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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

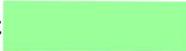


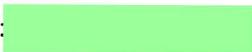
U.S. Citizenship
and Immigration
Services



DATE: JAN 24 2014

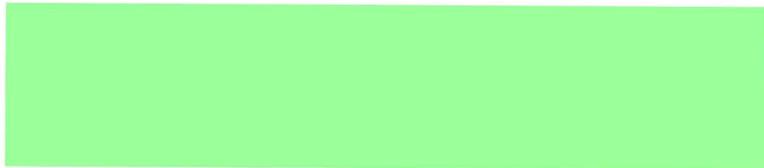
Office: VIENNA, AUSTRIA

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B) and 1182(i), and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

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,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
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 of the former Yugoslavia and a citizen of Kosovo 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 attempting to procure admission to the United States by fraud or willful misrepresentation of a material fact, and 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 one year or more and seeking readmission within 10 years of his last departure from the United States. The applicant's spouse is a U.S. citizen. He seeks a waiver of inadmissibility in order to reside in the United States.

The Field Office Director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the Field Office Director*, dated September 11, 2012.

On appeal, counsel asserts that the Field Office Director incorrectly concluded that the applicant's waiver request reiterated a previously denied waiver application and that hardship to his spouse was analyzed incorrectly. He adds that new evidence establishes that the applicant's spouse would experience extreme hardship if the waiver application is denied.

The record includes, but is not limited to, the applicant and his spouse's statements, financial records, medical records, information about conditions in Kosovo, statements of support and photographs. 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.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [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.

The record reflects that the applicant presented a photo-substituted Slovenian passport in seeking admission to the United States on May 29, 1999. He is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for seeking to procure admission to the United States by willful misrepresentation of a material fact. The applicant does not contest this ground of inadmissibility on 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) Waiver.-The [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 [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.

The applicant requested asylum upon his arrival in the United States on May 29, 1999. An immigration judge denied his request and the applicant was ordered removed on June 11, 2003. His appeal to the Board of Immigration Appeals was dismissed on August 23, 2004. He filed a petition for review with the U.S. Court of Appeals for the Seventh Circuit on September 9, 2004, and the petition for review was denied on September 1, 2005. He filed Form I-485, Application to Register Permanent Residence or Adjust Status, on June 22, 2008, and it was denied on August 13, 2010. He was removed to Kosovo on October 28, 2010. The applicant accrued more than one year of unlawful presence between the denial of his asylum claim and the filing of his application for permanent-resident status. The applicant therefore is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more and seeking readmission within ten years of his departure on October 28, 2010 from the United States. The applicant does not contest this ground of inadmissibility on appeal.

A waiver of inadmissibility under sections 212(a)(9)(B)(v) and 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. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative, in this case the applicant's spouse. 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 AAO will first address hardship to the applicant's spouse if she relocates to Kosovo. The applicant's spouse states that she was born and raised in Chicago and most of her family resides there. The applicant's spouse has concerns about the health system in Kosovo, her inability to communicate with her family, and the effect on her emotional health. The applicant's spouse states that she has visited Kosovo three times and arrived with hope and optimism on her first trip in 2010. This faded and she was admitted to a hospital in Kosovo for three days after attempting suicide. The record includes medical records from Kosovo reflecting that the applicant's spouse went to a clinic due to deterioration of her mental health, and she mentioned depressive nihilistic ideas and committing suicide. A doctor recommended she stay in the clinic for several days until her condition improved. The medical records also reflect that she felt anxious, scared, depressed, and she had problems sleeping. The U.S. Department of State information about Kosovo reflects that health facilities are limited and medications are in short supply. In addition, the record includes a letter from a licensed social worker who has diagnosed her with major depression, recurrent with anxiety, and who concludes that the applicant's spouse would be at risk for significant decrease in her daily functioning if she moved to Kosovo. The record reflects that the applicant's spouse has attended multiple sessions with this social worker and a psychiatrist.

The applicant's spouse states that she works at a public accounting firm and earns over \$50,000 annually; she does not speak Albanian; and she has two mortgages, a student loan and a debt owed by her ex-spouse to her father that she has assumed. She asserts she would not be able to repay these debts upon relocation to Kosovo. Moreover, according to the applicant and his spouse, he has not found employment in Kosovo. The record also includes evidence of the applicant's property and student loans and evidence that the employment rate in Kosovo is high. The record also includes country-conditions information reflecting gender discrimination in the job market.

The applicant's spouse also states that she does not feel safe in Kosovo. The record includes general reports describing crime and human-rights issues in Kosovo, including the lack of laws prohibiting sexual harassment. Additionally, the applicant explains that he feels unsafe in Kosovo and has no family ties there.

The record reflects that the applicant's spouse's family ties are in the United States; she does not have ties to Kosovo other than the applicant, and she does not speak Albanian. In addition, her prospects for employment appear unlikely based on language issues and the high unemployment rate in Kosovo. She also has financial obligations in the United States that would be difficult to manage without sufficient employment in Kosovo. The record also reflects that she has serious mental-health issues; she was admitted to a medical clinic during a trip to Kosovo because of a perceived danger to herself; and medical care in Kosovo is limited. Moreover, the country-conditions reports in the record support the assertions of hardship related to the applicant's health and employment. Based on the totality of the hardship factors presented, the AAO finds that the applicant's spouse would experience extreme hardship if she relocated to Kosovo.

The AAO will now address hardship to the applicant's spouse if she remains in the United States. Counsel states that the applicant's spouse is in a perilous mental and financial condition; her family and friends have struggled to assist her; she has been undergoing psychological and psychiatric treatment with prescribed medication; she suffers from severe depression, stress and anxiety; and the applicant also has been diagnosed with depression and anxiety, which exacerbates his spouse's emotional well-being. In addition, counsel states that the applicant's spouse supports the applicant financially; she has many expenses, including debts incurred by her ex-spouse; and she is on the verge of losing her home.

The applicant's spouse states that the applicant has been the one true constant in her life; he has helped her overcome many of her negative emotional tendencies stemming from abuse relatives had inflicted on her as a child; she was diagnosed with severe depression; she sees a psychiatrist on a monthly basis; she sees a chiropractor for neck and lower back pain; there are days that she cannot get out of bed; she takes sleep medication; and she and the applicant want to start a family and have put it off indefinitely. The applicant's spouse's psychiatrist states that she "has undergone severe hardship" without the applicant, "has undergone various medication changes . . . has had severe depression and anxiety [and] has a difficult time working and functioning." The licensed social worker states that the applicant's spouse reported that her ex-spouse was emotionally and psychologically abusive, and she states that the applicant's spouse is dependent on the applicant for her emotional and psychological well-being. The licensed social worker states that the applicant's spouse would be at risk for significant decrease in her daily functioning if she were involuntarily separated from the applicant. The record includes several prescription notes for the applicant's spouse and evidence of payments to her psychiatrist and chiropractor. The record includes statements from friends and family of the applicant's spouse detailing the emotional difficulty she is experiencing as a result of her separation from the applicant.

The applicant's spouse states that she has not been able to contribute to her retirement plan since the applicant's departure, as she needs that money for gas, food, clothes and phone expenses; and she can no longer help support her father financially as well as she once did. The record includes profit and loss statements for the applicant and his spouse that reflect their decreasing net income from 2009 through 2012, with negative income in the more recent statements. The record includes documentation of many of the applicant's spouse's expenses, including her loans and her travel expenses incurred by visiting the applicant in Kosovo.

The record reflects that the applicant's spouse has a close relationship with the applicant and she would experience significant emotional issues without him. The applicant's spouse has developed exacerbated mental-health difficulties as a result of the applicant's removal. The applicant's spouse also has documented neck and back pain problems. In addition, she would continue to experience serious financial hardship related to the loss of the applicant's contributions to their household and his need for her support, as well as the expenses she would incur by traveling to Kosovo to maintain their relationship. Based on the totality of the hardship factors presented and considering the evidence of hardship in the aggregate, the AAO finds that the applicant's spouse would experience extreme hardship if she remained in the United States without the applicant.

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 (citation omitted).

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 include the applicant's U.S. citizen spouse and other close family members in the United States, extreme hardship to his spouse, the lack of a criminal record, and statements in support of his good character. The unfavorable factors include the applicant's misrepresentation, unlawful presence and removal.

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.

The AAO notes that the Field Office Director denied the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) in the same decision. The Form I-212 was denied solely based on the denial of the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act, it will withdraw the Field Office Director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section

235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the [Secretary] has consented to the aliens' reapplying for admission.

On June 11, 2003 the applicant was ordered removed from the United States. As such, he is inadmissible under section 212(a)(9)(A) of the Act and must request permission to reapply for admission.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be granted as a matter of discretion.

ORDER: The appeal is sustained.