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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**

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Date:

Office: VIENNA, AUSTRIA

FILE: [REDACTED]

IN RE:

MAY 27, 2011 Applicant: [REDACTED]

APPLICATIONS: 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); and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

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 record reflects that the applicant is a native of Yugoslavia and citizen of Montenegro 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 admission within ten years of his last departure from the United States. The applicant is married to a United States citizen and is the father of a United States citizen child. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his spouse and son.

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 Officer in Charge*, dated December 4, 2008. The AAO notes that the OIC denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) in the same decision; however, since the AAO only received one Form I-290B with a filing fee, it will only adjudicate one appeal (Form I-601 appeal).¹

On appeal, the applicant's wife asserts that United States Citizenship and Immigration Services (USCIS) misunderstood the facts of the applicant's case. *Statement from the applicant's wife, attached to Form I-290B*, dated December 19, 2008.

The record includes, but is not limited to, an affidavit and statement from the applicant's wife, medical documents for the applicant's wife, a psychological evaluation for the applicant's wife, pay stubs and tax documents for the applicant's wife, an article on medical coverage abroad, the country specific information section on Montenegro, and documents for 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.-

¹ The Adjudicator's Field Manual provides guidance on adjudicating Forms I-601 and I-212 that are filed together.
43.2 Adjudication Processes.

(c) Of course, an alien might be applying for both consent to reapply and a waiver of inadmissibility, provided the particular ground(s) of inadmissibility applying to the alien are waivable. If the alien has filed both applications (Forms I-212 and I-601), adjudicate the waiver application first. If the Form I-601 waiver is approved, then consider the Form I-212 on its merits; if the Form I-601 is denied (and the decision is final), deny the Form I-212 since its approval would serve no purpose.

- (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 January 28, 2001 without inspection. On or about June 18, 2001, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On February 24, 2003, an immigration judge ordered the applicant removed to [REDACTED]. The applicant filed an appeal with the Board of Immigration Appeals (Board), which the Board dismissed on August 25, 2004. On July 10, 2006, the applicant was removed from 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 applicant began to accrue unlawful presence from August 26, 2004, the day after the Board dismissed the applicant's appeal, until July 10, 2006, when he was removed from the United States. The applicant is seeking admission into the United States within ten years of his July 10, 2006 removal. 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 or his child 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-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 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. [REDACTED] 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 wife if she relocates to [REDACTED]. In a statement dated December 19, 2008, the applicant’s wife states her “life, job, friends, language, and skills are all based” on being in the United States. She claims that she has “no true means of making a decent living in [REDACTED] and her son “should be allowed to live in his country.” In an affidavit dated April 24, 2008, the applicant’s wife states her son “requires extensive testing to diagnose the extent of an infection.” She states her son just “had [a] tonsillectomy and adenoidectomy,” and with the applicant’s “current salary of 300 Euros per month in [REDACTED], this procedure would be impossible.” The AAO notes that no medical documentation was submitted establishing that the applicant’s son suffers from any medical conditions or the severity of his medical conditions. 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)). The applicant’s wife states her “concerns are not mainly economic, but emotional and medical, and [her] inability to live and adapt to live in Montenegro.” The applicant’s wife states she has congenital heart disease, which is stable but “it is not guaranteed that it won’t worsen.” In a letter dated April 14, 2008, [REDACTED] states the applicant’s wife “has a history of congenital heart disease” with surgical repair. [REDACTED] also indicates that the applicant’s wife has “had sudden onset palpitations with dyspnea” and “dizzy spells.” In a note dated April 28, 2008, [REDACTED] states he diagnosed the applicant’s wife with depression/anxiety, and he prescribed her anti-depressants. The applicant’s wife claims that she and the applicant “would be unemployed in Montenegro, and [she] would not be able to obtain the constant medical care, surveillance, and monitoring without the benefit of insurance, up-to-date medical

equipment, and medications.” She states she “would feel unsafe living in [REDACTED], due to [her] desire to have more children, and [her] [complicated] medical condition. The lack of sophistication of medical equipment and techniques [sic] puts [her] in further fear. Additionally, [she] [is] unable to pay for the poor treatment.” The applicant submitted the country specific information section on [REDACTED], which indicates that many physicians in [REDACTED] are highly trained, and medicines and basic medical supplies are largely obtainable; however, the hospitals and clinics “are generally not equipped or maintained to Western standards.” Although the record shows that hospitals and clinics in [REDACTED] may not be maintained to U.S. standards, the record does not establish how this would impact the applicant’s spouse. Although the applicant’s spouse has congenital heart disease, the record reflects that her condition is currently stable. There is no evidence in the record that the applicant’s spouse is in need of treatment for her condition at this time or that any needed treatment would be unavailable in [REDACTED]. Similarly, although the applicant’s spouse states that she would feel “unsafe” in [REDACTED] due to her desire to have more children, the record does not establish that prenatal care is unavailable in [REDACTED]. Thus, there is no evidence in the record establishing that the applicant’s wife cannot be treated for her medical conditions in [REDACTED], that she has to remain in the United States to receive treatment(s), or that her medical conditions would affect her ability to relocate. However, the AAO notes the claims made regarding the difficulties the applicant’s wife and son would face in relocating to [REDACTED].

The AAO acknowledges that the applicant’s wife has resided in the United States for many years and that relocation abroad would involve some hardship. However, the AAO notes that the applicant’s spouse is a native of Montenegro and it is presumed that she would be able adapting to the culture and languages of [REDACTED]. The AAO notes that other than the country specific information section on [REDACTED], the record fails to contain any other documentary evidence, e.g., country conditions reports on [REDACTED] that demonstrate that the applicant’s wife would be unable to obtain employment upon relocation that would allow her to use the skills she has acquired in the United States. Additionally, the AAO notes that the applicant’s wife may be suffering from some mental health issues; however, there is no documentation in the record establishing that she cannot receive treatment and/or medication in Montenegro or that she has to remain in the United States to receive treatment and/or medication. The AAO acknowledges that the applicant’s son may suffer some hardship; however, the AAO finds that the applicant has not shown that hardship to his son will elevate his wife’s challenges to an extreme level. Therefore, based on the record before it, the AAO finds that, even considering the potential hardships in the aggregate, the applicant has failed to establish that his wife would suffer extreme hardship if she relocated to [REDACTED].

In addition, the record does not establish extreme hardship to the applicant’s wife if she remains in the United States. The applicant’s wife states her son “needs a father figure in his life” and she is “struggling to raise” him. She states her “son is aware of [the applicant], but does not see him.” In a psychological evaluation dated April 3, 2008, [REDACTED] diagnosed the applicant’s son with Attention Deficit Hyperactivity Disorder. [REDACTED] indicates that “[t]he emotional distress presently being suffered by [the applicant’s son] by virtue of being separated from [the applicant] is clearly exacerbating his Attention Deficit Hyperactivity Disorder.” The applicant’s wife claims that it is

depressing and causes anxiety for her son to be separated from the applicant. The applicant's wife states she is "on anti-depressants and anti-anxiety medicine" due to the emotional trauma of separation from the applicant. As noted above, [REDACTED] states the applicant's wife was seen in his office for depression/anxiety, and he prescribed her anti-depressants. [REDACTED] also diagnosed the applicant's wife with major depressive disorder. He indicates that the applicant's wife has "difficulty falling asleep"; she has a poor appetite and weight loss; she "has difficulty focusing, concentrating, and paying attention"; she is "sad, chronically anxious, and has very frequent crying spells"; and "she has reduced sexual libido." [REDACTED] states a "reduction in [the applicant's wife's] emotional stress levels would be beneficial." As noted above, the applicant's wife has congenital heart disease, and has had palpitations with dyspnea, and dizzy spells. The applicant's wife states because of her congenital heart disease, if she gets pregnant again, her doctor wants "regular follow-up visits." She states she intends to have more children and she would be a high-risk pregnancy. [REDACTED] reports that during the applicant's wife's pregnancy, "one of the valves began to leak again" and that she "has a presently leaking heart valve." However, the AAO notes that [REDACTED] reported that the applicant's wife's first pregnancy was uneventful, and there is no medical documentation in the record establishing that she would be a high-risk pregnancy for any future pregnancies and would require additional monitoring. Additionally, other than [REDACTED]'s statement, there is no other medical documentation in the record establishing that the applicant's wife's heart valve was leaking during her first pregnancy. Similarly, other than [REDACTED] statement, there is no other medical documentation in the record establishing that the applicant's spouse had a "presently leaking heart valve." The AAO notes the mental health and medical concerns of the applicant's wife and son.

The applicant's wife states because she suffers "from a congenital [sic] heart problems [sic], medical bills are costly and unrelenting." She states that she has medical insurance now, "which has kept cost minimal," but without insurance she could not afford her treatments. The AAO notes that the record establishes that the applicant's wife's income for 2007 was \$14,784. *See* 2007 U.S. Individual Income Tax Return (Form 1040). However, the AAO notes that Dr. [REDACTED] reported that the applicant's wife was in [REDACTED] for six months in 2007. Additionally, the applicant's wife's 2005 Form 1040 indicates that the applicant's wife claimed \$36,365 in income. Dr. [REDACTED] also indicates that the applicant's wife currently resides with her mother. The AAO notes the 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 psychological 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 be experiencing some financial hardship in being separated from the applicant; however, the applicant failed to submit sufficient documentation establishing that his wife is unable to support herself in his absence. Additionally, the AAO notes that the applicant has submitted no evidence to establish that he is unable to obtain employment in [REDACTED] and, thereby, reduce the financial burden on his wife. While the AAO acknowledges that acting as a single parent for a child is arduous, the applicant has not shown that his

son would create a burden on his wife that elevates her difficulties to an extreme level. The AAO notes that [REDACTED] indicated that the applicant's spouse's mother assists in caring for the child. Based on the record before it, the AAO finds that the applicant has failed to establish that his wife will suffer extreme hardship if his waiver application is denied and she 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 wife 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 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.

The AAO notes that the OIC denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. As the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, no purpose would be served in granting the applicant's Form I-212.

ORDER: The appeal is dismissed.