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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H6

[redacted]

FILE: [redacted] Office: VIENNA, AUSTRIA Date: DEC 23 2010

IN RE: [redacted]

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

[redacted]

INSTRUCTIONS:

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

Thank you,

Ellen C. Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility, was denied by the Officer in Charge, Vienna, Austria. Based on the denial of the Form I-601, the Officer in Charge also denied the Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal. The denial of the Form I-601 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The denial of the Form I-212 will be withdrawn.

The applicant is a native and citizen of Albania who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking admission within ten years of his last departure. The applicant is married to a U.S. citizen. He seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States.

The Officer in Charge found that the applicant had failed to establish that the bar to his admission would result in extreme hardship to a qualifying relative. Accordingly, she denied the Form I-601. *Decision of the Officer in Charge,* dated February 26, 2009.

On appeal, counsel contends that the Officer in Charge erred as a matter of fact and law in denying the applicant's waiver application as she failed to engage in a meaningful analysis of the extreme hardship factors presented by the applicant's spouse. *Form I-290B, Notice of Appeal or Motion,* dated March 24, 2009.

In support of the waiver, the record includes, but is not limited to, counsel's briefs; statements from the applicant's spouse, her parents and sister, as well as friends and former coworkers; a letter of support from a friend of the applicant; country conditions information concerning Albania, including information on the availability of health care, locally and nationally; documentation of the applicant's spouse's financial obligations; published materials on the nursing assistant profession; medical statements and records relating to the applicant's spouse; published information concerning Lexapro; documentation concerning the business recently started by the applicant's spouse and her mother; and police reports relating to the applicant's spouse's brother. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9)(B) states 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.

The record reflects that the applicant entered the United States without inspection on November 3, 2000 and remained until July 4, 2008 when he departed for a July 22, 2008 immigrant visa interview at the U.S. embassy in Tirana, Albania. Based on this history, the applicant accrued unlawful presence from November 3, 2000 until his July 4, 2008 departure from the United States. As he accrued unlawful presence in excess of one year and is seeking immigrant admission within ten years of his 2008 departure, the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

> The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Accordingly, in this proceeding, hardship to the applicant will be considered only insofar as it results in hardship to his spouse, the only qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals (BIA) stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (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 BIA 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 BIA 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 BIA has also held that the common or typical results of deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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 BIA 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.*

We observe that 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., In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the BIA considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the BIA considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-,* 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The AAO now turns to the question of whether the applicant in the present case has established that a qualifying relative would experience extreme hardship as a result of his inadmissibility.

In support of the applicant's claim that his spouse would suffer extreme hardship if she joined him in Albania, counsel contends that the applicant's spouse is unfamiliar with the Albanian language or culture and that, lacking language skills, she would be unable to find employment in Albania.

Counsel also asserts that the applicant's spouse would have to give up her employment as a certified nursing assistant, a job she enjoys and that this type of employment would not be available to her in Albania. Counsel states that if she relocated, the applicant's spouse would be unable to repay her debts and that her family in the United States could not assume that financial burden. He also notes that the applicant's spouse's relocation would leave her family in "dire financial straits" as she would have to turn her back on the vending machine business she and her mother have started. Counsel asserts that the vending machine business is dependent on the applicant's spouse's involvement and that it replaces family income lost as a result of the failure of the business run by the applicant's spouse's father. He contends that the applicant's spouse would be unable to seek financial support from the applicant's parents in Albania as they are already on welfare. Counsel also reports that the applicant's spouse suffers from depression and anxiety, and asserts that she would be unable to obtain treatment or medication for her condition in Albania.

In a March 21, 2009 statement, the applicant's spouse contends that if she moved to Albania, she would be unable to find a job as she does not speak, read or write Albanian, and that she previously suffered physical injury in Albania as a result of her lack of language skills. The applicant's spouse also states that employment opportunities in her field are virtually nonexistent in Albania and that the small town where the applicant lives does not have any nursing homes. She further states that her relocation to Albania would result in additional financial hardship for her and her family as she would be unable to pay her bills and her family would not be able to survive without her financial contribution. The applicant's spouse asserts that she has no family in Albania and that separation from her family, friends and coworkers would result in extreme emotional hardship for her. She states that she is a Christian and that relocating to Albania would require her to live in a Muslim country, to which she would not be able to adapt.

In support of counsel's claim that the applicant's spouse would experience hardship because she would be unable to obtain mental health treatment in Albania, the record includes medical statements and reports from psychotherapist [redacted]. In a June 18, 2008 letter, [redacted] indicates that she has been treating the applicant's spouse since May 13, 2008 for Adjustment Disorder with Mixed Moods of Anxiety and Depression, which has been caused by the applicant's immigration problems. She reports that the applicant's spouse's symptoms include anxiety, depression, sleep disturbance, morning awakenings, mood swings, frequent weeping and inability to limit this, hopeless and helpless feelings, fearfulness, poor concentration, defective short term memory, racing thoughts and excessive worry. Because of the severity of her symptoms, [redacted] states, the applicant's spouse was evaluated by the Center's staff psychiatrist [redacted] who prescribed Lexapro to reduce her high levels of anxiety and depression.

The record also contains a February 27, 2009 treatment record for the applicant's spouse that indicates she contacted [redacted] on that date after she had not slept for two days and was also unable to control her crying. A second letter from [redacted] dated March 12, 2009, indicates that the applicant's spouse's diagnosis has been changed to that of Major Depression, Recurrent, Severe and that she is experiencing intermittent suicidal ideation, an inability to work at her job and a reduction in her daily living activities as a result of her separation from the applicant. A March 12, 2009 statement from [redacted] also indicates that the applicant's spouse's depression and anxiety are

getting worse and a medical form issued by reports that the applicant's spouse's prescription for Lexapro was increased as of March 20, 2009. The record also contains a translated statement from District, dated March 9, 2009, that indicates the applicant's city of residence, does not have a psychiatrist, and published country conditions materials that establish medical care in Albania is limited and that prescription medications may be not be available locally.

While the AAO acknowledges the documentation provided to establish the applicant's spouse's emotional/mental health status and the difficulty she would have in obtaining mental health care in Albania, we do not find this evidence to establish that relocation would result in extreme hardship for her. The medical statements in the record indicate that the applicant's spouse's depression and anxiety, as well as the worsening of her symptoms, are the result of her separation from the applicant. They do not address how the applicant's spouse's emotional health would be affected if she left the United States to join the applicant in Albania. As a result, the record fails to demonstrate that the applicant's spouse has a mental health condition that would go untreated upon relocation.

We also find that the record fails to document that the applicant's spouse's parents are in any way financially dependent on her and would suffer a loss of income if she left the United States. No documentary evidence in the record establishes the business failure of the applicant's spouse's father, the family's current income or the extent to which that income is dependent on the applicant's spouse's vending machine business. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The 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). Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO does, however, take note of the fact that the applicant's spouse does not speak, read or write Albanian and the negative impact that her lack of language skills would have on her ability to obtain any employment in Albania or to participate in its society and culture. We also note that the record contains a March 3, 2009 statement from Municipality that indicates the applicant's spouse would be unable to rely on her medical training to obtain employment in as there are no local nursing homes or other institutions that employ nursing assistants. We further acknowledge that the applicant's family members are in the United States and that she has no ties to Albania beyond the applicant. When the hardships created by the applicant's spouse's lack of language skills, including the resulting impediments to her employment and her participation in Albanian society, are considered in concert with the normal disruptions and difficulties created by relocation, the AAO finds that relocation to Albania would result in extreme hardship for the applicant's spouse.

Counsel also contends that the applicant's spouse is suffering as a result of her separation from the applicant. Counsel asserts that the applicant's spouse is experiencing depression and anxiety as a result of his inadmissibility and that her declining mental health is interfering with her ability to

function as a nursing assistant, including her ability to follow directions and interact with her patients in a kind, calm manner. Counsel further asserts that the applicant's spouse's depression and anxiety have been noticed by colleagues at work, and by her family and friends.

Counsel also points to the financial burdens facing the applicant's spouse, noting that she has significant credit card debt and has defaulted on a car loan. Her financial burden, counsel asserts, is exacerbated by her financial support of the applicant in Albania, who has been unable to obtain employment since his 2008 return.

In her March 21, 2009 statement, the applicant's spouse asserts that her depression and anxiety are growing worse every day and are affecting her job performance. She states that she is having panic attacks, is unable to control her emotions at work, and is having great difficulty completing routine tasks. The applicant's spouse also reports that she has had serious thoughts about suicide. Her depression and anxiety, the applicant's spouse contends, have worsened as a result of her financial situation. She states that she is supporting herself and the applicant in Albania, as well as contributing financially to her family in the United States.

As previously discussed, the record includes medical statements and records that establish the applicant's spouse is experiencing significant emotional hardship as a result of her separation from the applicant. The AAO also finds the record to include statements from the applicant's coworkers, family and friends that further document how her mental health has deteriorated in his absence. the applicant's supervisor at her former place of employment, states that the applicant's spouse's work performance suffered as a result of the applicant's immigration problems and the denial of his immigrant visa case resulted in such severe distress for the applicant's spouse that she was unable to work for about one week. Statements from coworkers of the applicant's spouse at also indicate that they too observed the applicant's spouse's distraction and the changes in her behavior at work. A statement from the applicant's father indicates that his daughter who was previously full of energy and always laughing is now sad and cries a great deal. The applicant's spouse's mother reports that her daughter was previously a happy person but is now emotionally volatile and subject to panic attacks. The applicant's spouse's sister states that the family is concerned about what might happen to the applicant's spouse if the situation is not resolved soon. Statements from two of the applicant's friends echo the preceding concerns, noting the significant changes in her personality since the applicant's visa application was denied.

The AAO also notes that on September 21, 2010, counsel submitted a new statement from the applicant's spouse and documentation relating to her financial hardship. A copy of an October 9, 2009 Claim Information indicates that the applicant's spouse filed for unemployment benefits on October 2, 2009 after her employment at was terminated for "lack of work," which counsel interprets to mean her distracted behavior at work. In the new statement, dated September 11, 2010, the applicant's spouse asserts that while she obtained new employment as of January 6, 2010, she was unable to remain current on her financial obligations during the several months she was unemployed and thereby destroyed her credit. In support of this claim, the record contains numerous examples of overdue payment notices sent to the applicant's spouse, as well as

documentation establishing her enrollment in a debt consolidation program. At the time she was approved for the consolidation of her debt, the applicant's spouse owed more than $18,000 to a range of creditors. Her monthly consolidated payment is $530 a month.

As further evidence of the applicant's spouse's financial situation, counsel submits documentation to demonstrate that the applicant's spouse's car was damaged in an accident in December 2009. The applicant's spouse states that her new car is in her parents' names because of her bad credit history, although she is paying the monthly car loan payment of $270 a month. The record contains a copy of a loan statement from the applicant's parents' credit union indicating a loan in the amount of $15,325.40, showing monthly payments of $270, but does not demonstrate that these payments are being made by the applicant's spouse. The AAO notes that this $270 payment is not included in the applicant's spouse's consolidated monthly loan payment of $530. Her other monthly obligations, the applicant's spouse asserts, are $25 for internet services, $100 for car insurance, $80 for gasoline, and $80 for her cellular telephone.

The applicant's spouse, who currently lives with her parents, states that she earns approximately $1,200 a month at her new job but that her income barely covers the above expenses. The AAO is, however, unable to reach this same determination as we find no documentary evidence in the record to establish the applicant's spouse's income at her new place of employment. Neither, as previously noted, does the record indicate the level of income generated by the applicant's spouse's vending machine business. Accordingly, while the submitted financial documentation does establish that the applicant's spouse experienced a period of significant financial hardship as a result of her unemployment, no documentary evidence establishes her current financial status. The AAO also notes that the record contains no proof, e.g., documentation of electronic money transfers, that the applicant is receiving financial assistance from his spouse.

The AAO notes that the applicant's spouse also states that her financial hardship is forcing her to live in the same house as her brother, whom she states that she fears and who has assaulted her on at least one occasion. She states that if the applicant were issued a visa, they could afford a place of their own. In support of her claims, the record includes copies of three police reports, one from 1999, one from 2009 and the other from 2010. The AAO notes that the 1999 police report indicates that the applicant's spouse's brother was arrested on October 21, 1999 for assaulting her and his other sister; the 2009 report documents a verbal argument between the applicant's spouse and her brother on June 14, 2009. In her September 11, 2010 statement, the applicant's spouse describes a May 22, 2010 incident that she asserts involved her brother threatening her life with a baseball bat. However, her account is not supported by the record. The May 22, 2010 police report that documents this incident indicates only that a verbal argument took place, with the applicant's spouse's brother being advised to respect other members of the household. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). We further note that, as previously discussed, the record does not establish the applicant's spouse's financial situation and, therefore, that it prevents her from obtaining living accommodations outside her parents' home. Moreover, the AAO observes that the applicant's spouse indicates in her statement that she has a sister who lives at

another location and no evidence establishes that this sister is unable or unwilling to allow the applicant's spouse to live with her. The record also indicates that even when the applicant was living in the United States, he and his spouse resided with her parents. The Form G-325As, Biographic Informations, filed by the applicant and his spouse indicate that they began living in her parents' home in March 2006, more than two years prior to his July 2008 departure for Albania. Accordingly, the record does not establish that the applicant's spouse's financial hardship requires her to place herself at risk by living in her parents' home.

Having noted the absence of sufficient evidence to support the applicant's spouse's claims of financial hardship, the AAO does, however, find the record to demonstrate the significant emotional hardship she is experiencing in his absence. The statements from and well as the observations of the applicant's spouse's former coworkers, family and friends establish the pervasive negative impacts that separation from the applicant has had on his spouse's emotional/mental status and the resulting changes in her ability to function on a daily basis. Based on the record before us, the AAO finds the applicant to have demonstrated that his spouse would suffer extreme hardship if his waiver application is denied and she remains in the United States.

In that the applicant has established that the bars to his admission would result in extreme hardship to his spouse whether she relocates to Albania or remains in the United States, the AAO now turns to a consideration of whether he merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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 adverse factors in the present case are the applicant's unlawful presence for which he now seeks a waiver and his unauthorized employment while in the United States. The mitigating factors include the applicant's U.S. citizen spouse; the extreme hardship to her if his waiver application is denied; the absence of a criminal record and the letter of support from a friend of the applicant and his spouse. While the immigration violations committed by the applicant are serious and are not condoned, the AAO finds that, taken together, the favorable factors in the present case outweigh the adverse factors such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the applicant's appeal of the denial of the Form I-601 will be sustained.

The AAO also notes that in her February 26, 2009 decision, the Officer in Charge denied the Form I-212, filed by the applicant. The Officer in Charge's denial of the Form I-212 was based solely on the denial of the Form I-601.

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 Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

As previously discussed, the applicant entered the United States without inspection on November 3, 2000 and voluntarily departed the United States on July 4, 2008. Neither the record nor USCIS electronic records contain any evidence to indicate that the applicant was the subject of an outstanding order of removal at the time he left the United States. Therefore, based on the record, the applicant is not inadmissible to the United States pursuant to section 212(a)(9)(A) of the Act and does not require permission to reapply for admission. Accordingly, the AAO will withdraw the Officer in Charge's denial of the Form I-212.

ORDER: The appeal of the Form I-601 is sustained. The Officer in Charge's denial of the Form I-212 is withdrawn.