

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



U.S. Citizenship
and Immigration
Services



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DATE: **DEC 13 2012**

OFFICE: VIENNA, AUSTRIA

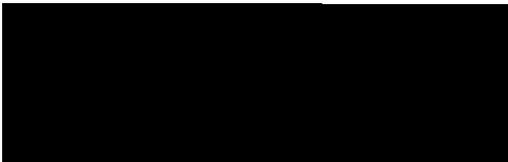
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IN RE: 

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(i) and of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i)

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,

A handwritten signature in cursive script that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, 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 under 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 country for more than one year and seeking readmission within ten years of his departure from the United States. The applicant was also found to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission into the United States through willful misrepresentation of a material fact. The applicant is the beneficiary of an approved Form I-130, Petition for Alien Relative (Form I-130). He 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) and section 212(i) of the Act, 8 U.S.C. §1182(i), in order to live in the United States with his U.S. citizen spouse.

The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director*, dated April 11, 2011.

On appeal counsel contests section 212(a)(6)(C)(i) inadmissibility and asserts that the evidence is sufficient to establish that the applicant's U.S. citizen spouse will suffer extreme hardship if a waiver is not granted. *See Form I-290B, Notice of Appeal or Motion* (Form I-290B), received May 9, 2011.

The record contains, but is not limited to: Forms I-290B, counsel's brief; Form I-601; Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212); Form I-130; Board of Immigration Appeals (Board) and Executive Office of Immigration Review decisions and orders; affidavits and letters from the applicant's wife, son and other family members; medical records; psychological evaluations; financial documents; court records; birth and marriage certificates; academic documents; photographs; and country-conditions reports. The entire remaining record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act states:

- (1) The Attorney General [now Secretary, Department of Homeland Security, "Secretary"] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The record reflects that the applicant attempted to enter the United States on November 13, 2000 under the Visa Waiver Program by presenting a Slovenian passport with the name [REDACTED]. The record shows that the applicant completed a Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form, and a customs declaration form with the name [REDACTED] and country of citizenship as Slovenia. The record illustrates that upon arrival, the primary inspecting officer noticed discrepancies among the applicant's passport and other documents, wrote his findings on the applicant's Form I-94W and referred the applicant to secondary inspection. The record includes a document from a secondary inspecting officer noting the possible fraudulent nature of the applicant's passport and other documents. The record includes a sworn statement taken during secondary inspection where the applicant stated his real name, admitted to purchasing a fake Slovenian passport and asked to apply for asylum. On appeal counsel contends that the applicant intended to use a fake passport to board a plane leaving Albania and travel to the United States, but did not intend to seek admission into the United States by using fraudulent documents. Counsel asserts that immediately upon his arrival to the United States, the applicant used his real name, admitted his passport was fake, did not attempt to use the fake passport to seek admission to the United States and recanted any misrepresentations in a timely matter.

The AAO finds that the record does not support counsel's assertions. The record reflects that the primary and secondary inspecting officers were not aware of the applicant's true identity and citizenship until the applicant was questioned by a secondary inspecting officer. The record does not indicate that the applicant was forthright in telling the primary or initial secondary inspecting officers of the fraudulent nature of his documents and revealing his actual name and citizenship.

The AAO notes that a timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for section 212(a)(6)(C)(i) ineligibility. *9 FAM 40.63 N4.6*. Whether a retraction is timely depends on the circumstances of the particular case. *Id.* In general, it should be made at the first opportunity. *Id.* If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview. *Id.*

In the present case, the applicant's retraction was made during his secondary inspection, not during his primary inspection which was his first opportunity to correct his misrepresentation. Therefore, the AAO finds that the application's retraction was not timely, and the application is inadmissible under section 212(a)(6)(C)(i) of the Act.

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

(i) [A]ny 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.

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

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.

The record reflects that the applicant arrived at the United States on November 13, 2000, and he presented a Slovenian passport that was not his own. The applicant applied for asylum, was denied by the immigration judge, and his appeal was dismissed by the Board on July 16, 2003. The applicant did not depart the United States and was arrested by Immigration and Customs Enforcement and removed to Albania in May 2005. The applicant accrued unlawful presence in the United States for a period in excess of one year. Based on the foregoing, he 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. The applicant seeks a waiver of inadmissibility under 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 U.S. citizen spouse. The record supports the inadmissibility finding, the applicant does not contest inadmissibility, and the AAO concurs that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

A waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member, which includes the U.S. citizen or lawful permanent resident spouse or parent of the applicant. Hardship to the applicant and his child can be considered only insofar as it results in hardship to a qualifying relative. In the present case, the applicant's spouse is the only qualifying relative. 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).

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*, 22 I&N Dec. 560, 565 (BIA

1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or U.S. 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).

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 v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (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.

The record contains references to hardship the applicant's child would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship under sections 212(a)(9)(B)(v) and 212(i) of the Act. In the present case, the applicant's spouse is the only qualifying relative for the waiver under sections 212(i) and 212(a)(9)(B)(v) of the Act, and hardship to the applicant's child will not be separately considered, except as it may affect the applicant's spouse.

The AAO finds that the applicant has established that his wife is suffering extreme hardship as a consequence of being separated from him. The applicant's 35-year-old wife is the sole provider for their 10-year-old son, who is a U.S. citizen, and her two parents, who are also U.S. citizens. She has lived separated from the applicant for over seven years and has visited him twice in Albania. According to a statement made in her psychological evaluation, she has not been able to visit the applicant more often because she "is barely living." Her full-time employment as a real-estate consultant, financial responsibilities including paying a mortgage, the care required for her ailing parents, the special attention needed by her son and the maintenance of all household duties cause her fatigue, stress, and depression. Affidavits and letters from the applicant's wife, parents, son, relatives and psychological evaluations corroborate her claims. A psychologist, who has seen the applicant's wife and son three times in nearly three years, states that the applicant's wife suffers from anxious-depressive and dysthymic disorder, anxious overeating, palpitations and hopelessness. Since 2010 the applicant's spouse's parents' health has diminished, and she now tends to their daily needs of monitoring medications, cooking, cleaning, laundry, shopping, and transportation. Medical documentation shows that her 74-year-old father suffers from cervical spondylitic myelopathy, neurological deterioration, hypertension and weakness in his lower and upper limbs that causes him to use a walker. Her 70-year-old mother's medical evidence indicates that she has been diagnosed with dementia, carotid stenosis and thoracic pain. The applicant's wife expresses that her anxiety, fatigue and stress is caused by the applicant not being able to help care for her parents as he did before he was removed. Statements from the applicant's parents and relatives and financial documentation show that the applicant assisted in caring for his wife's parents emotionally and financially before he was removed.

The applicant's wife further explains the hardship their son experiences due to his separation from his father. She states that their son misses the applicant very much and has bodily reactions, including vomiting, restlessness, and insomnia, in addition to sadness after he returns from visiting the applicant in Albania each year. Documentation from the applicant's son's school shows that he has been receiving at-risk guidance counseling and special-education classes. The applicant's wife explains that her full-time employment and assistance to her parents hinders her from spending adequate time with their son to provide him with the assistance and attention he requires. She maintains that without the applicant, she suffers stress from seeing their son struggle in school and mature without a father.

Financially, the applicant's wife states that her employment in the real-estate industry had been unstable due to the economic crash of the housing market. She was unable to pay the mortgage and other expenses. Bank statements, bills, a court summons, and payment notifications corroborate her assertions. When the applicant lived in the United States, he worked as a carpenter and his income supported the family and allowed her to complete her associate's degree, as evidenced by tax documentation. She maintains that the applicant's inability to financially contribute to the household has caused her hardship.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant's spouse, including the emotional strain of being separated from her husband; the financial responsibilities of maintaining a household of four people; her needed daily assistance to her aging parents; the emotional impact of seeing the effects of the separation on their son; and the psychological, physical and financial assistance the applicant's entry to the United States would provide. Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. citizen spouse is suffering and would continue to suffer extreme hardship due to separation from the applicant.

The applicant also demonstrated his qualifying spouse would suffer extreme hardship in the event that she relocated to Albania. The qualifying spouse's family ties to the United States include their U.S. citizen son and her U.S. citizen parents, with whom she lives, and her brother. She has lived in the United States for fifteen years since the age of twenty. The applicant's spouse expresses fear of returning to Albania, from where her mother fled and was granted asylum in the United States due to persecution to their family. She also worries about the violence and high crime rate in Albania. The record contains country-conditions documentation to confirm her assertions. She has returned to Albania four times in the past fifteen years and does not have significant ties there, except for the applicant and her sister. She does not have any property in Albania and indicates that the applicant lives on a small piece of land owned by his brother. The applicant has not been able to find substantial work and survives by growing his own food as a subsistence farmer. The applicant's spouse has twice sent him money from the United States. Moreover, her parents rely on her for their daily needs, medical appointments and ongoing health concerns. The AAO therefore concludes that, were the applicant unable to reside in the United States due to his inadmissibility, the qualifying spouse would suffer extreme hardship due to her separation from her family, her length of residence in the United States and country conditions in Albania if she returned there to be with the applicant.

Considered in the aggregate, the applicant has established that his wife would face extreme hardship if the applicant's waiver request is denied. Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. at 301. For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the Board stated that:

The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives).

Id. at 301.

The Board further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for sections 212(a)(9)(B)(v) and 212(i) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in this matter are the extreme hardship the applicant's U.S. citizen spouse would face if the applicant is not granted this waiver, whether she accompanied the applicant or remained in the United States; his family ties to the United States; his good character, as indicated in several statements; and his lack of a criminal record. The unfavorable factor in this matter is the applicant's use of a fraudulent passport in an attempt to enter the United States in 2000. Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors.

The AAO notes that the Director denied the applicant's Form I-212 in the same decision, solely based on the denial of the Form I-601.¹ In the present case, the record indicates that on November 13, 2000, the applicant attempted to enter the United States under the Visa Waiver Program, by

¹ On April 11, 2011, the Vienna office erroneously stated that in order to process the applicant's Form I-601 appeal, the applicant also must submit an appeal of his Form I-212 denial; therefore, the applicant's appeal of his Form I-212 dated May 6, 2011 is accepted as timely.

presenting a Slovenian passport in someone else's name; he then requested asylum. In May 2005, the applicant was removed to Albania after his appeal for asylum was denied.

8 C.F.R. § 217.4 provides, in pertinent part, that:

(a) *Determinations of inadmissibility.*

- (1) An alien who applies for admission under the provisions of section 217 of the Act, who is determined by an immigration officer not to be eligible for admission under that section or to be inadmissible to the United States under one of more of the grounds of inadmissibility listed in section 212 of the Act (other than for lack of a visa), or who is in possession of and presents fraudulent or counterfeit travel documents, will be refused admission into the United States and removed. Such refusal and removal shall be made at the level of the port director or officer-in-charge, or an officer acting in that capacity, and shall be effected without referral of the alien to an immigration judge for further inquiry, examination, or hearing, except that an alien who presents himself or herself as an applicant for admission under section 217 of the Act and applies for asylum in the United States must be issued a Form I-863, Notice of Referral to Immigration Judge, for a proceeding in accordance with 8 CFR 208.2(c)(1) and (c)(2).

....

- (3) Refusal of admission under paragraph (a)(1) of the section shall not constitute removal for purposes of the Act.

The record establishes that the applicant was refused admission to the United States after attempting to enter under the Visa Waiver Program. Therefore, the AAO finds that pursuant to 8 C.F.R. § 217.4(a)(3), the applicant is not inadmissible to the United States under section 212(a)(9)(A)(ii) of the Act. As such, the issue of whether the applicant has established eligibility for permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act is unnecessary and need not be addressed.

In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.