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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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Washington, DC 20529-2090



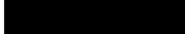
**U.S. Citizenship  
and Immigration  
Services**

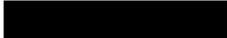


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Date: JAN 25 2012

Office: VIENNA, AUSTRIA

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the 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.

Thank you,

A handwritten signature in black ink that reads "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer in Charge, Vienna, Austria. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Albania who 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 is married to a U.S. citizen and 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 with his wife and child in the United States.

The officer in charge found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the Officer in Charge*, dated July 8, 2009.

On appeal, counsel contends that the officer in charge erroneously stated that the applicant had been deported and that he had an appeal pending before the Board of Immigration Appeals. In addition, counsel contends the officer in charge erred in finding that the applicant's wife married the applicant knowing of the applicant's possible deportation. Counsel submits additional evidence of hardship.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and his wife, [REDACTED] indicating they were married on January 24, 2005; two affidavits from the applicant; letters and affidavits from [REDACTED]; a letter from a mental health counselor; a letter from [REDACTED] physician; copies of medical records; copies of tax records and other financial documents; a copy of the U.S. Department of State's Country Reports on Human Rights Practices for Albania and other background materials; letters and documents from Florida Community College; letters of support, including from the applicant's former employer; photographs of the applicant and his family; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

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

(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 1158 of this title 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 Attorney General [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 this case, the record shows, and the applicant concedes, that he entered the United States in August 2003 without inspection. *Affidavit of* [REDACTED] dated June 11, 2007. The record also shows that the applicant filed an asylum application in July 2004 and was granted voluntary departure by an immigration judge on July 2, 2007. In addition, as the officer in charge found, the applicant conceded that he accepted unauthorized employment during his asylum proceedings. The applicant remained in the United States until his departure in October 2008. Therefore, no exception applies to the applicant's period of unlawful presence and the applicant was unlawfully present from August 2003 until his departure from the United States in October 2008.

Counsel's contention that "the USCIS policy at the local USCIS office in Florida is that unauthorized employment is waived in essence where the applicant marries a U.S. citizen and the marriage is bona fide," *Notice of Appeal or Motion (Form I-290B), Addendum to Part 3: Basis for Appeal*, dated July 31, 2009, is unpersuasive. The Act clearly places the burden of proving eligibility for entry or admission to the United States on the applicant. See Section 291 of the Act, 8 U.S.C. § 1361. Counsel has not submitted any evidence to support his claim. Indeed, the most recent USCIS policy memorandum addressing unlawful presence confirms that "[a]n alien, whose bona fide application for asylum is pending, is in an authorized period of stay and does not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act unless the alien is employed without authorization while the application is pending." *Memorandum by Donald Neufeld, Acting Associate Director, Domestic Operations Directorate; Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate; Pearl Chang, Acting Chief, Office of Policy and Strategy* at 29, dated May 6, 2009 ("unlawful presence does not accrue while the application is

pending unless the alien engages in unauthorized employment”). Accordingly, the applicant is 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 one year or more and seeking admission to the United States within ten years of his last departure.

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 this case, the applicant's wife, [REDACTED], states that when she married her husband, she never believed they would be separated due to immigration reasons. She states that she has been diagnosed as being clinically depressed as a result of her husband's immigration situation. [REDACTED] contends that due to her depression, she is unable to care for their newborn baby and that if she relocates to Albania to be with her husband, she would be separated from her family who are taking care of the baby. According to [REDACTED], she is very close to her parents, her twenty-five year old brother, her eleven-year old sister, and her elderly grandparents. [REDACTED] states that she lived in Albania with her husband for a year while petitioning for him to enter the United States. She states that she left Albania in January 2009 because she was pregnant and the prenatal care was inadequate. Citing several articles, [REDACTED] contends that if she remains in the United States without her husband, her daughter will be more at risk of being sexually promiscuous at an early age, becoming pregnant, engaging in juvenile violent crime, becoming depressed, having an eating disorder or substance abuse problem, or committing suicide. Furthermore, [REDACTED] claims she cannot repay her student loan without her husband's assistance and that she has had to drop out of school where she was studying to be a medical doctor. She states that her parents cannot afford to support her, that she is now dependent on food stamps, and that if her husband were with her in the United States, she would not have to be dependent on government benefits. Moreover, [REDACTED] states that she cannot return to live in Albania with her husband because she does not speak Albanian and fears for her safety as a foreigner. She states that when she lived in Albania, not one time did she go out alone because of her fear. Furthermore, she states that the educational system in Albania is very weak, medical facilities are poor, hygiene standards are poor, and that she does not want their daughter living in Albania. She also contends that if she returns, she will never have surgery on her facial bone abnormality which causes her headaches, difficulty chewing food, and muscle pain. *Affidavit of [REDACTED]* dated December 12, 2009; *Letters from [REDACTED]* dated January 14, 2009 and June 13, 2007; *see also Affidavit of [REDACTED]* dated July 2009.

After a careful review of the record, the AAO finds that the applicant's wife, [REDACTED] will suffer extreme hardship if the applicant's waiver application were denied. If [REDACTED] decides to stay in the United States without her husband, the record shows that she will continue to suffer extreme financial hardship. The record shows that prior to the applicant's departure from the United States, [REDACTED] was a student and the applicant was essentially the sole income earner for the family. *2007 U.S. Individual Income Tax Return (Form 1040)*, dated January 29, 2008; *2007 Wage and Tax Statement*

(Form W-2) (indicating [REDACTED] earned only \$413 while the applicant worked two jobs, earning a total of \$32,636). Moreover, the record shows that [REDACTED] is now dependent on public assistance and food stamps. *Letter from the State of Florida Department of Children and Families*, dated March 25, 2009 (stating [REDACTED] qualifies for \$95 per month in AFDC benefits); *Letter from the State of Florida Department of Children and Families*, dated February 12, 2009 (stating [REDACTED] qualifies for Medicaid assistance); *Food Stamps*, undated (stating [REDACTED] qualifies for Food Stamp benefits of \$367 per month). Moreover, the record contains documentation that [REDACTED] has accumulated over \$10,000 in student loans. *Initial Disclosure Statement, USAF – USA Funds*, dated October 19, 2007. In addition, a letter from a mental health counselor substantiates [REDACTED] contention that she is clinically depressed. *Letter from [REDACTED]*, dated July 22, 2009. Considering all of the evidence in the aggregate, the AAO finds that if the applicant decided to stay in the United States, the effect of separation from the applicant goes above and beyond the experience that is typical to individuals separated as a result of inadmissibility or exclusion and rises to the level of extreme hardship.

Furthermore, relocating to Albania to avoid separation would be an extreme hardship for [REDACTED]. The AAO acknowledges [REDACTED] contention that she does not speak Albanian and that she has already attempted to adjust to living in Albania, but was unable to do so. Her contention is corroborated by the letter from a mental health counselor. *Letter from [REDACTED]*; *supra* (“Living in Albania is not an option for [REDACTED] as she has already experienced that for a year and could not adjust to the extreme differences in culture.”). In addition, the AAO recognizes that relocating to Albania would involve [REDACTED] discontinuing her education and being separated from her family. Moreover, as [REDACTED] contends, the U.S. Department of State acknowledges that women are discriminated against due to social norms that consider women to be subordinate to men, that government and police corruption are a serious problem, and that human trafficking also remains a problem. *U.S. Department of State, Country Reports on Human Rights Practices, Albania*, dated April 8, 2011; *see also U.S. Department of State, Country Specific Information, Albania*, dated June 20, 2011 (stating that organized crime continues to operate in all regions, that corruption is pervasive, and that pick-pocketing, theft, and other petty street crimes are widespread, particularly in areas where tourists and foreigners congregate). Considering all of these factors cumulatively, the AAO finds that the hardship [REDACTED] would experience if she moved to Albania to be with her husband is extreme, going well beyond those hardships ordinarily associated with inadmissibility or exclusion. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the [REDACTED] factors cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case include the applicant’s initial entry without inspection, his unlawful presence in the United States and periods of unauthorized employment. The favorable and mitigating factors in the present case include: significant family ties in the United States including

his U.S. citizen wife and child; the extreme hardship to the applicant's wife and child if he were refused admission; and the fact that the applicant has not had any arrests or convictions in the United States.

The AAO finds that, although the applicant's immigration violation is serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.