

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: OCT 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,

A large, stylized handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility 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 and the application will be approved.

The record reflects that the applicant is a native and citizen of Albania who on June 15, 1997 was admitted to the United States on a nonimmigrant visa to participate in a soccer tournament. The applicant did not depart the United States at the end of the tournament but instead applied for asylum. His application was referred by the asylum office, denied by the immigration judge, his appeal was dismissed by the Board of Immigration Appeals, and he was ordered removed. The applicant did not depart the United States and was arrested by Immigration and Customs Enforcement (ICE) on November 29, 2006 and removed to Albania on January 16, 2007. 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, father and mother. 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.

The Field Office Director determined that the applicant failed to establish extreme hardship to a qualifying relative and does not merit favorable discretion, and concurrently denied the Form I-601 and Form I-212 applications. *See Decision of the Field Office Director*, dated December 1, 2010.

The record contains, but is not limited to: Forms I-290B and counsel's letter and appeal brief in support thereof; numerous immigration applications and petitions including the denials of previously submitted Forms I-601 and I-212; hardship letters from the applicant's spouse and parents; numerous supporting letters from relatives of both the applicant and the applicant's spouse; psychological and medical records for the applicant's spouse, medical records for the applicant's mother and father, and medical records for the applicant's spouse's father and brother; country conditions reports concerning Albania; affidavits and letters concerning the applicant's prior counsel relating to the applicant's arrest and removal; records related to removal proceedings and removal; and mortgage documents and documents concerning the applicant's restaurant. The entire record was reviewed and considered in rendering this decision on the appeal.

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- ...

(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, mother and father are his qualifying relatives. 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.

The record reflects that the applicant’s spouse is a 29-year-old native of Italy and citizen of the United States who has been married to the applicant since May 2007. She explains that she met the applicant in 2000 and they began dating when she was only 17-years-old, making separation from him feel as if she has been unplugged from her partner and from the person she herself used to be. The applicant’s spouse states that her life has deteriorated dramatically since the applicant’s removal, resulting in the cessation of her college studies in 2006 and the loss of her job in 2007 due to declining performance, and necessitating seeing a therapist on a regular basis. She explains that she suffers from depression and anxiety which are exacerbated by the continuing separation, and is currently taking the prescription medications Zoloft, Ambien and Xanax for her symptoms. The applicant’s spouse contends that she has become socially withdrawn and even her physical appearance has suffered as a result of separation. [REDACTED] presents the following findings regarding the applicant’s spouse: depressive disorder, NOS; rule out major depression; rule out dysthymia; rule out adjustment disorder with anxious mood. He recommends that she continue psychotherapy sessions and psychiatric medications. [REDACTED] previously diagnosed the applicant with major depressive order, single episode, moderate, and

noted that she may also meet the criteria for generalized anxiety disorder. [REDACTED] states that the applicant's spouse has been suffering from clinical symptoms of depression and anxiety and that the thought of permanent separation from her husband continues to exacerbate her current psychological symptoms. The applicant's spouse explains that she is currently working in the applicant's restaurant which is the only place she can maintain employment due to her mental condition.

The applicant's father states that as a result of being struck by a drunk driver, he sustained multiple injuries including dislocation of his right hip, right femoral head fracture, and right ankle fracture which have left him permanently disabled and unable to work. Extensive corroborating medical documentation has been submitted for the record. The applicant's father explains that when he was in the hospital, it was the applicant who slept next to him, bathed him, changed him and took care of him like a baby. He writes that he and his wife have been dependent upon the applicant who took care of everything for them, paying their bills, putting food on the table, and providing them with shelter.

The applicant's mother states that she cannot imagine being separated any longer from the applicant. She explains that her health is not good, her husband's is worse, and that traveling to Albania is difficult for them both on account of health and financial issues. The applicant's mother writes that her husband's condition has deteriorated following her son's removal, and that he does not sleep at night and calls the applicant multiple times each day. She expresses great concern for her son having no immediate family in Albania and no one there to help him on a daily basis. The applicant's mother states that the applicant started working in the family's restaurant in 2002, seven days a week, nearly twelve hours a day. She maintains that the applicant worked hard to build the restaurant to make sure that his approximately twenty-five employees are happy in their jobs. The applicant's mother fears that if her son is not permitted to return to the United States, the restaurant will fail and the employees will lose their jobs.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant's spouse and parents including his spouse's significant emotional/psychiatric conditions, and the impact these have had on her physical health; the serious medical conditions suffered by the applicant's father and his reliance upon the applicant to operate and oversee the restaurant they own together and which employs numerous individuals; the economic impact of separation from the applicant on his spouse, mother and father; and the emotional/familial impact on the applicant's parents. 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 states that she has no family in or cultural ties to Albania and does not speak the language. She indicates that even when she has visited the applicant there, he is the only person with whom she can communicate and she felt helpless when he was not with her to translate. The applicant's spouse fears that under such circumstances in Albania her already significant depression and anxiety would be exacerbated and the likelihood that she could secure employment would be low, resulting in severe economic challenges and the likelihood that she would lose the home she purchased with her life savings in the United States.

She maintains that she is very close to her family, all of whom reside lawfully in the United States, and as a result of her father's serious medical conditions, her mother's financial situation, and her brother's medical condition she worries about them all the time. The applicant's spouse explains that she cannot imagine living thousands of miles away from her family and knows that as a result of economic and health-related challenges, they will be unable to visit her in Albania. She writes that her mother has resided with her since losing her job in 2009, and that she has no financial means to support herself and no health insurance.

The applicant's spouse states that she is the primary caregiver for her father who is very ill with obesity, diabetes, vision problems, sleep apnea and cardiovascular disease. She writes that she visits him at least twice daily to prepare his meals and medication and adjust his insulin pens as necessary. [REDACTED] confirms that the applicant's spouse's father suffers from type 2 diabetes in conjunction with peripheral neuropathy, nephropathy, coronary artery disease and a severe vision detriment. [REDACTED] notes that the applicant's spouse's father is on two different types of insulin requiring three injections a day. She adds that due to his poor vision, the applicant's spouse must be present to administer the injections and draw them in the morning, evening and at bedtime. [REDACTED] writes that the applicant's spouse's assistance is crucial to her father's health and without her he would be unable to get the correct amount of insulin and his diabetes would become uncontrolled worsening his health.

[REDACTED] states that the applicant's spouse's father has an extensive history including atherosclerotic coronary artery disease, dilated cardiomyopathy, paroxysmal arterial fibrillation, heart failure, hypertension, hyperlipidemia, diabetes mellitus, venous insufficiency, and obstructive sleep apnea. [REDACTED] writes that it is very important that the applicant's spouse's father take his medications accurately and be seen for regular follow-up, and notes that since the applicant's spouse has been caring for him he has been stable from a cardiac standpoint. The applicant's spouse explains that while she has three siblings, she is the only one who can care for her father. She explains that her sister has three young children of her own, one brother has a job and two children of his own, and another brother is dealing with ongoing health problems resulting from a 2008 automobile accident. Corroborating evidence has been submitted for the record. The applicant's spouse states that she is closest to their father of the three, both emotionally and in terms of residence, and she has the deepest understanding of his illnesses and necessary healthcare regimen.

Counsel asserts that the applicant's parents would be unable to obtain medical care in Albania comparable to what they currently receive and to which they have access in the United States. Corroborating country-conditions evidence has been submitted for the record, also demonstrating safety and human rights concerns in Albania.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse and parents including the applicant's spouse's adjustment to a country and culture so different from her own where she has never lived and does not speak the language; her close familial ties to the United States – particularly to her seriously ill father for whom she is the primary caregiver and her mother who resides with her and is financially dependent on her; her significant, psychiatric/emotional conditions that will likely be exacerbated as a result of

separation from close family members in the United States; her employment and economic concerns and the likelihood she would lose the home she owns in the United States; and the unlikelihood her parents would be able to visit her in Albania; the inability of the applicant's parents to relocate to Albania where they have not resided for numerous years and where they are prevented from even visiting the applicant as a result of significant medical conditions and economic issues including the probability they will lose the restaurant they own in the United States leaving approximately twenty-five employees without jobs; and stated health-related and safety concerns for Albania. 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-Moralez at 300.

In *Matter of Mendez-Moralez*, 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, and significant hardship to his mother and father as a result of the applicant's inadmissibility; the applicant's significant family and community ties to the United States; his ownership of a business in the United States that employs a significant number of individuals and his payment of taxes; numerous attestations by others to his good moral character and essential presence in the community; and his apparent lack of a criminal record. The unfavorable factors are the applicant's immigration violations including that he overstayed the period authorized by his visa, his periods of unlawful presence and unauthorized employment in the United States, his failure to comply with a removal order and his subsequent removal from the United States. Although the applicant's violations of immigration law are 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 proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

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