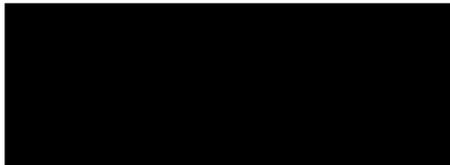


**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY



**U.S. Citizenship
and Immigration
Services**



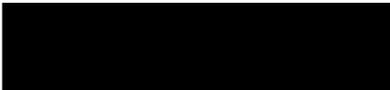
H6

#2

FILE: 

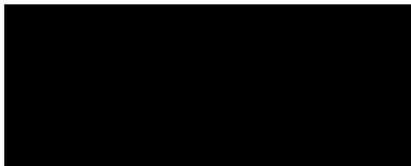
Office: VIENNA, AUSTRIA

Date: **DEC 08 2009**

IN RE: 

APPLICATION: 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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), 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, [REDACTED] is a native and citizen of Albania. He 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 having used a fraudulent Greek passport to enter the United States. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to return to the United States to join his U.S. citizen spouse and child.

The OIC concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, his United States citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel asserts that the applicant's spouse has submitted a plethora of information discussing her close familial ties in the U.S., significant and continuing health problems, the strain of separation, and financial hardships and concerns. Counsel states that the OIC's decision fails to consider these factors in their totality. Counsel states that the positive factors in this case significantly outweigh any negative implications of the applicant's admission to the United States or previous immigration violations.

In support of the application, the record contains, but is not limited to, a written brief from counsel, a letter from the applicant's pastor, letters from friends and family members, photographs, country condition reports, sociological reports, medical documentation, financial records, and statements from the applicant's spouse and father-in-law. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The OIC found the applicant inadmissible under section 212(a)(6)(C) of the Act for having used a fraudulent Greek passport to enter the United States in December 2000. Although the applicant has not disputed his inadmissibility on appeal, the record does not support the OIC's finding that he is inadmissible under section 212(a)(6)(C) of the Act. Since the record in the present case appears to be lengthy, the AAO will first present a chronological overview of the applicant's immigration proceedings.

The record reflects that the applicant filed an Application for Asylum (Form I-589) on March 19, 2001. On the application he stated that he entered the United States without inspection at the US/Mexico border on November 5, 2000. The applicant had an asylum interview at the Newark

Asylum Office on April 17, 2001. The director of the Newark Asylum Office referred the applicant's asylum claim to an Immigration Judge for a hearing in removal proceedings on April 19, 2001. The director's Notice to Appear in Removal Proceedings (Form I-862) charges the applicant as an alien present in the United States who has not been admitted or paroled. The applicant filed a second asylum application on February 7, 2002 while in removal proceedings. The applicant indicated on his second application that he last entered the United States without inspection on December 6, 2000 at the US/Mexico border.

On August 19, 2004, the Immigration Judge issued a decision denying the applicant's asylum application and ordered the applicant removed from the United States to Albania on the charge contained in the Notice to Appear. The Immigration Judge stated in his decision that during the applicant's master calendar hearing he conceded to the charge of removability arising under section 212(a)(6)(A)(i) of the Act as an alien present in the United States without being admitted or paroled. The Immigration Judge noted that the applicant testified during the merits hearing that he entered the United States in December 2000 by walking across the border from Mexico. The Immigration Judge further noted that the applicant testified that he arrived in Mexico with a Greek passport, a Greek driver's license and a Greek identity certificate. The record contains the originals of these documents issued under the name [REDACTED]. The record also contains an original Mexican Migratory Form and an original hotel receipt from [REDACTED].

The applicant appealed the Immigration Judge's denial to the Board of Immigration Appeals (BIA). On January 24, 2006, the BIA affirmed, without opinion, the Immigration Judge's decision. The applicant filed a petition for review of the BIA's decision with the United States Court of Appeals for the Sixth Circuit. On April 17, 2006, the Field Office Director, Detention & Removals Office, Cleveland, Ohio, issued a warrant for the applicant's removal. The warrant stated that the applicant was subject to removal from the United States pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act. The applicant filed a motion for a stay of removal with the Sixth Circuit Court of Appeals, and the motion was granted on April 21, 2006. On May 24, 2006, the applicant departed the United States and returned to Albania.

A review of the record fails to show that the applicant entered the United States with a fraudulent Greek passport in December 2000. As discussed above, the record instead reflects that the applicant entered the United States without inspection in either November or December 2000. The applicant was found removable by an Immigration Judge under section 212(a)(6)(A)(i) of the Act, which pertains to aliens who are present in the United States without admission or parole. Therefore, the record does not support the director's finding that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for entry into the United States with a fraudulent document.

However, beyond the decision of the director, the AAO finds under its de novo review that the applicant is inadmissible under 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 and seeking admission within 10 years of his last departure from the United States.¹

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

(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.

....

(iii) Exceptions.

(II) Asylees.- No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

U.S. Citizenship and Immigration Services (USCIS) has interpreted the phrase "bona fide asylum application" to mean a properly filed asylum application that has a reasonably arguable basis in fact or law, and is not frivolous.² Unlawful presence does not accrue while the application is pending unless the alien engages in unauthorized employment.³ USCIS considers the application for asylum to be pending during any administrative or judicial review (including review in Federal court).⁴ As discussed, the record reflects that the applicant entered the United States in either November or

¹ The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

² U.S. Citizenship and Immigration Services Memorandum, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate, Pearl Chang, Acting Chief, Office of Policy and Strategy, dated May 6, 2009.

³ *Id.*

⁴ *Id.*

December 2000. The applicant filed an Application for Asylum (Form I-589) on March 19, 2001. The applicant's asylum application was still pending review before the Sixth Circuit Court of Appeals when he departed the United States on May 24, 2006.

The AAO must now determine whether the applicant engaged in any period of unlawful employment from the date he filed his asylum application, March 19, 2001, until his departure from the United States, May 24, 2006. The record contains a brief the applicant's former counsel initially filed with the waiver application. The brief states that the applicant owned and operated "The Famous Greek Place" restaurant in Chardon, Ohio. The record contains a certificate from the State of Ohio certifying that The Famous Greek Place filed and recorded its domestic articles of incorporation on January 14, 2005. The record also contains copies of federal tax returns reflecting that The Famous Greek Place, Inc. was in operation in 2005 and 2006 and the applicant was a shareholder in the business with 49% stock of ownership. DHS records show that the applicant filed Applications for Employment Authorization (Form I-765) on July 23, 2001, November 21, 2001 and September 18, 2003. The applicant's November 21, 2001 and September 18, 2003 applications were approved, and his July 23, 2001 application was denied. The applicant was granted employment authorization for the periods March 6, 2002 until March 5, 2003 and September 18, 2003 until November 10, 2003. There is no evidence in the record that the applicant had employment authorization during his operation of The Famous Greek Place from January 2005 until his departure in May 2006. Therefore, the applicant accrued unlawful presence during this period of unlawful employment in the United States. The applicant is attempting to seek admission into the United States within ten years of his May 2006 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for having been unlawfully present in the United States for a period of more than one year and seeking admission to the United States within ten years of his last departure.

The AAO notes that the record reflects that the applicant was convicted on May 16, 2002 for petty theft in violation of section 2913.02 of the Ohio Revised Code, a misdemeanor of the first degree. The maximum term of imprisonment for a misdemeanor of the first degree under the Ohio Revised Code is not more than 180 days. Ohio Rev. Code Ann. § 2929.24 (West 2009). The record shows that the applicant was given a 6 month suspended sentence, placed on one year of probation, and ordered to pay a \$100 fine for his conviction.

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974)(stating, "It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . ."); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, "Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude]."). An alien who has been convicted of a crime involving moral turpitude is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

A conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). It is unclear from the record whether the applicant intended to permanently deprive the victim of his or her property. However, even if the

applicant's theft conviction involved a permanent taking of property, he would not be found inadmissible for having committed a crime involving moral turpitude because the conviction would fall under the "petty offense" exception. The "petty offense" exception applies in cases where there is only one conviction of a crime involving moral turpitude if the maximum penalty possible for that conviction did not exceed imprisonment for one year and the applicant was not sentenced to a term of imprisonment in excess of six months. See Section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Since the applicant's conviction would fall within the petty offense exception, it is unnecessary for the AAO to determine whether the conviction is a crime involving moral turpitude.

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

(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 [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 section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the alien himself experiences upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The denial notice in this case assesses the applicant's eligibility for a waiver under section 212(i) of the Act. However, section 212(i) of the Act only pertains to waivers of inadmissibility under section 212(a)(6)(C)(i) of the Act, for fraud or willful misrepresentation of a material fact. As discussed, the waiver provision applicable to this case is section 212(a)(9)(B)(v) of the Act. Nevertheless, the OIC's actions must be considered to be harmless error because the provisions under sections 212(i) and 212(a)(9)(B)(v) of the Act delineate parallel standards of extreme hardship to an alien's spouse.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to United States citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant

health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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. *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record reflects that the applicant wed [REDACTED] a U.S. citizen, on December 12, 2002. The applicant's spouse is a qualifying family member for section 212(a)(9)(B)(v) of the Act extreme hardship purposes. The applicant and his spouse have a five year old U.S. citizen child, [REDACTED]. Hardship to the applicant's child will be considered insofar as it results in hardship to the applicant's spouse.

The AAO will first address hardship to the applicant's spouse if she accompanies the applicant to Albania. Counsel asserts that if the applicant's spouse moved with the applicant to Albania, she would be separated from her father, with whom she currently lives and assists, as well as her brothers and sisters. Counsel states that the applicant's spouse's father is obese, suffers from a myriad of medical problems, including arthritis in his legs, high blood pressure and cholesterol, and uses an oxygen tank to assist with his breathing. Counsel further asserts that the applicant's spouse heavily identifies with her church, First Assembly of God, and finds her involvement with the church as a support structure in the United States. Counsel states that should the applicant's spouse leave the United States, she would be required to leave one of the few support structures that currently play an active role in helping manage the different pressures in her life. Finally, counsel asserts that Albania is one of the poorest countries in Europe. Counsel states that given the serious nature of the applicant's spouse's medical issues, her long-term presence in an environment so poorly equipped to ensure her medical well-being is frightening. Counsel states that the applicant's spouse has already attempted to live in Albania for a significant period of time, only to return to the U.S. after being unable to start a life there.

In support of these assertions, the record contains the following relevant documentation:

- A letter from the applicant's father-in-law's physician, [REDACTED] dated April 29, 2008, which states, "Due to his morbid obesity, he has 3+ edema in his lower extremities. In addition, he has varicose veins and stasis dermatitis. He has a history of a motor vehicle accident in 2001, resulting in open reduction and internal fixation of a right clavicular fracture. He also has a history of bladder cancer for which he had surgery in 2001. He suffers from arthritic pain in his spine, shoulders, knees and ankles. He has difficulty ambulating and uses oxygen by nasal cannula for exertional dyspnea and has atrial fibrillation and congestive heart failure." [REDACTED] letter further

states, "Due to his medical conditions, he is unable to take care of himself. Being a retired employee from GE, he lives on a limited income. Recently he became a widower. He depends on his daughter and son-in-law, [REDACTED] who provide him with physical, emotional and financial assistance."

- A letter from Reverend [REDACTED] Pastor, First Assembly of God, dated June 22, 2007, which states, "As their pastor for the almost two years prior to [REDACTED] deportation, I can attest to the fact that they are husband and wife. . . . They are married, and during the time that they have been part of my congregation, I ministered to them during times of sorrow and joy and have observed them to be partners in life."
- A letter from [REDACTED] dated January 24, 2008, which states, "Please be advised at [sic] [REDACTED] has been diagnosed with moderate to severe cervical dysplasia, which is a pre-cancerous condition. She will require additional surgery and close follow up. It would be beneficial for her to have additional family support available, due to the degree of follow up that is necessary to prevent this from becoming a cancerous condition."
- A letter from the applicant's spouse, which was initially filed with the waiver application. The letter states, "I lived in Albania for 1 year while I was there I lost at least 40 pounds because I couldn't eat the food, I couldn't speak the language & I couldn't drive . . . We never had lights, running water, no electric [sic] all the time. I was still grieving he loss of my mother while I was there & had no family around when the holidays came around. It was unbearable! . . . I was angry & upset the whole time I was there. Also because I don't have my anger medication & depression pills. My mother died of cancer August 6, 2005 & we left for Albania May 25, 2006 . . ."
- A letter from [REDACTED] Acting COO, Pastoral Counseling Service of Summit County, dated June 28, 2007, which states, "Mrs. [REDACTED] asked for her diagnosis while she was being seen by our staff, including [REDACTED] diagnosis was: Adjustment Disorder with Depressed Mood – DSM-IV – 309.0; Partner Relational Problem – DSM-IV – V61.1; Bereavement – DSM-IV – V62.82. She was prescribed the following medication: Citalopram 20 mg.; Trazedone 50 – 100 mg.; Lexapro 10 mg."
- A letter to the applicant's spouse from [REDACTED] Pastoral Counseling Service of Summit County, dated May 9, 2006, which states, "Due to the fact that you will be leaving the country, your case here at Pastoral Counseling will be closed. I recommend that you seek psychiatric follow-up for medication management in the country where you relocate."

The AAO notes that the U.S. Department of State reports the following problematic conditions involving access to medical care and lack of infrastructure in Albania:

Medical facilities and capabilities in Albania are limited beyond rudimentary first aid treatment. Emergency and major medical care requiring surgery and hospital care is inadequate due to lack of specialists, diagnostic aids, medical supplies, and prescription drugs. Travelers with previously diagnosed medical conditions may wish

to consult their physicians before travel. As prescription drugs may be unavailable locally, travelers may also wish to bring extra supplies of required medications.

Electricity shortages have resulted in sporadic blackouts throughout the country, which can affect food storage capabilities of restaurants and shops. While some restaurants and food stores have generators to properly store food, travelers should take care that food is cooked thoroughly to reduce the risk of food-borne illness. Water in Albania is not potable. Visitors should plan to purchase bottled water or drinks while in country.

Major roads in Albania are often in very poor condition. Traveling by road throughout Albania is the most dangerous activity for locals and tourists. Vehicle accidents are the major cause of death, according to police statistics. Electricity shortages have resulted in sporadic blackouts throughout the country that can happen any hour of the day or night. Such outages affect traffic signals and street lights, making driving increasingly treacherous at any time of day.

U.S. Department of State, *Country Specific Information, Albania*, July 14, 2009.

The above factors, when considered in the aggregate, demonstrate that the applicant's spouse would suffer extreme hardship if she relocated with the applicant to Albania. These factors include the applicant's spouse's ties to her family and church in the United States, her commitment to provide support to her father who is suffering from multiple medical conditions, her medical diagnosis with moderate to severe cervical dysplasia, her mental health diagnosis with Adjustment Disorder with Depressed Mood, her unfamiliarity with the language, culture and customs in Albania, and, finally, the lack of basic medical care, specialists, medical supplies, and prescription drugs in Albania. Given the numerous hardship factors presented in this application, it has been established that the applicant's spouse would suffer extreme hardship if she were to relocate to Albania due to the applicant's inadmissibility.

Although hardship to the applicant's spouse in the event that she relocates with the applicant to Albania is material for establishing eligibility for a waiver under section 212(a)(9)(B)(v) of the Act, it is not the only factor to be considered. Extreme hardship to the applicant's spouse must be established in the event that she accompanies the applicant or in the event that she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

Counsel asserts that should the applicant's spouse remain in the United States, she would need to raise her son, [REDACTED] without the applicant's assistance. Counsel states that a psychiatric evaluation of [REDACTED] has concluded that he seems to have begun showcasing some indicia of psychological problems that may develop from his father's prolonged absence. Counsel states that the applicant's absence seems to have triggered [REDACTED] erratic behavior, and the applicant's spouse is left without any father figure to control and remedy the situation. Counsel cites to studies that document the negative impact of single parent families on children and their mothers. Counsel states that the applicant's

spouse's father and son require her constant attention and care. Counsel asserts further that the applicant's spouse has been unable to accept full-time employment because she cannot afford child care for her son. Counsel states that given the lack of substantive employment opportunities in Albania, the applicant is unable to financially assist his spouse. Counsel states that the applicant's spouse relies on her father's limited income and family financial support to make ends meet. Counsel states that should the applicant return to the United States, he has a continuing oral agreement with his business partner to assume management of The Famous Greek Place, and in turn accept revenue from the business. Finally, counsel asserts that the stress of the applicant's removal coupled with the applicant's spouse's inability to cope with her multiple obligations has led her to seek psychiatric therapy and counseling. Counsel states that the applicant's spouse has started feeling overwhelmed and has experienced high levels of anxiety. Counsel notes that the applicant's spouse has been diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood and cervical dysplasia, a pre-cancerous condition.

In support of these assertions, the record contains the following relevant documentation:

- A letter from [REDACTED] dated September 10, 2009, which states, "Mrs. [REDACTED] provides for her young son, and father who is incapacitated. She receives government assistance to provide her father 24-hour medical care. Enclosed are Mr. [REDACTED] financial statements and government assistance statements from Ohio Department of Jobs and Family Services. . . . Please note the financial statements including Food Stamp Issuance History and Cash Issuance History from the ODJFS as this is the only income Mrs. [REDACTED] receives."
- Statements, dated August 7, 2009, from Mahoning County Job and Family Services detailing food stamp and cash issuance history. Although an identifying name is not listed on the statements, the statements were sent from Congressman Wilson's office, indicating that they relate to the applicant's spouse.
- A letter from the applicant's spouse, which provides, "The circumstances now for my son and I are unbearable. We are forced to live on government assistance, I have no one to watch my son, so I can work, I take care of a physically handicapped father who is extremely obese, who has heart problems and back problems, who is a widower, I have lost my mother four years ago of cancer, now I've been with out [sic] my husband and my child has been with out [sic] a father for two and half years."
- A case summary from [REDACTED] MA, LSW, Therapist, and [REDACTED] PCC-S, Clinical Supervisor, dated August 10, 2009. The case summary notes that the clinician, [REDACTED] MA, LSW, Clinical Social Worker, [REDACTED] and Psychiatrist, [REDACTED] were involved in providing treatment to the applicant's son, [REDACTED] from October 31, 2007 through July 28, 2009. The case summary states, [REDACTED] and his mother participated in counseling, community support and pharmacological services. . . . Treatment goals targeted reducing disruptive behaviors including his anxious mood and tantrum behavior. . . . Throughout sessions, mother reported that [REDACTED] often verbalized missing father and referenced wanting to see him. This was also observed during some sessions. Maximum gains were made overall and the case was closed."

- A letter from [REDACTED] D.O., Community Medical Associates, LTD., dated February 6, 2009, which states, "I am currently the primary care physician of [REDACTED] along with her son [REDACTED]. Over the past two years, I have noticed an increase in disruptive behavior occurring with [REDACTED] due to separation anxiety."
- A letter from [REDACTED] LPC, Turning Point Counseling Services, dated July 15, 2009, which states, "[REDACTED] has been my client . . . since November of 2007. [REDACTED] presented with symptoms of depression. [REDACTED] reported struggling with these symptoms since mother [sic] death, and husband's deportation. [REDACTED] has been experiencing ongoing hardships, relocating her family due to financial strain, lack of supports, and unemployment."
- A letter from [REDACTED] Ph.D., Psychology Resident, PsyCare, dated September 4, 2007, which states, "Mrs. [REDACTED] came to Psycare on 8/10/07 seeking counseling for her difficulties dealing with her husband's deportation to Albania and her mother's death from cancer. Mrs. [REDACTED] displayed symptoms of (309.28) Adjustment Disorder with Mixed Anxiety and Depressed Mood, including low energy, low motivation, difficulty sleeping, loneliness, anger, tension, and feeling blue. Mrs. [REDACTED] has also reported difficulty raising her child, caring for her father, and supporting her family in the absence of her husband."

The Ninth Circuit Court of Appeals has stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes that in denying the application, the OIC stated that based on the record, the applicant's spouse has a substantial history of depression and anger management issues, many of which stem from her mother's death, first divorce, childrearing difficulties, and her marital problems with the applicant. The OIC further stated that considering the detailed record of the applicant's spouse's marital problems, including verbal and physical abuse, it is entirely unclear how the presence of the applicant would improve her medical conditions. The OIC noted that the narratives from the applicant's spouse and her psychologist reflect that the applicant's spouse's turbulent relationship with the applicant actually causes her to be angry, physically violent towards the applicant, and depressed, as opposed to lessening her problems.

In addressing this basis for denial, counsel asserts that if the applicant's spouse had identified the applicant as a source of her problems, she would not be submitting the instant petition. Counsel states that given the wealth of documentation submitted on the applicant's spouse's behalf documenting her issues with depression and anger management, the applicant's absence, not his presence, is the driving force behind her psychological problems. Counsel states that rather curious is the OIC's willingness to

bypass approximately 100 pages of medical documentation evidencing the applicant's spouse anxiety about her husband's situation and instead concentrating on a single stream-of-consciousness journal entry.

The AAO has reviewed the medical documentation in the record and concurs that the documentation demonstrates that the applicant's spouse has, in the past, suffered from anger management issues and has verbally and physically abused the applicant. However, the documentation also demonstrates that the applicant's spouse has sought mental health treatment for her psychological problems. Further, she has sought to maintain her marital relationship with the applicant as demonstrated by her attempt to relocate to Albania. The past history of psychological hardships suffered by the applicant's spouse, while not directly related to her separation from the applicant, compound the hardships she is now suffering as a result of her separation from the applicant, and render her more vulnerable to psychological suffering than would be typically endured in instances of separation.

In sum, the AAO finds that the record demonstrates that the applicant's spouse is suffering extreme psychological distress due to her separation from the applicant. The applicant's spouse's psychological suffering is demonstrated by her diagnosis with Adjustment Disorder with Mixed Anxiety and Depressed Mood. The evidence reflects that the applicant's spouse has undergone long-term individual psychotherapy as treatment for her mental health conditions. The evidence also reflects that she has had to cope as a single parent with her son's "disruptive behaviors" and has participated in family psychotherapy to resolve his issues. Furthermore, the record demonstrates that the applicant's spouse is suffering extreme financial hardship as a result of her separation from the applicant. This financial hardship is evident from her reliance on state issued public assistance. The AAO notes that counsel's assertion regarding the applicant's prospective management of The Famous Greek Place is not demonstrated by the record.⁵ However, the applicant's Biographic Information Form (Form G-325A) reflects that he was previously employed in the United States as a bridge painter and cook, indicating that his presence in the United States would contribute to his family's household income. The AAO notes further that if the applicant remains separated from his spouse, it is unlikely that he would be able to send her remittances from Albania due to the country's economic conditions. Country condition reports reflect that the official unemployment rate in Albania was at 12.5% in 2008, with an estimated actual unemployment rate in excess of 30%.⁶ The most recent poverty data reflects that in 2004 an estimated 25% of Albania's population was living below the poverty line.⁷ These factors, when considered in the totality, demonstrate that if the applicant's waiver is denied, and the applicant remains separated from his spouse, the applicant's spouse would continue to suffer extreme hardship.

⁵ Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

⁶ Central Intelligence Agency (CIA), The World Factbook, Albania, <https://www.cia.gov/library/publications/the-world-factbook/geos/al.html> (October 28, 2009).

⁷ *Id.*

Finally, in denying the application, the OIC stated that notes from the applicant's Form I-130 (Petition for Alien Relative) interview reflect that the applicant's spouse was aware of the applicant's immigration status and that he was in removal proceedings before they met. The OIC stated that the applicant's spouse knew that she would need to choose whether she wishes to remain the United States or move abroad to be with the applicant. The OIC noted that less weight is given to equities acquired after a deportation or removal order has been entered. The OIC cited to *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991), *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992), and *Cervantes-Gonzales*, 22 I&N Dec. 560 (BIA 1999).

In rebuttal, the applicant's attorney asserts that the equities obtained through the applicant's marriage were acquired at a time when the applicant had prepared and submitted his application for asylum to the immigration court. Counsel contends that since the applicant's asylum application was not frivolously submitted, the presumption that the two were married with the knowledge that he would eventually be removed is simply incorrect.

The AAO notes that the OIC's citation to *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991) and *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992) as precedent decisions involving an extreme hardship analysis is misplaced. Both decisions establish the general principle that "after-acquired equities" are given less weight for purposes of assessing favorable equities in the exercise of discretion. A discretionary analysis is conducted once extreme hardship has been established. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

In *Cervantes-Gonzalez*, the BIA did not use the term "after-acquired equities," but took into consideration the qualifying family member's expectations at the time that she married the respondent, and stated that:

The respondent's wife knew that the respondent was in deportation proceedings at the time they were married. In contrast to the respondent's assertions on appeal, this factor is not irrelevant. Rather, it goes to the respondent's wife's expectations at the time they were wed. Indeed, she was aware that she may have to face the decision of parting from her husband or following him to Mexico in the event he was ordered deported. In the latter scenario, the respondent's wife was also aware that a move to Mexico would separate her from her family in California. We find this to undermine the respondent's argument that his wife will suffer extreme hardship if he is deported.

22 I&N Dec. 560, 566-67 (BIA 1999).

The AAO finds that the present case can be easily distinguished from the facts in *Cervantes-Gonzalez*. Here, the applicant had a pending asylum application at the time of his marriage to his U.S. citizen spouse. This application remained pending until the applicant's May 24, 2006 departure from the United States. As discussed, the applicant would not be considered inadmissible for unlawful presence if he had simply renewed his employment authorization document while his asylum application remained pending. *See* 8 C.F.R. § 274a.12(c)(8). There is no indication that the respondent in *Cervantes-Gonzales* had a pending application for relief from deportation at the time

of his marriage to his U.S. citizen spouse. Further, the record reflects that the applicant's spouse resided with him for one year in Albania immediately upon his departure from the United States. Her residence in Albania provided her first hand knowledge of the hardship she would suffer if she permanently relocated with the applicant there. This information was not known to the applicant's spouse until several years after their marriage when she attempted to relocate to Albania. In contrast, in *Cervantes-Gonzales*, the respondent's wife failed to state that she would suffer hardship in Mexico if she relocated there with the respondent. 22 I&N Dec. 560, 567. Therefore, based on the facts of this particular case, the AAO finds that the applicant's spouse's expectations at the time of her marriage to the applicant do not undermine or warrant giving less weight to her claim of extreme hardship.

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

The favorable factors in this matter are the extreme hardship to the applicant's U.S. citizen spouse, hardship to the applicant's U.S. citizen son, and the passage of over three years since the applicant's immigration violation. The unfavorable factors in this matter consist of the applicant's unlawful employment, which resulted in his unlawful presence in the United States, the "after-acquired" nature of some of his equities, and the applicant's May 16, 2002 conviction for petty theft in violation of section 2913.02 of the Ohio Revised Code. The applicant does not appear to have been arrested for any other criminal offenses and he has not been charged with any other immigration violations.

The AAO finds that the applicant's breach of the immigration laws of the United States and criminal conviction are serious in nature and cannot be condoned. Nevertheless, the AAO finds that the totality of the hardship imposed on the applicant's spouse as a result of the applicant's inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

The AAO notes, however, that the applicant was ordered removed by an Immigration Judge on August 19, 2004. This order was affirmed by the BIA on January 24, 2006. The applicant departed the United States on May 24, 2006. Since the applicant was ordered removed and is applying for admission within ten years of his removal order, he is inadmissible under section 212(a)(9)(A)(ii) of the Act for having departed the United States while under an outstanding order of deportation and seeking admission within 10 years of his departure from the United States. Therefore, the applicant is required to file an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) with the OIC if he seeks admission to the United States

before May 23, 2016.⁸

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained, and the application will be approved.

ORDER: The appeal is sustained.

⁸ The OIC stated in the Form I-601 denial notice that the applicant's Form I-212 had also been denied. However, the record before the AAO does not contain evidence that the applicant filed a Form I-212.