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

U.S. Citizenship and Immigration Services

H6

[redacted]

Date: OCT 24 2012 Office: VIENNA, AUSTRIA FILE: [redacted]

IN RE: *Applicant:* [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application will be approved.

The applicant is a native and citizen of Montenegro 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. He was also found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission to the United States through fraud or misrepresentation. In addition, he was found to be inadmissible to the United States pursuant to sections 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), because he was removed. The applicant is married to a U.S. citizen, and he seeks a waiver of inadmissibility in order to reside in the United States with his spouse.

The Field Office Director found that the applicant failed to establish that his qualifying relative would experience extreme hardship as a consequence of his inadmissibility. The application was denied accordingly. *See Decision of the Field Office Director,* dated November 30, 2010.

On appeal, the applicant's attorney asserts that the Field Office Director failed to consider the relevant factors cumulatively in assessing hardship.[1] *See Form I-290B, Notice of Appeal or Motion (Form I-290B),* dated December 23, 2010.

The record contains Applications for Waiver of Grounds of Inadmissibility (Form I-601); Applications for Permission to Reapply for Admission after Deportation or Removal (Form I-212); Forms I-290B; briefs written on behalf of the applicant; relationship and identification documents; letters and declarations from the qualifying spouse, applicant, family, friends, employers and a U.S. senator; photographs; three psychological evaluations and other medical documentation regarding the qualifying spouse and her mother; documents regarding the qualifying spouse's education; financial documentation; country-conditions materials; an Application for Immigrant Visa and Alien Registration (DS-230) and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, 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

[1] The applicant also appealed the denial of his Form I-212 application. That appeal was decided in a separate decision.

> admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
>
> . . . .
>
> (v) The Attorney General [now 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 . . . 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.

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

> (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 provides, in pertinent part:

> (1) The [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.

A waiver of inadmissibility under sections 212(i) and 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 his child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife is the only qualifying relative in this case. 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 indicates that the applicant arrived at Newark International Airport in New Jersey with a counterfeit Slovenian passport on March 9, 2000. Upon his arrival, the applicant was placed into asylum-only proceedings to pursue an asylum claim. His asylum application was denied on August 16, 2000. The immigration judge's decision was affirmed by the Board of Immigration Appeals, and his motion to reopen was dismissed in February 2004. The applicant returned to Montenegro on December 6, 2005. The applicant accrued over one year of unlawful presence in the United States from February 2004 until his departure in December 2005. In applying for an immigrant visa, the applicant is seeking admission within ten years of his departure from the United States. Therefore, as a result of the applicant's unlawful presence and prior misrepresentation, he is inadmissible to the United States under sections 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Act. The applicant has not disputed his inadmissibility.

The AAO finds that the applicant has established that his qualifying relative is suffering extreme hardship as a consequence of his separation from her. The applicant's spouse states that her situation has become unbearable for her and has caused her mental and emotional anxiety and depression. To support these assertions, the record contains letters from the qualifying spouse, family members and friends, as well as psychological documentation from doctors in the United States and Montenegro. According to the most recent psychological evaluation administered in the United States, the qualifying spouse is suffering from severe clinical depression, anxiety, agitation, suicidal ideation, insomnia, "impaired thought processes and diminished capacity to function on a daily basis." The qualifying spouse is currently treating these issues with a daily anti-depressant medication. Letters from family and friends also confirm that she is suffering from depression, which has affected her job performance and her ability to function. According to her psychological evaluation, the qualifying spouse lost her four-year employment as a senior project coordinator because she was no longer able to perform at her previous level after her separation from the applicant. With regard to the applicant's spouse's financial hardships, letters from the qualifying spouse and friends, as well as financial documentation, indicate that the qualifying spouse is struggling financially, has credit-card debt and relies upon her parent's financial support. As such, the psychological and financial hardships that the qualifying spouse is experiencing in the aggregate constitute extreme hardship.

The applicant has also demonstrated that his qualifying spouse would suffer extreme hardship in the event that she relocated to Montenegro. The qualifying spouse was born and has lived in the United States her entire life, and her entire immediate family lives in the United States, including her parents and brother. The letters provided by the qualifying spouse's family and friends describe her very close relationships with her family and friends in the United States. The qualifying spouse also indicates that the applicant is unemployed in Montenegro and has been unable to find employment. In addition, the record reflects that the qualifying spouse has attempted to relocate to Montenegro and find employment there, also without any success. The record also reflects that the qualifying spouse graduated from college and earned her master's degree in the United States and that she would be unable to utilize her education due to her language barriers in Montenegro. A letter from a potential employer in

Montenegro indicates that the applicant's spouse was terminated from a training program because of her inability to speak, read or write Montenegrin. As a result of the applicant and qualifying spouse being unemployed, they are dependent financially on the qualifying spouse's parents. In addition, the applicant' spouse stated that she had a difficult time adjusting to life in Montenegro without her family and due to the conditions in the village where she was living. The record contains country-conditions information to support assertions that the applicant's spouse would suffer financially in Montenegro due to a lack of employment opportunities. The record also contains letters regarding the qualifying spouse's medical treatment in Montenegro, indicating that she experienced emotional instability, fear, insomnia, and distress, among other issues, and was treated with medications. Moreover, the record contains documentation indicating that most of the applicant's family, except for his father, lives in the United States and therefore there is little family support for the applicant and his qualifying spouse in Montenegro. As such, the record reflects that the cumulative effect of the hardships to the qualifying spouse, in light of her family ties to the United States, country conditions, financial and psychological hardships, and her length of stay in the United States, rises to the level of extreme. The AAO thus concludes that the applicant's qualifying spouse would suffer extreme hardship if she relocated to Montenegro to be with him.

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.

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 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 hardships 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 lack of a criminal record; and his good character, according to letters of support from family and friends. The unfavorable factors in this matter are the applicant's attempt to use a fraudulent document to gain admission to the United States and his unlawful presence in the United States.

Although the applicant's violations of the immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. 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.