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U. S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals (AAO)  
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U.S. Citizenship  
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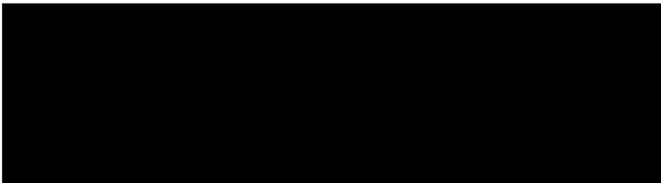
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IN RE:

Applicant:

APPLICATION: 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)

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,

*P*

Perry Rhew  
Chief, Administrative Appeals Office

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

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 his last departure from the United States. The applicant is married to a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse.

The Officer-in-Charge found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the Officer-in-Charge*, dated November 17, 2008.

On appeal, counsel for the applicant asserts that the applicant's spouse would suffer extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant's spouse; a medical letter for the applicant's spouse; statements from the parents of the applicant's spouse; medical letters for the parents of the applicant's spouse; statements from the sister of the applicant's spouse; cable bills; a telephone bill; bank statements; an employment letter for the applicant's spouse; published country conditions reports; tax statements; a W-2 Form for the applicant's spouse; apartment leases; and statements from family members. The entire record was reviewed and considered in rendering 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.

In the present case, the record indicates that the applicant entered the United States without inspection on an unknown date and at an unknown place. *Attorney's brief*. The applicant initially filed for asylum on February 28, 2006, however, his application was rejected for failing to comply with the filing instructions. The applicant properly filed for asylum on March 16, 2006. *Id.* The applicant's application for asylum was referred to immigration court and on November 26, 2007 an immigration judge granted the applicant voluntary departure until March 25, 2008. *Asylum Referral*

*Notice*, dated May 2, 2006; *Order of the Immigration Judge*, dated November 26, 2007. The applicant departed the United States on March 23, 2008. *Consular Memorandum, Embassy of the United States of America, Consular Section, Tirana, Albania*, dated June 12, 2008. The period of authorized stay begins on the date the alien files a bona fide application for asylum. *Memorandum, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009. The asylum office director found that the applicant had failed to demonstrate that he entered the United States in 2005, and evidence on the record indicated that he left Albania in 2001. On appeal, the applicant submitted evidence, including Canadian immigration records and a sworn affidavit, indicating that he departed Canada and entered the United States on March 5, 2005. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for a period of more than one year before he properly filed an application for asylum.

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 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 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.

If the applicant’s spouse joins the applicant in Albania, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant’s spouse is a native of Albania. *Naturalization certificate*. Her parents reside in the United States. *Form G-325A, Biographic Information sheet, for the applicant’s spouse*. The applicant’s spouse does not have any close relatives in Albania. *Statement from the applicant’s spouse*, dated December 8, 2008. She notes that she came to the United States at a young age and would suffer from cultural shock in Albania. *Id.* The applicant’s spouse further notes that she and her sister divide the responsibilities in caring for their sick parents. *Id.* She notes that her father suffers from schizophrenia and requires 24 hours monitoring and

medical care. *Id.* Although he lives with her sister and her family, the applicant's spouse notes that her sister has two children, a husband, and two private businesses to run. *Id.* The applicant's spouse also notes that her mother is sick and unable to walk, recently having undergone back surgery. *Id.* A medical letter included in the record notes that the applicant's father is suffering from Paranoid Schizophrenia, Asthma, C.O.P.D., and generalized Osteoarthritis. *Statement from* [REDACTED], dated December 5, 2008. His physician notes he is desperately ill – in a psychiatric sense and needs 24 hour a day supervision by his family to keep him safe, sound, well nourished and protected from the elements. *Id.* A medical letter for the mother of the applicant's spouse notes that she underwent a decompressive lumbar laminectomy along with a removal of a ruptured lumbar disc on November 24, 2008. *Statement from* [REDACTED] M.D., dated November 26, 2008. Because of the surgery, the mother of the applicant's spouse requires extended home care which her physician expected to last approximately six months. *Id.* The applicant's spouse notes that she went to Albania to be with the applicant and missed her family a lot, as she had never been away from her family. *Statement from the applicant's spouse*, undated. In Albania, the applicant's spouse was diagnosed as having depression and weakness in the whole body as well as pain in the pars cervical and pars thoracalis. *Statement from* [REDACTED] Doctor, Republic of Albania, Ministry of Health, Health Center, Commune of Castrat, dated October 31, 2008. The applicant's spouse also notes that in Albania, she and the applicant live with the applicant's family in a house with seven people and two bedrooms. *Statement from the applicant's spouse*, undated. She notes that only the applicant's father works because there are no jobs for her or the applicant. *Id.* While the record includes published country conditions reports, these reports document the human rights situation in Albania and not the economic situation. Nevertheless, when looking at the aforementioned factors, particularly the applicant's spouse's lack of family ties to Albania, the health conditions of the applicant's spouse's parents as documented by licensed healthcare professionals, and the applicant's spouse's own documented health conditions, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in Albania.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse is a native of Albania and her parents reside in the United States. The applicant's spouse notes that she and her sister divide the responsibilities in caring for their sick parents, and her father suffers from schizophrenia and requires 24 hours monitoring and medical care. *Id.* Although he lives with her sister and her family, the applicant's spouse notes that her sister has two children, a husband, and two private businesses to run. *Id.* The applicant's spouse also notes that her mother is sick and unable to walk, recently having undergone back surgery. *Id.* A medical letter included in the record notes that the applicant's father is suffering from Paranoid Schizophrenia, Asthma, C.O.P.D., and generalized Osteoarthritis. *Statement from* [REDACTED], D.O., P.C., dated December 5, 2008. His physician states that he needs 24 hour a day supervision by his family to keep him safe, sound, well nourished and protected from the elements. *Id.* The AAO acknowledges the documented health conditions of the parents of the applicant's spouse and recognizes the added responsibilities place upon her and how this may affect her ability to work. The applicant's spouse notes that she went to Albania with the applicant because it was too difficult to live by herself and pay the bills. *Statement from the applicant's spouse*, undated. She notes that her income was not enough to make it by herself. *Id.* She also notes that in Albania, only the applicant's father works because there are no jobs for her or the applicant and that sometimes his income is insufficient to provide enough food for everyone. *Id.* The record includes a W-2 Form for the applicant's spouse showing her earnings to

be \$6,102.00 in 2006. *W-2 Form*. The record also includes documentation of various expenses of the applicant's spouse, including cable bills, an apartment lease, and a telephone bill. *Cable bills; apartment lease; telephone bill*. While the record does not include published country conditions documenting the economy and availability of employment in Albania, the AAO acknowledges the documented expenses of the applicant's spouse and her limited earnings, particularly in light of her parents' health conditions and her responsibilities in assisting with their care. When looking at the aforementioned factors, particularly the documented health conditions of the parents of the applicant's spouse, her assistance in their care, and her documented financial difficulties, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to remain in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility 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).

The adverse factors in the present case are the applicant's unlawful presence for which he now seeks a waiver. The favorable and mitigating factors are his United States citizen spouse, the extreme hardship to his spouse if he were refused admission, and his supportive relationship with his spouse as documented in the record.

The AAO finds that, although the immigration violations committed by the applicant are serious and cannot be condoned, when 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)(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 met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.