

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 16 2012

Office: VIENNA, AUSTRIA FILE:

IN RE: Applicant:

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

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.

The applicant is a native and citizen of Montenegro who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure admission to the United States through fraud or misrepresentation. The record indicates that the applicant entered the United States on January 22, 2002 using a passport which belonged to another person. In addition, the applicant was found to be inadmissible to the United States pursuant to 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. After entering the United States in 2002 using a passport belonging to another person, the applicant applied for asylum in the United States. The applicant's asylum application was denied, and an appeal to the U.S. Court of Appeals for the Second Circuit was dismissed on November 22, 2006. However, the applicant did not depart following the denial of his asylum application, and was subsequently removed from the United States on April 18, 2011. Thus the applicant accrued unlawful presence in the United States from November 22, 2006 until April 18, 2011, a period of more than one year. The applicant does not contest the findings of inadmissibility, but rather seeks a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), and under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his U.S. citizen wife.

The field office director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601 accordingly. *See Decision of the Field Office Director*, dated September 30, 2011.

The record contains the following documentation: briefs filed by the applicant's attorney; statements from the applicant, the applicant's spouse, the applicant's father, and the father and mother of the applicant's spouse; financial documentation; psychological evaluations of the applicant's spouse; medical documentation for the applicant's spouse and the father and mother of the applicant's spouse; and letters of recommendation. 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:

- (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, in pertinent part:

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...

A waiver of inadmissibility under section 212(i) of the Act and under section 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. The applicant's U.S. citizen spouse is the only qualifying relative in this case. Under these two provisions of the law, children are not deemed to be "qualifying relatives." However, although children are not qualifying relatives under the statute, USCIS does consider that a child's hardship can be a factor in the determination whether a qualifying relative experiences extreme hardship. 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.

Counsel contends that the applicant's spouse is suffering from financial hardship due to her separation from the applicant. In an affidavit, the applicant's spouse states that she is unable to work because she is caring for her parents, and that she was forced to move out of her house and rent the house in order to pay the monthly mortgage payments. Financial documentation in the file indicates that in 2008, the applicant and his spouse had a monthly mortgage payment of \$1,285.44. A copy of the 2008 federal income tax return for the applicant and his spouse indicated that the couple had an adjusted gross income of \$24,938, and that the occupation of the applicant's spouse was customer service. Counsel states that the applicant's spouse became a stay-at-home mother after the birth of their second child in June 2008, in order to care for their two young children. In an affidavit dated April 11, 2011, the applicant's spouse states that she has no independent source of income. A psychological evaluation in the record indicates that the applicant's spouse stated that her husband was the only provider in the family, and that she is now getting food stamps.

Counsel also states that the applicant's spouse is suffering from medical hardship. The applicant's spouse states that she was involved in a car accident in September 1998, in which she suffered broken bones and spinal damage. The record includes medical documentation indicating that the applicant's spouse suffered lower back pain, numbness in the left hand and right leg, and temporomandibular joint disorder (TMJ) of the right jaw. The record also includes medical documentation to indicate that the applicant's spouse was diagnosed with two lumps in her breast in 2012. Although the growths were not cancerous, her condition needs to be monitored with continued routine examinations.

In addition, counsel contends that the applicant's spouse is suffering from psychological hardship due to her separation from the applicant. The record indicates that the applicant's spouse has a history of psychological problems. The evidence in the record shows that, following the car accident in September 1998, the applicant's spouse was diagnosed with depression and post-traumatic stress disorder. In a letter dated April 12, 2011 from the psychiatrist who treated the applicant's spouse with her psychological problems following the car accident, the psychiatrist states that the applicant's spouse began seeing the doctor again in February 2011 for depression, and the psychiatrist prescribed Zoloft for her depression and insomnia. The record further includes a psychological evaluation performed by a licensed psychologist, in which the applicant's spouse is diagnosed with Major Depressive Disorder, Severe, Recurrent. The psychologist states that the applicant's spouse is unable to handle her family responsibilities without the assistance of the applicant.

The record establishes that if the waiver application were denied, the applicant's spouse would experience financial, medical and emotional hardship, as well as emotional hardship resulting from her concern over her ability to care for the applicant's two children. These hardships, when considered in the aggregate, are beyond the common results of removal and would rise to the level of extreme hardship if she remained in the United States without the applicant.

The record further indicates that the applicant's spouse would experience hardship were she were to relocate to Montenegro to be with the applicant.

The record indicates that the applicant's spouse has resided in the United States since 1998, and that both her parents are lawful permanent residents residing in the United States. The record includes medical documentation for both parents. The father of the applicant's spouse is disabled as a result of a car accident in 2006, and suffers from post-traumatic memory difficulty, post-concussion syndrome, post-traumatic stress disorder/mood disorder, post-traumatic neck and low back pain, periodic dizziness, headaches, and left hip pain. A doctor's statement on the record states that the applicant's spouse is the main care giver for her father. The record also includes medical documentation which indicates that the mother of the applicant's spouse is suffering from fibromyalgia, depression, hypertension, and hyperlipidemia, and that she requires help and assistance from the applicant's spouse. The record indicates that the applicant's spouse has two brothers in the United States, and includes evidence that the older brother is currently incarcerated, and the younger brother entered college as a freshman in the Fall of 2011, thus neither brother is able to assist with providing care for the parents of the applicant's spouse in the United States.

Counsel states that although the applicant's spouse was born in [REDACTED] the applicant's spouse is ethnic [REDACTED], she speaks the [REDACTED] language, and does not speak the [REDACTED] language, as do the majority of the residents of [REDACTED]. Counsel submitted evidence to indicate that only 5.3% of the population of [REDACTED] speak [REDACTED] and this would limit chances for the applicant's spouse to find employment in [REDACTED].

Counsel further notes that the applicant's spouse and their two children tried to live in [REDACTED] with the applicant during the summer months of 2011. Counsel states that the applicant's children both became ill and had to undergo medical treatment for acute enterocolitis infections, and submitted medical documentation to verify the condition of the applicant's children. Counsel also submits evidence that the applicant was unable to find employment in [REDACTED] to support his wife and children at the time of their stay in [REDACTED].

Based on the evidence on the record, the applicant has established that his spouse would suffer hardship beyond the common results of removal if she were to relocate to [REDACTED] to reside with the applicant.

The AAO thus 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).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The favorable factors in this matter are the extreme hardships the applicant's U.S. citizen spouse and U.S. citizen children would face if the applicant were to reside in ██████████ regardless of whether they accompanied the applicant or remained in the United States; the fact that the applicant resided in the United States for almost 10 years; and letters of reference written on behalf of the applicant. The unfavorable factors in this matter are the applicant's attempt to procure admission to the United States through fraud or misrepresentation and the applicant's unlawful presence 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 her 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.

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