, and some evidence demonstrating the applicant's income from 1998 and 1999. The record contains letters from the qualifying spouse and her family indicating that the qualifying spouse is struggling to financially support and take care of her four children under the age of six. The record also contains mortgage statements from 2009 indicating that the qualifying spouse has been subject to late fees. Although the documentation regarding the qualifying spouse's financial hardships is limited, this hardship, when considered with the psychological, emotional and medical hardships she is experiencing and her difficulties financially supporting and caring for her children on her own, rises to the level of extreme.

The applicant has also demonstrated that his qualifying spouse would suffer extreme hardship in the event that she relocated to Albania. The qualifying spouse has lived in the United States for her entire life and her children, parents and siblings live in the United States. In addition, in her letters, the qualifying spouse describes her very close relationship with her siblings and parents. The qualifying spouse also indicates that her husband is unemployed in Albania and has been unable to find employment. She also states that she and her children had medical issues when they went to visit the applicant, and the record contains letters from Albanian doctors confirming their issues. Further, the applicant provided an affidavit which also indicates that he is unemployed and living in a little home along with fifteen other people. The record also contains country condition information to support the assertions that the applicant's spouse may suffer financially in Albania due to a lack of employment opportunities. As such, the record reflects that the cumulative effect of the hardships to the qualifying spouse, in light of her family ties to the United States, her length of residence in the United States, and country conditions, 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 spouse would suffer extreme hardship if she relocated to Albania to be with him.

Considered in the aggregate, the applicant has established that his wife would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 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.

In *Matter of Mendez-Morales*, 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 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 spouse and children would face if the applicant is not granted this waiver, regardless of whether she accompanied the applicant or remained in the United States, and his support from the qualifying spouse, family and friends. The unfavorable factors in this matter are the applicant's use of a fraudulent documents and unlawful presence in the United States. The applicant was also convicted in 1999 of passing a false title and he filed a fraudulent asylum application, in which he claimed he was a native and citizen of Yugoslavia (Kosovo). He had an asylum interview in which he testified that he was from Kosovo, and submitted a fraudulent birth certificate in support of the claim.

Although the applicant's violations of the 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.