



U.S. Citizenship
and Immigration
Services



H6

DATE: DEC 31 2012

Office: VIENNA, AUSTRIA

FILE: 

IN RE: 

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:

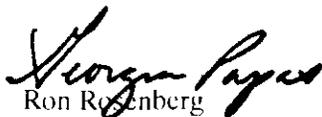


INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Vienna, Austria, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Serbia 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 10 years of his last departure. The applicant is also inadmissible pursuant to section 212(a)(9)(A) of the Act, for being removed after his failure to comply with a voluntary-departure order.¹ The applicant is a spouse of a U.S. citizen and the beneficiary of an approved Petition for Alien Relative. He seeks a waiver 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 spouse and child.

The director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *See Field Office Director's Decision*, dated August 12, 2011.

On appeal, counsel asserts that unlawful presence "cannot be imputed" to the applicant, because he was a minor when he came to the United States and he was "never informed" about the voluntary-departure order. Counsel further asserts that the applicant's spouse would suffer extreme hardship if the applicant's waiver application is denied. *See Counsel's Attachment to Form I-290B, Notice of Appeal or Motion*, dated September 12, 2011 (Form I-290B). On Form I-290B, counsel indicates that additional evidence would be submitted within 30 days of the filing of the appeal. However, to date, the AAO has not received additional evidence, and therefore, the record is considered complete.

The evidence of record includes, but is not limited to: counsel's attachment to the appeal; statements from the applicant and his spouse; letters from family and their pastor; financial evidence, medical documents and psychological evaluations for the applicant's spouse; country-conditions information for Serbia; and documents in Serbian.

8 C.F.R. § 103.2(b) states:

(3) Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

¹ The Field Office Director 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), on August 12, 2011. The applicant did not appeal the denial of his Form I-212.

As such, the Serbian-language documents without English translations cannot be considered in analyzing this case. However, the rest of the record was reviewed and all relevant evidence was considered in reaching a decision on the appeal.

Section 212(a)(9) states 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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions.-

(I) Minors.-No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

The record reflects that the applicant entered the United States on July 24, 1991 with a nonimmigrant visa, which authorized him to remain in the United States for six months. At the time of his entry into the United States, the applicant was five years old. His parents subsequently filed for asylum, and their application was denied by an immigration judge. The applicant and his parents were granted voluntary departure on or before June 23, 1998; however, the applicant failed to depart timely. The applicant turned 18 years of age on June 22, 2004. The record reflects that the applicant was removed from the United States on December 10, 2007. Based on the applicant's history, the AAO finds that the applicant accrued unlawful presence from June 23, 2004, the day after his 18th birthday, until his removal in December 2007.

On appeal, counsel asserts that unlawful presence "cannot be imputed" to the applicant because he was a minor when his parents brought him to the United States, and he was "never informed" about the voluntary-departure order. The AAO finds counsel's assertion unpersuasive, as he

submitted no authority for his argument. As the applicant accrued unlawful presence of more than one year and is seeking admission within 10 years of his 2007 removal, he is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or other family members can be considered only insofar as it results in hardship to a 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).

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 factors to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(a)(9)(B)(v) of the Act, and hardships to the applicant's child will not be separately considered, except as they may affect the applicant's spouse.

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, 631-32 (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, "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-I-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., *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). 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.

The AAO now turns to the question of whether the applicant in the present case has established that his qualifying relative would experience extreme hardship as a result of his inadmissibility.

On appeal, counsel states that without the applicant, his spouse's major depressive disorder "will only get worse." Counsel also states that the applicant's spouse would suffer economic hardship if she relocates because she is unemployable. She does not speak Serbian and does not have a college degree. Counsel further states that the applicant's spouse will have "no access to suitable healthcare" in Serbia.

The applicant was five years old when his parents brought him to the United States and for 17 years he lived in New Jersey, where he completed his primary- and secondary-school education. He states that he has a difficult time adjusting to life in Serbia and faces challenges with the language there. We note that the applicant's hardship is a discretionary factor to be considered only if he shows his inadmissibility causes extreme hardship to his qualifying relative.

With respect to the possibility of relocating to be with the applicant, the applicant's spouse states that she would feel "incredibly isolated" in Serbia. Moreover, she is Catholic and she states that in Serbia, all the churches are Orthodox. Not being able to attend Catholic services in English would cause her extreme hardship.

With respect to her financial hardship in Serbia, the applicant's spouse states the applicant works irregular hours as a construction laborer, earning about \$40 a week. The applicant states that he is not able to provide a future for his family in Serbia, because he can hardly provide for himself. The applicant's spouse is concerned that their "quality of life would diminish" if she relocates, because she would not be able to find employment and their income would allow them only to survive. The applicant's spouse also states that she experiences financial hardship in the United States without the applicant. Her expenses include \$350 monthly rent, \$1,300 annual car insurance, \$1,200 for college loans, and unspecified amounts for food, gas, and other expenses. She estimates she would need to pay about \$600 for monthly childcare expenses. Although evidence indicates that the applicant's spouse is employed, she does not provide information about her income.

The applicant's spouse also is concerned about medical care in Serbia. She states that her first delivery was via caesarean section and her subsequent deliveries likely will be the same. She states that she would not be able to afford regular check-ups on a "Serbian income." She also is concerned about her son's healthcare because of her inability to communicate with doctors in Serbian.

The applicant's spouse has close family ties to the United States. She is concerned for her mother, who has undergone treatment for breast cancer, and she would like to be able to continue to assist her mother with follow-up care. Moreover, the record indicates that the applicant's spouse has "many symptoms" of major depressive disorder and is anxious. [REDACTED] states that the applicant's spouse feels alone, socially isolates herself, and thinks about death. According to [REDACTED] the applicant's spouse would not hurt herself because of their son. Although she "tries to stay strong," if the applicant does not return, she "could possibly fall apart and even have trouble taking care of her child." [REDACTED] psychological evaluations of the applicant's spouse are silent about treatment recommendations.

Letters from their family and pastor attest to the loving and supportive relationship between the applicant and his spouse. They also refer to the applicant's good character and support his return to the United States.

Having reviewed the preceding evidence, the AAO finds that the applicant's spouse would experience extreme hardship if the waiver application is denied and she relocates to Serbia. In reaching this conclusion, we note that the applicant's spouse was born and raised in the United States. She has no family ties to Serbia, other than the applicant, and does not speak Serbian. Even the applicant, although is a native Serbian, finds communicating in Serbian challenging for himself, because he grew up in the United States. His income is very limited. Without proficiency in Serbian, finding employment would be difficult, if not impossible, for the applicant's spouse, and therefore, she would face financial hardship if she relocates. Moreover, the applicant's spouse has strong family ties in the United States and cannot benefit from her family's support in Serbia. Staying in the United States provides her the stability she needs for herself and their son. Furthermore, the applicant is concerned about her mother's health and would like to continue to assist in her mother's care. Accordingly, the AAO concludes, considering the evidence in the aggregate, the applicant's spouse would experience extreme hardship should she relocate to Serbia.

The record, however, does not establish that the applicant's spouse would experience extreme hardship if she remains in the United States. The AAO acknowledges that the applicant and his spouse have a loving relationship, and nothing in this decision should be interpreted as suggesting otherwise. However, the record does not demonstrate that the applicant's spouse is experiencing extreme hardship resulting from their separation. The record indicates that the applicant's spouse has many symptoms of major depression and anxiety; however, the psychological evaluations lack details concerning treatment recommendations and her response to any counseling or medical treatments she may have received. With respect to financial hardship, the record lacks information about the applicant's spouse's income; other than proof of her college tuition and childcare expenses, the applicant's spouse does not provide documentary evidence corroborating her claims about her household expenses. Without such evidence, the AAO cannot conclude that the applicant's spouse is experiencing financial hardship as a result of her separation. The assertions of the applicant's spouse are relevant evidence and have been considered. However, absent supporting documentation, these assertions are insufficient proof of hardship. *See Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Therefore, the AAO concludes, considering the evidence in the aggregate, the hardship experienced by the applicant's spouse resulting from their separation does not rise to the level of extreme.

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 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.

The applicant has not established statutory eligibility for a waiver of his inadmissibility under section 212(a)(9)(B)(v) of the Act. As the applicant has not established extreme hardship to his qualifying family member if she lived in the United States, no purpose would be served in determining whether the applicant 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.