



U.S. Citizenship
and Immigration
Services

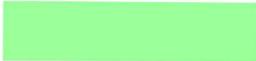
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Date: JUL 18 2013

Office: SEATTLE

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)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Seattle, Washington, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application will be approved.

The record reflects that the applicant is a native and citizen of Bosnia-Herzegovina. The applicant was approved for refugee status in the United States on June 4, 2001, and arrived in the United States on August 31, 2001. On September 10, 2009, the applicant's refugee status was terminated based on misrepresentation of the nature of his service with the Bosnian Serb Army when applying for refugee status. The decision to terminate the applicant's refugee status further indicated that the applicant did not meet the definition of a refugee under section 101(a)(42) of the Immigration and Nationality Act (the Act) because he had ordered, incited, assisted, or otherwise participated in the persecution of civilians during the Bosnian conflict. *Decision of the Acting Field Office Director*, dated September 10, 2009. He was also found inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. ^ 1182(a)(6)(C)(i), for having procured an immigration benefit through fraud or the willful misrepresentation of a material fact. The applicant is married to a U.S. citizen, and is the beneficiary of a Petition for Alien Relative (Form I-130), which was approved on June 30, 2010. The applicant 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 with his U.S. citizen spouse and U.S. citizen children.

The Field Office Director found that the applicant had established that extreme hardship would be imposed on a qualifying relative. However, the Field Office Director denied the Application for Waiver of Ground of Inadmissibility (Form I-601) as a matter of discretion. *See Decision of the Field Office Director*, dated February 14, 2013.

On appeal, counsel for the applicant contends that the field office director ignored substantial evidence in the record, made erroneous conclusions of facts contrary to evidence in the record, applied unfounded speculation and made erroneous assumptions on evidence in the record. *Statement from the applicant's counsel on Form I-290B, Notice of Appeal or Motion*, dated March 14, 2013.

The record contains the following documentation: a brief filed by the applicant's attorney in support of the applicant's Form I-290B; a brief filed by the applicant's attorney in response to the Notice of Intent to Revoke Refugee Status; declarations of the applicant; declarations from experts on the Bosnian conflict; a declaration from the applicant's spouse; financial documentation; and a psychological evaluation of the applicant, the applicant's spouse, and children. 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.

The record indicates that when the applicant applied for refugee status in 1998 and 2001, the applicant stated on his Registration for Classification as Refugee (Form I-590) that he served in the "RS Army" (the Bosnian Serb Army, or *Vojska Republike Srpska*, VRS) as a private from 1992 to 1995. Further information included in the refugee application indicates that the applicant stated that he was mobilized by the Bosnian Serb Army in 1992, that he was stationed at the frontline, about one kilometer from his house, and that he "had the defensive duties of keeping the border and never participated in any offensive combat" and "never participated or witnessed in persecution of any civilians or soldiers."

The record further indicates that during subsequent interviews of the applicant following his arrival in the United States, the applicant stated that he was a member of a mortar team of the Bosnian Serb Army and that he was involved in firing the mortar at coordinates directed by commanders via field telephone.

The AAO notes that counsel, in his brief in response of Notice of Intent to Revoke Refugee Status, contended that the applicant was not inadmissible for fraud, as the applicant maintained that the alleged false statements were based on misunderstanding, not on the basis of willfully misrepresenting a material fact. The AAO further notes that on appeal, the applicant is no longer contesting inadmissibility under section 212(a)(6)(C) of 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. . . .

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. The applicant's U.S. citizen spouse is the applicant's 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 1292, 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 Field Office Director determined that the financial and emotional hardships to the applicant's wife should the applicant's waiver application be denied go beyond the expected hardships when

family members are separated. The Field Office Director further determined that the applicant's wife would endure extreme hardship should she return to Bosnia to be with the applicant. The Field Office Director thus concluded that the hardships reach the level of extreme as envisioned by Congress if the applicant is not allowed to remain in the United States. *See Decision of the Field Office Director*, dated February 14, 2013.

The AAO concurs with the field office director that the situation presented in this application rises to the level of extreme hardship to the qualifying relative. 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 Field Office Director found that the nature and role of the applicant's service with the Bosnian Serb Army constitute negative discretionary factors toward consideration of whether the applicant warrants the Secretary's discretion in granting the waiver. The record indicates that, subsequent to the applicant's arrival in the United States, the applicant stated that he served in a mortar unit of the Bosnian Serb Army and was involved in setting the mortar to coordinates in the city of [REDACTED] dictated by superior officers and firing on command. The Field Office Director held that "[the applicant's] testimony regarding [his] actions during the [REDACTED] tends to show that [the

applicant] participated in the atrocities that occurred during that time. The Field Office Director further held that the membership and role in the Bosnian Serb Army are sufficient to find that the applicant assisted in the persecutory acts of that army. The Field Office Director found that these negative discretionary factors outweighed the positive factors, and denied the applicant's Form I-601 accordingly. *Decision of the Field Office Director*, dated February 14, 2013.

Counsel contends that the Field Office Director ignored substantial evidence in the record regarding the nature of the war in Bosnia, and cited the expert opinions provided by Dr. [REDACTED] Professor of Anthropology, Law and Public & International Affairs at the [REDACTED] and [REDACTED] researcher, author, journalist, and an expert on the Bosnian conflict, as evidence that the Field Office Director failed to properly consider. Counsel further contends that the Field Office Director applied unfounded speculation and erroneous assumptions on evidence in the record.

Regarding the Field Office Director's statement that the applicant's service tends to show that [the applicant] participated in the atrocities that occurred during that time, counsel contends that this conclusion was based on speculation that some of the applicant's mortar rounds might fall within the city limits, and neglected material evidence that the applicant provided that shows the military action the applicant was involved in was legitimate fighting and did not involve the persecution of civilians.

Counsel cites the expert opinion of Dr. [REDACTED] who states that the casualty figures from [REDACTED] during the period 1992-1995 are indicative of war, not persecution. According to Dr. [REDACTED] a report of demographic experts employed by the [REDACTED] used very careful methodology to conclude that in the battles over [REDACTED] related to the war, and [t]hat so many soldiers were killed indicates that the conflict surrounding Sarajevo was primarily military, not a campaign of persecution against civilians. *Letter of Dr. Robert M. Hayden*, dated April 8, 2013.

The Field Office Director includes a reference to a description of the war included on the [REDACTED] website: Through overwhelming military superiority and a systematic campaign of persecution of non-Serbs, they quickly asserted control over more than 60% of the country. [REDACTED] notes that this is a very brief description of the wars on the portal of the [REDACTED] and that this is not in any sense an authoritative or even reliable source. Dr. [REDACTED] further notes that [t]his circumstantial explanatory material on the [REDACTED]'s website is of unknown authorship and has not been subjected to any kind of peer review or other unbiased assessment of accuracy; neither does it provide sources for its assertions, which are not accepted by reliable authors. [REDACTED]

Dr. [REDACTED] proceeds to point out that the remainder of the paragraph from which the Field Office Director quotes undercuts the assertion of persecution. The last sentence of that paragraph states: The conflict turned into a bloody three-sided fight for territories, with civilians of all ethnicities becoming victims of horrendous crimes. [REDACTED] states, [t]his is a description of a civil war, with civilian casualties, not of persecution, and it is just this characterization of the war that is presented by the

most respected scholarly analysis, based on intensive research throughout the wars by scholars who were fluent in [the language], monitored events closely, aimed to deliver objective analyses.”

The Field Office Director cites three incidents, two related to attacks by the Bosnian Serb Army originating from [redacted] as evidence that the applicant was involved in persecution of non-Serbs during the war:

- the shelling on [redacted]
- the shelling of [redacted]
- incidents involving prisoner abuse and extrajudicial killing following the attacks on the [redacted]

These three incidents were described in a report by the USCIS Refugee, [redacted]

Information on the shelling on [redacted] is sourced to the [redacted] Judgment. The [redacted] report states that the incident involved the shelling of a non-military target during a period of no fighting. Counsel contends that the description of shelling a non-military target is not accurate compared to the text of the [redacted] judgment, noting that “the actual text reflects that the area was used by uniformed officers intermittently and that on the day of the alleged attack there were mobilized people for the army in the area.” See [redacted]. With respect to the shelling of the [redacted] building, the [redacted] report also cites the [redacted] stating that one civilian was killed during the shelling. The AAO notes that the [redacted] judgment finds that the attacks that had originated in [redacted] did not result from mortar shells, but rather modified air bombs, and did not determine that subsequent mortar shells that landed in [redacted] came from the [redacted] area, where the applicant was located.

A prosecution expert did testify that the shells in that attack had come from the direction of [redacted] but that the modified air bomb had come from the [redacted] direction.

The Field Office Director also references incidents involving prisoner abuse and extrajudicial killing which occurred at or around the Rajlovac barracks following the attack on the [redacted] neighborhood, citing [redacted] and a report by the UN Human Rights Committee. See [redacted]

Counsel states that there is nothing in the record to indicate that the applicant was involved in or aware of any of the alleged acts described in the judgment or the UN document, and contends that the Field Office Director did not allege the applicant’s involvement or knowledge about the incidents. Dr. Hayden states that, with respect to the incidents described, “there is literally no

indication in the text of the Letter of Denial that [the applicant] had anything whatever to do with them, or that he knew of them, or that knowledge of them could even be imputed to him. *Letter of*

The Field Office Director also found not credible the applicant's statements that he was not aware of the actual targets he was firing at, and that they were just coordinates given to him by telephone from a commander. The denial decision states, given the geography of [redacted] and your acknowledged position in the mountains overlooking the city center; it is hard to believe that you had no knowledge about where in the city you were aiming, and [a]dditionally, the daylight would have enabled you to see more clearly in which direction you were firing the rounds and given you more reason to suspect that your targets affected the civilian population. In his opinion, Dr. [redacted] states that even if he knew the mortars he was firing against the positions of the Army of Bosnia cause civilian casualties, he was hardly in a position to do anything about it, especially since, as in any city, military targets were interspersed in civilian neighborhoods, and he had no way or reason to believe that the coordinates he was given were anything other than enemy positions.

In her declaration in support of the applicant's application for adjustment of status, journalist [redacted] states that she believes that the applicant was a low-level soldier in the siege of [redacted], based on his obvious confusion about the nature of the [redacted] battle and on the fact that his position was not static. She states, The troops actually targeting the city at close range were not moving around. Rather, they were carefully situated in certain positions to achieve as much as possible during daylight hours. [redacted] dated June 29, 2010. She further states, The weapons Mr. [redacted] used as well as the fact that he was moving around makes likely that he was assigned to protect the back of the frontline soldiers and to target the Bosniak Army with long-distance weapons positioned near the city. Both [redacted] state that the applicant would not have been able to understand the effects of his actions on civilians because there was no reliable media source available in Bosnia at the time, as each ethnic group produced media reports biased against the other ethnic group.

Dr. [redacted] states that the Field Office Director's decision imputes at some length the knowledge on [the applicant's] part of the effects of the mortars he was firing on the civilian population of [redacted] but that the decision provides no evidence that [the applicant] knew or should have known that the targets identified by his superiors were anything other than legitimate military targets, and indeed there is not even any evidence that any of the mortars fired by [the applicant's] unit ever even caused any civilian casualties. [redacted]

The Field Office Director also found that the applicant had not presented evidence that his service in the VRS was truly voluntary and found statements that he was conscripted and would have been jailed for refusing to serve inconsistent with a prior statement that he served so that he could continue to reside near his home and take care of it. Both Dr. [redacted] state that the applicant's statements that he was conscripted to serve in the [redacted] and stayed at his home when not on the front lines to be consistent with well-established reporting about the [redacted] states,

Mr. [REDACTED] statements, then, are completely in keeping with the established facts of service in the [REDACTED] he was conscripted in a system of compulsory military service for men under age 55 and avoiding conscription or refusing to serve were prosecuted and punished; and he served in a locally-based unit under a system that required that he stay at home when not literally on the front lines, and that he be supplied mainly from home.

Letter of Dr. Robert M. Hayden, dated April 8, 2013

The fact that elements of the Bosnian Serb Army engaged in acts of persecution and atrocities against non-Serbs is uncontested, as evidenced through the work of [REDACTED]. However, the AAO finds the contentions of counsel that the applicant did not participate or knowingly assist in any persecutory acts committed by the Bosnian Serb Army, backed by expert evidence, to be persuasive. Counsel notes that the Field Office Director did not discredit any of the expert opinions submitted on behalf of the applicant, and the AAO finds that the evidence on the record does not establish that the applicant participated in persecution of civilians during the Bosnian war.

The Field Office Director states, “even if [the applicant was] not personally responsible for the bombardment and death of civilians, [the applicant’s] membership and role in [the applicant’s] unit is [sic] enough to find that [the applicant] assisted in these actions.” *Decision of the Field Office Director*, dated February 14, 2013. Relevant case law holds that membership in an organization that engages in persecution does not automatically lead to a finding that the individual member is a persecutor. A member’s action or inaction must have furthered the persecution in some way. *Matter of Rodriguez-Majano*, 19 I&N Dec. 811 (BIA 1988); *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001); *Vukmirovic v. Ashcroft*, 362 F. 3d 1247 (9th Cir. 2004). In this particular case, in view of the evidence provided by the applicant in the form of expert opinion, the record does not support a finding that, solely by his involuntary service in the Bosnian Serb Army, the applicant can be found to have assisted in persecutory acts that were committed by that army.

Thus, the favorable factors to consider in whether the applicant the Secretary’s discretion in granting the waiver include:

- the extreme hardship the applicant’s U.S. citizen spouse would face if the applicant were to reside in Bosnia and Herzegovina, regardless of whether she accompanied the applicant or remained in the United States.
- the applicant has two U.S. citizen children residing in the United States.
- the applicant has resided in the United States for more than ten years.
- the apparent lack of a criminal record.

The unfavorable factor in this matter is the fact that the applicant did not fully disclose the nature of his service in the Bosnian Serb Army on his refugee application, which may have prevented an appropriate line of inquiry into the applicant's service in the military.

However, in the absence of evidence that the applicant ordered, incited, assisted, or otherwise participated in the persecution of others, 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 application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

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