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



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

H6



FILE:



Office: VIENNA, AUSTRIA

Date:

FEB 22 2011

IN RE:

Applicant:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. section 1182(a)(9)(B)(v).

ON BEHALF OF APPLICANT:

UNREPRESENTED

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,

A large, stylized handwritten signature in black ink.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Vienna, Austria. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Albania. He 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 one year or more and seeking admission within ten years of his last departure. He is married to a United States citizen and has one U.S. citizen child. 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).

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on July 28, 2010.

On appeal, the applicant's spouse asserts the Field Office Director's conclusions were incorrect and that the Field Office Director failed to consider evidence that had been submitted to establish that she is suffering psychological and financial hardship. *Form I-290B*, received on August 27, 2010.

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.

....

The record indicates that the applicant entered the United States without inspection on October 11, 2000, and filed for asylum on that date. His asylum claim was denied on May 30, 2002. Subsequent appeals and motions to reopen were denied. The applicant absconded by departing the United States on September 7, 2008. The applicant resided unlawfully from May 30, 2002, the date his asylum claim was denied, until September 7, 2008. As the applicant has resided unlawfully in the United States for over a year and is now seeking admission within ten years of his last departure from the United States, she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The record includes documents, forms and decisions relating to the applicant's prior removal proceedings and documents filed in relation to his Form I-130 and Form I-485. With regard to the applicant's Form I-601, the record contains, but is not limited to, a statement on appeal from the

applicant's spouse; previous statements from the applicant's spouse; a brief from the applicant's prior counsel; a statement from [REDACTED] of [REDACTED] dated [REDACTED]; a statement from [REDACTED] dated [REDACTED]; a statement from the applicant; an undated, unattributed periodical excerpt regarding the mental health industry in Albania; copies of receipts for paid legal fees; a copy of the applicant's marriage certificate; a copy of the applicant's spouse's naturalization certificate; a copy of the lease for a residential [REDACTED] copy of a periodical on Adjustment Disorder, dated May 7, 2007; a Psychoemotional and Family Dynamics Assessment of the applicant's spouse by [REDACTED] dated [REDACTED]; a statement from [REDACTED] and [REDACTED] dated [REDACTED]; three statements from [REDACTED] dated [REDACTED], [REDACTED] and [REDACTED]; a statement from the applicant's spouse's grandmother; a statement from the applicant's spouse's father; statements from friends, family and acquaintances of the applicant attesting to his moral character; an offer of employment for the applicant; a copy of the country conditions profile for Albania from the U.S. State Department's Bureau of Consular Affairs, Tirana, Albania; copies of bank account statements; the 2007 and 2008 Country Report on Human Rights Practices, Section on Albania, published by the U.S. Department of State, Bureau of Democracy, Human Rights and Labor; a copy of a periodical discussing gender wage comparisons in Albania; a copy of the applicant's 2002 tax return; a statement from the applicant's church; and a statement from Representative [REDACTED] of the U.S. House of Representatives, dated February 26, 2010.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

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. Hardship to the applicant or his child 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-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 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.

On appeal, applicant's spouse has submitted a statement rebutting certain factual conclusions made by the Field Office Director. *Statement of the applicant's spouse*, received March 9, 2010. She states that her husband has been unable to find employment in Albania and that the average pay is \$10 a day. She states that on a previous visit to Albania her daughter became ill and was hospitalized. She also states that in Albania she would have to reside in a house with nine people, would not have access to hot water, electric lights or washing machines for their clothes and would not have access to medical insurance or health facilities which could offer more than basic first aid.

Applicant's prior counsel asserted that the applicant's spouse would experience extreme hardship upon relocation to Albania. *Brief in Support of Waiver Application*, dated March 9, 2010. Specifically, applicant's prior counsel asserted that the conditions in Albania would present a hardship for the applicant's spouse, that she would be unable to find competent mental health care in Albania, that she would be straddled with debt incurred in the United States upon her return to Albania and that gender discrimination in Albania would complicate her ability to find employment. He also asserted that it would be a hardship to disrupt the applicant's spouse's educational career. Applicant's prior counsel also noted that the applicant's spouse has resided in the United States since 1999, that her immediate family all reside in the United States, that she no longer has family ties to Albania and that if she relocated her grandmother, who is 73, has several serious medical conditions and depends on her physically, would suffer.

The record contains numerous documents, including country conditions materials from the U.S. Department of State indicating that Albania has high unemployment, suffers political tension and moderate crime, and that medical facilities and services are limited beyond first aid, including a lack of medical specialists. Based on this the AAO recognizes the physical living conditions described by the applicant's spouse as a hardship factor upon relocation.

On appeal the applicant presents new facts and evidence not previously presented to the Field Office Director. Specifically, the applicant has submitted a statement from his spouse's primary care physician detailing an upcoming operation on the applicant's spouse's feet. *Statement of [REDACTED]*, dated December 21, 2010. He states that the applicant will have a recovery period of three months during which she will need additional physical support. It can be included that this would greatly increase the physical burden on the applicant's spouse in caring for herself, her

daughter and her grandmother. [REDACTED] discusses the risks if the applicant's recovery does not proceed well. Although this statement does not indicate that the applicant's spouse has a serious, long-term condition, it is sufficient to establish that she will have surgery requiring a significant period of recovery and physical hardship. These facts establish that disrupting the applicant's spouse's continuity of care with her doctors would pose an uncommon challenge to her upon relocation.

The record contains letters from several psychologists, all asserting that the applicant's spouse has been diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood. Her physical symptoms are reported as stress-induced dyssomnia, loss of appetite, digestive and GI problems, heart palpitations and headaches. *Psychoemotional and Family Dynamics Assessment of the applicant's spouse*. [REDACTED] Most recently, the record contains a statement from [REDACTED] regarding the applicant's spouse's history of treatment for mental health issues. She states that she has been treating the applicant's spouse for her condition by seeing her every 3 – 4 weeks and prescribing Venlafaxine. She discusses the applicant's spouse's prescription history and asserts that she has been having suicidal ideations. The fact that the record contains numerous letters from mental health practitioners concerning the applicant's spouse's mental health condition and psycho-somatic symptoms is sufficient to establish that the applicant's spouse would experience an uncommon challenge due to a disruption in her continuity of care with [REDACTED]

The record contains statements from the applicant's spouse's family and extended family attesting to the hardships that would be presented by relocation, including separation from her U.S. family members. The record contains a statement from the applicant's grandmother and her doctor establishing that she resides with the applicant's spouse and depends on the applicant's spouse for physical support.

The record does not contain any documentary evidence that the applicant's daughter became ill and had to attend a hospital during any previous stay in Albania. However, the AAO notes that the applicant's spouse has resided in the United States for twelve years, and when this factor is considered with the other factors – her history of mental health issues, her foot surgery and physical rehabilitation, separation from her family in the United States, her lack of family ties in Albania, the physical living conditions in Albania and the political and criminal environment in Albania - they rise above the common hardship impacts experienced by the relatives of inadmissible aliens and, as such, constitute extreme hardship.

With regard to hardship upon separation, the applicant's spouse has asserted that she is experiencing extreme financial and emotional hardship due to the applicant's inadmissibility. She asserts that she has incurred \$30,000 in debt, is behind on her rent and cannot concentrate on her studies. She asserts that she has a history of depression related to her separation from the applicant and that she needs him now more than ever because she has to have surgery on her feet.

Applicant's prior counsel asserted that the applicant's spouse suffers from Major Depression and Anxiety Disorder, referring to the numerous doctors statements in the record. As discussed above

there is sufficient evidence to establish that the applicant's spouse has a history of mental health issues. Based on the evidence in the record it can be concluded that the applicant's spouse would experience emotional hardship upon separation, a significant hardship factor.

Also, as discussed above, the record contains sufficient evidence to establish the applicant's spouse will experience physical hardship due to her foot operation and rehabilitation period. The AAO notes that this medical condition would impact the applicant's spouse's ability to care for herself and her child if the applicant were not there to assist her, a significant hardship factor.

Applicant's prior counsel asserts that the applicant's spouse will experience financial hardship because her father is no longer able to afford to pay her bills and she has fallen behind on her rent and is in danger of being evicted.

Applicant's prior counsel has asserted that the applicant's spouse has had to assume additional parenting duties due to the applicant's absence, compounding the physical burden on the applicant's spouse who is also caring for her elderly grandmother. The record contains sufficient evidence to establish that the applicant's grandmother resides with her, and while it appears the applicant's spouse's father provides for the applicant's spouse and grandmother financially, the record indicates that the burden for physically caring for her grandmother falls on the applicant's spouse, regardless of the fact that other family members may live within the United States. In light of her impending foot surgery these facts must also be considered a significant hardship factor.

With regard to financial hardship the AAO would note that the applicant's spouse has failed to establish why she is unable to work to support herself financially. She has asserted that it would be a hardship if she was unable to continue her education but this is considered a common impact upon separation. Applicant's prior counsel referenced the arrears on the applicant's spouse's rent and bank statements showing little money in savings, however, the AAO would note that the record does not contain any evidence of the applicant's spouse's actual financial obligations. It appears that her father had been paying her rent, that she has somehow been affording college tuition without the support of her spouse, and there is no documentation indicating that the applicant's spouse is supporting her grandmother financially. There is no documentation that she has incurred '\$30,000' in debt. Based on the evidence in the record the AAO cannot conclude that the financial impact on the applicant's spouse rises above the common impacts of separation, and as such, it has not been established that financial hardship is a significant factor impacting the applicant's spouse.

Applicant's prior counsel asserts that the applicant's daughter will experience hardship due to the applicant's absence. As noted above, children are not qualifying relatives in this proceeding, and as such, any hardship on them is only relevant to the extent that it impacts the qualifying relative. The record does not contain any documentation indicating that the challenges of the applicant's daughter will elevate the hardship on the applicant's wife above those commonly experienced by the relatives of inadmissible aliens.

The record establishes significant physical and emotional hardship on the applicant's spouse. When these hardship factors considered in the aggregate, the physical and emotional hardship impacts in

this case rise above the common impacts of separation, and as such establish that a qualifying relative will experience extreme hardship upon separation. As the applicant has established extreme hardship to a qualifying relative the AAO may now consider whether he warrants a waiver as a matter of discretion.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The AAO finds that the unfavorable factors in this case include the applicant's unlawful presence, unauthorized employment and departure from the United States while an Order of Removal was pending. However, the applicant explains that he felt compelled to flee Albania due to the conditions there and that it was not his intent to "do anything illegal." *Statement of the applicant*, September 4, 2008.

As noted by the Field Office Director, there were several inconsistencies in testimony by the applicant. However, whether these inconsistencies were deliberate mischaracterizations by the applicant or mere inaccuracies is not clear from the record.

The favorable factors in this case include the presence of the applicant's spouse, the hardship impact she would experience due to his inadmissibility, the presence of his U.S. citizen daughter, the

statements of moral character by family and friends other than his spouse, his offer of employment and his lack of a criminal record while residing in the United States. The applicant also explains that he felt compelled to flee Albania due to the conditions there and that it was not his intent to “do anything illegal.” *Statement of the applicant*, September 4, 2008. The favorable factors in this case outweigh the negative factors, therefore favorable discretion will be exercised. The field office director’s decision will be withdrawn and the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.