

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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**



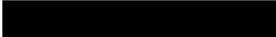
H/S

Date: **MAY 12 2011**

Office: VIENNA, AUSTRIA

FILE: 

IN RE:

Applicant: 

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:

SELF-REPRESENTED

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 AAO notes that on appeal, the applicant's fiancé requested 30 days to submit a brief and/or evidence to the AAO. *Form I-290B*, dated September 15, 2008. On May 3, 2011, in response to a letter from the AAO, the applicant's fiancé indicated that he did not file a brief or evidence in support of the appeal as he indicated on the Form I-290B. However, the applicant's fiancé requested that the applicant be allowed to return home. He also states that they "have paid the price of being separated for six years, and still are in love!!" The record is considered complete.

The record reflects that the applicant is a native and citizen of Bulgaria 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 her last departure from the United States. The applicant is the fiancée of a United States citizen and the mother of a lawful permanent resident of the United States. She is the beneficiary of an approved Petition for Alien Fiancé(e) (Form I-129F). 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 her fiancé, daughter, and son-in-law.

The OIC found that the applicant had 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 Office in Charge*, dated August 28, 2008.

On appeal, the applicant's fiancé claims that he is "suffering from the effects of clinical depression," he cannot move to Bulgaria because he cares for his "mentally retarded adult" brother, and the applicant helped care for his brother when she was in the United States. *Form I-290B, supra*.

The record includes, but is not limited to, statements from the applicant's fiancé and daughter, household documents from the applicant's second marriage, divorce and marriage documents for the applicant, and documents from the applicant's removal proceeding. 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.

(iii) Exceptions.-

(II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

(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 September 14, 1994 on a B-2 nonimmigrant visa with authorization to remain in the United States until March 13, 1995. On March 31, 1998, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On April 21, 1999, an immigration judge ordered the applicant removed to Bulgaria. On May 18, 1999, the applicant filed an appeal of the immigration judge's decision to the Board of Immigration Appeals (Board). On April 8, 2003, the Board dismissed the applicant's appeal. On or about July 3, 2003, the applicant filed a motion to reopen the Board's decision. On July 30, 2003, the Board reopened the applicant's case and remanded the case to the immigration judge. On October 8, 2003, the immigration judge certified the case to the Board. On January 21, 2004, the Board re-certified the case back to the immigration judge. On May 10, 2005, the immigration judge granted the applicant voluntary departure to depart the United States by July 11, 2005. On July 5, 2005, the applicant departed the United States.

Under section 212(a)(9)(B)(iii)(II) of the Act, no period of time in which the applicant has a bona fide asylum application pending shall be taken into account in determining the period of unlawful presence in the United States, unless the applicant was employed without authorization. The AAO notes that the record establishes that the applicant had authorization to work from July 1999 until July 2000, April 2001 until April 2003, and January 2004 until January 2005. Additionally, the AAO notes that based on the applicant's Biographic Information (Form G-325A) dated November 1, 1998, she claims that she was employed by Search Recovery from October 1995 until she filed her Form G-325A. During her visa interview, the applicant admitted that she did not file for employment authorization when she filed her Form I-589 because her lawyers failed to instruct her to do so. Therefore, the applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until

July 5, 2005, the date she departed the United States. The applicant is seeking admission into the United States within ten years of her July 5, 2005 departure. 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.

The AAO notes that if an alien seeking a K-1 nonimmigrant visa is inadmissible, the alien's ability to seek a waiver of inadmissibility is governed by 8 C.F.R. § 212.7(a), which provides, in pertinent part:

- (a) *General—(1) Filing procedure—(i) Immigrant visa or K nonimmigrant visa applicant.* An applicant for an immigrant visa or “K” nonimmigrant visa who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision.

The AAO considers the applicant's fiancé to be a qualifying relative in this situation. In determining that a fiancé is equivalent to a spouse for purposes of the extreme hardship statute, the AAO relies on 22 C.F.R. § 41.81 which provides:

§ 41.81 Fiancé(e) or spouse of a U.S. citizen and derivative children.

(a) Fiance (e). An alien is classifiable as a nonimmigrant fiancé(e) under INA 101(a)(15)(K)(i) when all of the following requirements are met:

(3) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, *including the requirements of paragraph (d)* of this section.

(d) *Eligibility as an immigrant required.* The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under paragraphs (a), (b) or (c) of this section *as if the alien were an applicant for an immigrant visa*, except that the alien must be exempt from the vaccination requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent first 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/fiancé or parent of the applicant. Hardship to the applicant or her child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's fiancé 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 the United States Citizenship and Immigration Service (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 (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.

The first prong of the analysis addresses hardship to the applicant's fiancé if he relocates to Bulgaria. On appeal, the applicant's fiancé states he cannot move to Bulgaria because he is the legal guardian for his "mentally retarded adult" brother. He states his brother currently resides in a home; however, a "condition of his being accepted there is that he have bimonthly visits home with [him], and that he be with [him] during holidays." Additionally, the applicant's fiancé states he suffers from clinical depression. The AAO notes the applicant's fiancé's concerns regarding his mental health and his brother.

The AAO acknowledges that the applicant's fiancé is a citizen of the United States and that he may experience some hardship in residing in Bulgaria. The AAO notes that applicant's fiancé's claim that his brother has a mental disability and that he must visit him twice a month in his home; however, there is no documentary evidence in the record supporting the applicant's fiancé's claim. 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's fiancé may be suffering from some mental health issues; however, there is no documentation in the record establishing that he cannot attend therapy in Bulgaria or that he has to remain in the United States to receive therapy. Further, the AAO notes that other than the applicant's fiancé's statement that he is depressed, the record fails to demonstrate that he has any medical condition, physical or mental, that would affect his ability to relocate or that he would experience any other form of hardship in Bulgaria. In that the record does not include sufficient documentation of financial, medical, emotional or other types of hardship that the applicant's fiancé would experience if he joined the applicant in Bulgaria, the AAO does not find the applicant to have established that her fiancé would suffer extreme hardship upon relocation.

In addition, the record does not establish extreme hardship to the applicant's fiancé if he remains in the United States. As noted above, the applicant's fiancé claims that he is "currently suffering from the effects of clinical depression. This was exclusively brought on by the absence of [the applicant]." He states his symptoms include "loss of desire to maintain good physical health," weight loss, and loss of two teeth and hair. He also states he loves the applicant and intends to marry her. The applicant's fiancé

states that because he is fifty-three years old, his “age should be considered as a factor, since [his] time left when [he] [is] at an age like this limites [sic] time to ever meet a woman [he] could love more than [the applicant].” Additionally, he claims that when the applicant resided in the United States, she helped care for his adult brother with a mental disability. The AAO notes the concerns of the applicant’s fiancé.

In a statement dated September 24, 2008, the applicant’s daughter states that she is having difficulty coping with separation from the applicant. She claims that “[t]he separation has had not only significantly adverse emotional, but also physiological effect on [her].” She states she is suffering from depression, she has “lost [a] significant amount of weight,” and the absence of the applicant has “had a significant impact on [her] family planning decisions.” The applicant’s daughter states she needs the applicant in the United States to “comfort [her] during and following the term of a pregnancy.” The AAO notes the applicant’s daughter’s concerns.

The AAO acknowledges that the applicant’s fiancé may be suffering from depression; however, his statement alone does not establish that his emotional hardships go beyond the typical effects of separation. Additionally, the AAO acknowledges that the applicant’s daughter may be suffering some hardship in being separated from the applicant. However, the AAO notes that the record establishes that the applicant’s daughter resides in California with her husband, while when the applicant was in the United States, she resided in Illinois. *See Form I-601*, dated October 30, 2007. Additionally, the AAO notes that the applicant’s daughter is not a qualifying relative, and her hardship is only considered to the extent that it has an impact on the applicant’s fiancé. The applicant has not asserted or shown that hardship to her daughter will impact her fiancé. In that the record does not include sufficient documentation of financial, medical, or other types of hardship that the applicant’s fiancé would experience, the AAO finds that the applicant failed to establish that her fiancé would suffer extreme hardship if her waiver application is denied and he remains in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant’s fiancé caused by the applicant’s inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she 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.