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



U.S. Citizenship  
and Immigration  
Services



H6

DATE: JUL 17 2012

OFFICE: VIENNA, AUSTRIA

File: 

IN RE:

Applicant: 

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.

Thank you,

Perry Rhew  
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, 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 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility in order to reside 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 30, 2010.

The record contains but is not limited to: Form I-290B and counsel's appeal brief; counsel's earlier brief and addendum to Form I-601; numerous immigration applications and petitions; applicant's statement; hardship statement from the applicant's spouse and letters from her mother and twin sister; medical and financial records; birth and marriage certificates and family photos; and records pertaining to the applicant's removal proceedings and voluntary departure compliance. The entire record was reviewed and considered in rendering this decision on the appeal.

The record reflects that the applicant entered the United States without inspection in May 2001 when he was 15-years-old. The applicant turned 18-years-old on July 31, 2003. On April 24, 2004 the applicant filed a Form I-589, Application for Asylum, which was pending until December 10, 2007, when the Immigration Judge granted voluntary departure in lieu of removal on or before April 8, 2008. The applicant complied with the Immigration Judge's order and voluntarily departed the United States on March 17, 2008. The Field Office Director found that the applicant was unlawfully present for more than one year and because he seeks readmission within 10 years of his departure, the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 USC § 1182(a)(9)(B)(i)(II).

On appeal, counsel asserts that the applicant accrued unlawful presence only from July 31, 2003, the date of his 18<sup>th</sup> birthday, until April 24, 2004, the date on which he filed his application for asylum, and should only be subject to the three-year-bar under section 212(a)(9)(B)(i)(I) of the Act. The AAO notes that under section 212(a)(9)(iii)(II) of the Act an alien does not accrue unlawful presence during the entire pendency of a bona fide request for asylum, unless at any time during that period he was employed without authorization. The Field Office Director found that the applicant "accepted unauthorized employment" while his asylum application was pending. *See Decision of the Field Office Director*, dated April 30, 2010. The applicant writes that he was granted employment authorization from July 6, 2006 to July 5, 2007. Counsel contends that the applicant "had valid employment authorization (EAD) while his asylum application was pending,"

and points to evidence contained in "Exhibit H." Exhibit H consists of an approval notice, dated October 1, 2008, for the Form I-130 petition filed on the applicant's behalf on December 27, 2007, as well as photos of the applicant and his spouse together. This evidence is insufficient to establish that the applicant had valid employment authorization throughout the pendency of his asylum proceedings or that he did not accept unauthorized employment at any time during the pendency thereof.

The applicant states that though his asylum application was pending from April 24, 2004, he did not apply for employment authorization until he was in removal proceedings, and that his first EAD was issued for the period of July 6, 2006 to July 5, 2007. On Form G-325A, Biographical Information, signed and dated by the applicant on December 14, 2007, the applicant listed employment from March 2006 to August 2007, including acting as an independent contractor for [REDACTED], and a position in a Sales Department for [REDACTED]. Thus, the applicant has identified instances of employment that occurred outside of the July 6, 2006 to July 5, 2007 authorized period. The applicant also described his employment in his family's restaurant in Brunswick, Ohio that lasted until they sold the establishment and relocated to Florida. The applicant indicated on Form G-325A that he relocated to Florida in October 2004, approximately six months after his asylum application was filed. This timeline supports that he was working in his family's restaurant without authorization after his asylum application as filed. Based on the foregoing, the applicant has failed to establish that he never worked without authorization during the pendency of his asylum application. The AAO concurs with the Field Office Director's finding that the applicant accrued unlawful presence in excess of one year and is thus inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9) of the Act provides:

(B) ALIENS UNLAWFULLY PRESENT.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States...prior to the commencement of proceedings...and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

...

(v) Waiver.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

A waiver of inadmissibility under section 212(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. 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*, 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.

The record reflects that the applicant’s spouse is a 26-year-old native and citizen of the United States who started dating the applicant in 2002 while still in high school. She contends that being separated from her husband is the hardest thing she has ever had to deal with in her life, she is very distraught with the situation, and is challenged every day to make do without his support. She maintains that though she and the applicant are young, they have had a long history together and have many plans for their future. The applicant’s spouse indicates that they dream of owning and operating successful restaurants and starting a family together while they are young. She explains that she has undergone two surgeries to treat polycystic ovaries and fears her condition may cause complications during pregnancy and after childbirth. Supporting medical evidence has been submitted for the record. The applicant’s spouse joined her husband when he voluntarily departed to Albania in March 2008 and returned to the United States to visit her family and undergo medical tests six months later. She indicates that she returned to Albania to be with her husband but on January 29, 2009, came back to the United States due to reoccurring abdominal pain and the need for medical treatment from her own trusted doctors. The applicant’s spouse maintains that she moved to Ohio where she knew her parents would help her, and returned to work at Anthony’s Family Restaurant so she can pay the bills and keep her mind off things. She explains that she is much calmer about her health management in the United States because she trusts in her doctors and has health insurance.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant’s spouse including that despite their youth, she and the applicant have been together for many years; and that she attempted to reside with her husband in Albania but her medical problems were so disruptive that she was compelled to return for treatment in the United States where she has faced emotional challenges being separated from him. 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.

Addressing relocation, the applicant's spouse indicates that she was born and raised in Ohio and is close to her parents, twin sister, and other siblings. She indicates that her experience living in Albania over a nine month period proved impossible under her unique circumstances. The applicant's spouse explains that she tried very hard to learn the Albanian language but could not speak it fluently, was unable to secure employment in the country, and was not prepared for such a huge culture change. She contends that despite this she still would have stayed in Albania to be with her husband, but the challenges to her health were too great. The applicant asserts that as soon as she moved to Albania she got very sick and her symptoms grew worse every day. She states that the applicant and his parents did not know what to do because they could not take her to a hospital where hygiene issues could make things worse. The applicant's spouse indicates that a physician neighbor paid a house call and told her she was better off returning to the United States where she could receive adequate care. A U.S. State Department publication in the record warns travelers that many medical facilities outside of Tirana are limited beyond rudimentary first aid treatment; emergency and major medical care requiring surgery and hospital care is often inadequate due to a lack of specialists, diagnostic aids, medical supplies and prescription drugs; and if previously diagnosed medical conditions exist one may wish to consult his/her personal health care provider before travel.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse including adjusting to a culture and language so different from her own; her close family ties in the United States; home ownership; employment and employment-provided benefits including health insurance; and her medical conditions, relationship with physicians in the United States, and the fact that medical facilities and health care availability in Albania are far below the standards of those in the United States. Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate to Albania to be with the applicant.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). 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.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

*Matter of Mendez-Morales* at 300.

In *Matter of Mendez-Morales*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA 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 BIA 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 section 212(h)(1)(B) 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 the present case include extreme hardship to the applicant's U.S. citizen spouse as a result of the applicant's inadmissibility; the applicant's significant family ties to the United States; his home and business ownership and payment of taxes; attestations by others to his good moral character; and the apparent lack of a criminal record. The unfavorable factors include

the applicant's immigration violations which include his entry into the United States without inspection when he was 15-years-old and his periods of unlawful presence and unauthorized employment in the United States.

Although the applicant's violation of immigration law is significant and cannot be condoned, the positive factors in this case outweigh the negative factors. Therefore, the AAO finds that a favorable exercise of discretion is warranted.

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 and the appeal will be sustained.

**ORDER:** The appeal is sustained. The application is approved.