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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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



H6

FILE: [REDACTED] Office: VIENNA, AUSTRIA

Date:

APR 07 2011

IN RE: Applicant: [REDACTED]

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:

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge, Vienna, Austria. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Albania who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of her last departure from the United States. The record indicates that the applicant is married to a United States citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, in order to reside in the United States with her United States citizen spouse and children.

The Officer-in-Charge found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Officer-in-Charge*, dated December 24, 2008.

On appeal, counsel asserts that the Officer-in-Charge failed to properly evaluate the evidence of hardship presented by the applicant in support of her claim. Counsel asserts that the evidence in the record is sufficient to establish extreme hardship to the applicant's qualifying relative. *See Form I-290B*, dated January 16, 2009, and "Notice of Appeal to the AAO" submitted by counsel in support of the appeal.

The record includes, but is not limited to, "Notice of Appeal to the AAO" dated January 16, 2009, statements and an affidavit from the applicant's spouse, supportive letters from the applicant's spouse's family, a copy of a lease agreement, copies of financial and tax documents, affidavits from [REDACTED] regarding the applicant's spouse, copies of "outpatient account" and emergency department discharge instructions relating to the applicant's spouse from Maimonides Medical Center, Brooklyn, New York, a copy of the Central Intelligence Agency, World Factbook on Albania, accessed on May 25, 2008, and copies of newspaper and other articles on Albania. The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(9) 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 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.

In the present case, the applicant claims that in May 2001, she entered the United States without being inspected and admitted or paroled. The applicant remained in the United States until May 27, 2007, when she voluntarily departed the United States for Albania. On January 14, 2002, the applicant's United States citizen spouse filed a Form I-130 on the applicant's behalf. On April 15, 2005, the Form I-130 was approved. On January 22, 2008, a Consular Officer in Tirana, Albania, found the applicant inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, and the applicant filed a Form I-601. On December 24, 2008, the Officer-in-Charge denied the Form I-601, finding that the applicant failed to demonstrate extreme hardship to a qualifying relative. The applicant's unlawful presence for more than one year and departure from the United States triggered the ten-year bar in section 212(a)(9)(B)(i)(II) of the Act. Thus, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

A waiver of inadmissibility under 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. Hardship to the applicant or her children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

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 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 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 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 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.*

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 Board 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 Board 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.

In this case, the record reflects that the applicant's spouse [REDACTED], is a 30-year-old native of Albania and citizen of the United States. The applicant and her husband were married in Albania on March 26, 2001, and they have two children. The record reflects that the two children are currently residing with the applicant in Albania.

In an affidavit, the applicant's spouse states that he is suffering from emotional, psychological and financial hardships as a result of separation from his family and the denial of the applicant's waiver request. The applicant's spouse states that he misses his spouse and children, that he is concerned about the health and overall wellbeing of his family in Albania because of the substandard living conditions and inadequate medical care in Albania. The applicant's spouse states that being without the applicant has caused him to suffer separation anxiety and chest pains periodically, and that he has gone to an emergency room for the chest pains. The applicant's spouse states that he is alone, that he does not sleep at night, that he forgets to eat and he has lost ten pounds since the applicant left the United States, that he does not have motivation and that "it is incredibly depressing and coping with loss is overwhelming at times." The applicant's spouse states that he has incurred significant expenses as a result of his medical condition. *See Affidavit of [REDACTED] dated June 2, 2008.* The record contains a copy of Emergency Department Discharge Instructions from Maimonides Medical Center, Brooklyn, New York, showing that the applicant was admitted and treated at the Medical Center's emergency room on May 17, 2008, for chest wall pain.

The record contains two affidavits from [REDACTED], a licensed psychologist, based in New York City, dated January 9 and May 9, 2008. Based on an interview of the applicant's spouse on January 8, 2008, [REDACTED] states that the applicant's spouse suffers from Major Depressive Disorder stemming from the separation from his spouse and children. [REDACTED] also states that the applicant's children will develop separation anxiety disorder and depressive symptomatology as a result of being separated from their father. [REDACTED] further states, "Given the fact that [the applicant's spouse's] depressive symptoms are a function of the separation from his family, neither antidepressant medication nor supportive psychotherapy can fully alleviate his symptomatology since those symptoms are rooted in the reality experience of separation itself." [REDACTED] concludes that it would be in the interest of the applicant and his family if she were able to return to the United States and resume her life with her husband. *See Affidavit of [REDACTED] dated January 9, 2008.* In his affidavit of May 8, 2008, Dr. Reich states that the applicant's spouse is "significantly more depressed" than he initially was in January 2008. [REDACTED] states that the applicant's spouse's condition will become worse the longer he is separated from his family. [REDACTED] then suggests that the applicant's spouse see a psychologist for psychotherapy. *See Affidavit of [REDACTED] dated May 9, 2008.*

The record also contains two affidavits from [REDACTED], a clinical psychologist, dated May 22, 2008, and January 12, 2009, respectively. [REDACTED] stated that the applicant's spouse suffers from chronic anxiety disorder (panic attack), in which he is inordinately apprehensive, tense, and uneasy about the prospect of something terrible happening if he is not reunited with the applicant, and that the fear of being alone is worsening his mental depression which first began at the time of separation. [REDACTED] diagnosed the applicant's spouse with Post Traumatic Stress Disorder, Chronic; Major Depressive Disorder; and recurrent headaches. [REDACTED] relates the applicant's

spouse's conditions to separation from his family. *See Affidavit of* [REDACTED] dated January 12, 2009. [REDACTED] states, "it is a fact that [REDACTED] fear of being separated from his family is causing his condition to worsen it appears he will have significant risk of psychological harm if he is not reunited with his family he has a real immediate risk of deepening his depression." *Id.* [REDACTED] recommends that the applicant's spouse continue to receive "appropriate and effective treatment" for his serious, chronic condition in order to fully recover and resume a productive life, although he believes that without a safe environment and reliable relationship, little therapeutic progress can be made. *Id.*

In this case, a preponderance of the relevant evidence demonstrates that the applicant's spouse would suffer extreme hardship if the applicant's waiver request is denied and she continues to be denied entry into the United States while her spouse remains in the United States. The record contains ample medical and psychological evidence to demonstrate that the applicant's spouse has faced and will continue to face severe emotional and or psychological hardship as a result of family separation and the denial of the applicant's wavier request that is beyond the common results of removal or inadmissibility to the level of extreme hardship.

Regarding relocation, the applicant's spouse states that he does not want to relocate to Albania because he has been living in the United States for the past ten years, his immediate family members are in the United States, only his distant relatives remain in Albania, he has a good paying job in the United States and is concerned that he will not be able to find adequate employment in Albania that will pay him enough money to be able to financially care for his family, he is concerned that the medical care in Albania is inadequate and he does not have a home in Albania. The applicant also states that he is concerned about the health and overall wellbeing of his family in Albania because of their poor living conditions, inadequate health care and crime. *See Affidavit of* [REDACTED] dated June 2, 2008. The applicant submitted articles indicating that Albania has a high unemployment rate of about 13% and that there is shortage of certain medicines and medical procedures at the University Medical Center in Tirana, Albania. The record also contains a copy of the Central Intelligence Agency World Factbook and copies of other country condition reports on Albania, documenting the high unemployment level, widespread corruption, a dilapidated physical infrastructure and a powerful organized crime in Albania.

A preponderance of the relevant evidence also demonstrates that the applicant's spouse would experience extreme hardship if he relocated to Albania with the applicant. The applicant's spouse has significant family ties in the United States and no family ties in Albania, except the applicant and his children, and the applicant's spouse has spent most of his adult life in the United States. Additionally, the country condition reports indicate that Albania is one of the poorest countries in Europe, with a high unemployment rate, inadequate medical facilities and a high crime rate. If forced to return to Albania, the applicant's spouse will have to leave his family and support network and his long-term gainful employment, and he would be concerned about his and his children's safety, health, and financial well-being at all times while in Albania. It has thus been established that the applicant's spouse would suffer extreme hardship were he to relocate to Albania to reside with the applicant due to her inadmissibility.

Considered in the aggregate, the applicant's spouse's emotional and psychological hardship, family ties in the United States, lack of family ties in Albania and risks to his and his family's health and personal safety in Albania, the applicant's spouse would face extreme hardship if the applicant's waiver request is denied.

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.

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 negative factors in this case are the applicant's entry into the United States without inspection and her unlawful presence in the United States. The positive factors in this case include the extreme hardship the applicant's United States citizen spouse and children will face if the waiver is denied, and the lack of a criminal record.

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.

ORDER: The appeal is sustained.