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

H6

[Redacted]

Date: **APR 06 2012** office: VIENNA, AUSTRIA

[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 of Yugoslavia and citizen of Kosovo 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 is the father of a United States citizen. 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 child.

The OIC found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Officer in Charge*, dated August 18, 2009. The OIC also 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 relating to the Form I-601 appeal, it will only adjudicate one appeal.

On appeal, the applicant, through counsel, asserts that the United States Citizenship and Immigration Services (USCIS) erred in denying the applicant's waiver application. *Form I-290B*, filed September 11, 2009. Counsel claims that USCIS "failed to take the totality of the circumstances regarding the claimed hardship into account." *Id.* Additionally, counsel claims that USCIS "made an erroneous determination that the application should be denied in discretion." *Id.*

The record includes, but is not limited to, counsel's appeal brief, counsel's briefs in support of the Form I-212 and Form I-601, a statement from the applicant's wife, country-conditions documents on Kosovo, 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.-

(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.

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- (v) Waiver.-The [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 March 17, 2004 without inspection. On or about July 8, 2004, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On April 11, 2005, an immigration judge ordered the applicant removed from the United States. On May 19, 2006, the applicant's appeal to the Board of Immigration Appeals (Board) was denied, and he was removed from the United States on June 5, 2007.

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. Therefore, the applicant accrued unlawful presence from May 20, 2006, the day after the Board denied the applicant's appeal, until June 5, 2007, when the applicant was removed from the United States. The applicant is seeking admission into the United States within ten years of his June 5, 2007 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 and seeking admission within 10 years of his departure. The applicant does not contest his ground of inadmissibility.

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).

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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In her brief in support of the Form I-601 dated June 3, 2008, counsel states that Kosovo "remains poor and lacking in any opportunities" for the applicant, his wife, and daughter. Counsel states the applicant has been unable to find employment in Kosovo, the quality of health care in Kosovo is not comparable to

health care in the United States, and the applicant's daughter will not have the same opportunities in Kosovo that she has in the United States. In her appeal brief dated September 29, 2009, counsel states all of the applicant's wife's immediate family resides in the United States, and in close proximity to each other. She claims that "Kosovo offers virtually no opportunities for work or schooling," and it is worse for women. Counsel states "[e]xpectations regarding [the applicant's daughter's] education and young adult life necessarily would change if the family decided to relocate to Kosovo." In a statement dated June 2, 2008, the applicant's wife states that there is a potential for violence in Kosovo, and she "lived through the atrocities of the last war and refuse[s] to introduce [their] baby to that kind of life." Counsel states that Kosovo remains "a volatile region of the world." The record establishes that the applicant's wife was born in Yugoslavia, and came to the United States as a refugee. Counsel states that the fact that the applicant's wife "experienced persecution in Kosovo should automatically translate to a finding of extreme hardship if she relocates back to Kosovo to be with [the applicant]."

The AAO acknowledges that the applicant's wife is a citizen of the United States and that she has been residing in the United States for many years. Based on the record as a whole, including the applicant's wife's entry to the United States as a refugee, her separation from her family, having to raise her daughter in Kosovo, having to leave her employment in the United States, and country conditions in Kosovo, the AAO finds that the applicant's wife would suffer extreme hardship if she were to relocate to Kosovo to be with the applicant. However, the record fails to establish extreme hardship to the applicant's wife if she remains in the United States.

Counsel claims that the applicant's wife makes "just over" \$9.00 an hour as a factory worker. Counsel states that the applicant's wife cannot afford daycare, so the applicant's wife's mother cares for their daughter. The applicant's wife states she cannot depend on her brothers and sisters for help because they have their own family and work responsibilities. Counsel states that while the applicant was in the United States, he was the primary caregiver for his daughter, they have "an extremely strong parent/child relationship," and she is having a difficult time with the applicant's absence. The applicant's wife states their daughter "cries all the time" for the applicant. Counsel states the applicant's daughter has "already displayed certain behavioral and psychological issues associated with [the applicant's] removal from the United States." The AAO acknowledges that the applicant's daughter may be suffering some hardship in being separated from the applicant. However, the applicant's daughter is not a qualifying relative, and the applicant has not shown that hardship to his daughter has elevated his wife's challenges to an extreme level.

The applicant's wife states she is "sad, lonely and scared without [the applicant]," and her "daily life has become extremely difficult." The AAO acknowledges that the applicant's wife may be suffering some emotional problems in being separated from the applicant. 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.

Regarding financial hardships, the record does not contain any material establishing that the applicant's wife is unable to support herself in the applicant's absence. Additionally, the submitted country conditions documents do not establish that the applicant is unable to obtain employment in Kosovo 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.

Although the applicant has demonstrated that his wife would experience extreme hardship if she relocated abroad to reside with the applicant, we can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining in the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also *cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

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.