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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

PUBLIC COPY

[redacted]

#6

Date: MAY 03 2011 Office: VIENNA, AUSTRIA FILE: [redacted]

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:

[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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Macedonia who was found to be inadmissible to the United States pursuant to 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 readmission within ten years of his last departure from the United States. The applicant is married to a United States citizen and 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, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his United States citizen spouse.

The OIC found that the applicant failed to establish that extreme hardship would be imposed on 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 17, 2008.

On appeal, the applicant, through counsel, asserts that the United States Citizenship and Immigration Services (USCIS) "failed to consider all factors and their cumulative effects in determining [whether] extreme hardships exists [sic]." *Form I-290B*, dated December 29, 2008.

The record includes, but is not limited to, counsel's appeal brief, affidavits from the applicant and his wife, a mental health evaluation on the applicant's wife, school documents for the applicant's wife, tax documents for the applicant's in-law's, employment documents for the applicant's mother-in-law, and a 2007 U.S. Department of State country report on Macedonia. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

> (B) Aliens Unlawfully Present.-
>
> (i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> . . . .
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
>
> . . . .
>
> (v) Waiver.-The 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 record indicates that the applicant entered the United States on December 19, 2004 without inspection. In May 2008, the applicant departed the United States.

The applicant accrued unlawful presence from December 19, 2004, the day he entered the United States without inspection, until May 2008, when he departed the United States. The applicant is seeking admission into the United States within ten years of his departure in May 2008. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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 can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife 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 (Board) 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 a qualifying relative, 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, counsel argues that USCIS' reliance on *Matter of Uy*, 11 I&N Dec. 159 (BIA 1965), in their decision denying the applicant's waiver application, was misplaced. The AAO notes that the applicant's case will be reviewed *de novo*, and the AAO will apply the appropriate legal standards and precedent case law, irrespective of the OIC's reference to *Matter of Uy*.[1]

The first prong of the analysis addresses hardship to the applicant's wife if she relocates to Macedonia. In an affidavit dated May 7, 2008, the applicant's wife states moving to Macedonia would cause her

[1] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

"extreme emotional, psychological, and economic hardships." In a psychological evaluation dated January 22, 2009, licensed social worker [redacted] states the applicant's wife's family "is a very close and loving family," and the applicant's wife would "suffer hardship if she were forced to be separated from her loving, and supportive family who all live in the United States." The applicant's wife states that if she joins the applicant in [redacted], she "would be separated from [her] father and mother" with whom she currently resides, she "wouldn't be able to afford to buy plane tickets to visit [her] mother and father in the US often," and her parents "wouldn't be able to afford" to travel to [redacted] She states that it "could create tremendous hardships to" her parents if she moved to [redacted] because her father currently supports her and the applicant, and he could not afford to support two households. Ms. Rosengarten claims that "[t]here are no jobs, no work, no careers or educational opportunities in Macedonia." The AAO notes the applicant's wife's concerns regarding being separated from her family.

Counsel states that the applicant's wife does "not speak academic level of any lanauges [sic] spoken in [redacted]" The applicant's wife states if she moves to [redacted], she "would be deprived of all the further educational opportunities [she] could have in the US." Additionally, she states she "would suffer from discrimination due to [her] Albanian ethnicity." [redacted] claims that "[i]t would be further trauma and extreme hardship for [the applicant's wife]" should she "be forced to leave her native country, America, to join [the applicant] in a country where she would have no future, could not further her education, could not have a career, could not read, write, or communicate in the language of [redacted] or [redacted], could not drive because women do not drive or work in [redacted], and would know no one but her husband." In counsel's undated appeal brief, counsel states the applicant's wife "understands Albanian, but has no language capability with [redacted]." The AAO notes that the applicant's wife states she speaks "basic conversational Macedonian," and she claims that her uncle resides in [redacted] Additionally, [redacted] reports that the applicant's wife's grandmother resides in [redacted] However, the AAO notes the claims made regarding the difficulties the applicant's wife would face in relocating to Macedonia.

The AAO acknowledges that the applicant's wife is a native and citizen of the United States and that she may experience some hardship in relocating to [redacted] However, the record establishes that the applicant's wife has some family ties to Macedonia, she understands Albanian, and she speaks conversational [redacted] The AAO notes that counsel submitted a 2007 U.S. Department of State country report; however, this report does not establish that the applicant's wife would be unable to continue her education in [redacted] and/or obtain employment in [redacted] In fact, the report states "[e]thnic minorities remained underrepresented at the university level, although there has been progress in increasing the number of minority students since the 2004 recognition of the predominately ethnic [redacted] State University." The AAO acknowledges that the applicant's wife's parents may suffer some hardship in being separated from their daughter. However, the AAO notes that the applicant has not shown that his parents-in-law will experience challenges that elevate his wife's difficulty to an extreme hardship. Therefore, based on the record before it, the AAO finds that the applicant has failed to establish that his wife would suffer extreme hardship if she relocated to [redacted]

The second prong addresses hardship to the applicant's wife upon remaining in the United States. The applicant's wife states that after she and the applicant became engaged, she returned to the United States

without him. She claims that "[i]t became immensely difficult for [her] to make it through even the simplest of dates without him" and she "couldn't pay attention to [her] studies." [redacted] states the applicant's wife has developed the symptoms for major depressive disorder and adjustment disorder with mixed anxiety and depressed mood. She reports that the applicant's wife is "depressed every day," she "frequently cries," she has "lost interest and pleasure in almost all activities," she has "lost five pounds," she sleeps less, "she has no energy to do daily activities," and she has "trouble concentrating." [redacted] claims that the longer the applicant's wife is separated from the applicant, "the more severe her symptoms will become." The applicant's wife states she plans to attend college, have children, and stay close to her family. Additionally, she claims that the applicant would have a hard time finding a job in Macedonia. The AAO notes the mental health and financial concerns of the applicant's wife.

The AAO acknowledges that the applicant's wife may be suffering some emotional problems in being separated from the applicant. The AAO has carefully considered the mental health evaluation regarding the emotional difficulty experienced by the applicant's wife. While it is understood that the separation of spouses often results in significant psychological challenges, the applicant has not distinguished his wife's emotional hardship upon separation from that which is typically faced by the spouses of those deemed inadmissible. The AAO notes that the applicant's wife may experience some financial hardship in being separated from the applicant; however, the applicant has not provided sufficient documentation to establish his wife's financial situation. 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)). Additionally, the AAO notes that the applicant has submitted no evidence to establish that he is unable to obtain employment in [redacted] and, thereby, financially assist his wife from outside the United States. Based on the record before it, the AAO finds that the applicant has failed to establish that his wife would suffer extreme hardship if his waiver application is denied and she remains in the United States.

As the record does not establish that the applicant's wife would experience extreme hardship as a result of his inadmissibility, he is not eligible for a waiver under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, the AAO finds no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

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 remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.