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

(b)(6)

Date: JAN 02 2013 Office: VIENNA FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Ground of Inadmissibility (Form I-601) and the Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212) were concurrently denied by the Field Office Director, Vienna, Austria, and are now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The applications will be approved.

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 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 under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien previously removed. The applicant does not contest these findings of inadmissibility. Rather, he 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 and child. In addition, the applicant seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

The field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Inadmissibility (Form I-601) accordingly. The field office director further noted that approving the Form I-212 would serve no purpose as the Form I-601 was being denied. As such, the I-212 was denied as a matter of discretion concurrently with the Form I-601. *Decision of the Field Office Director,* dated July 29, 2011.

On appeal, counsel for the applicant submits the following: a brief; medical, behavioral and academic documentation pertaining to the applicant's child; a psychological evaluation regarding the applicant's spouse; financial documentation; and evidence of the applicant's spouse's past membership with the American Culinary Federation. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (A) Certain alien previously removed.-
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> (i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
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> (ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

(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 [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…

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. The applicant's U.S. citizen spouse is

the only qualifying relative in this case. Hardship to the applicant, the applicant's child, born in 2004 and/or the applicant's adult children 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-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-Salcidov. INS*, 138 F.3d 1292, 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 applicant's U.S. citizen spouse asserts that she will suffer extreme hardship were she to remain in the United States while the applicant continues to reside abroad due to his inadmissibility. In a declaration the applicant's spouse explains that she loves her husband very much and long-term separation from him is causing her hardship. She explains that he is very depressed in Albania and speaks often of suicide and she is deeply concerned about him. In addition, the applicant's spouse details that her son is a developmentally disabled child suffering from significant emotional, mental and physical problems, and she also supports her two adult children from a previous marriage and as a result, she needs her husband to return to the United States so that he may contribute to their care and support. Finally, the applicant's spouse details that her husband is unemployed in Albania and she assists with his finances and as a result, she is experiencing financial hardship. Due to her financial situation, she contends that she cannot afford to travel to Albania often and in fact, has only been there one time since he departed the United States in 2006. *Supplemental Affidavit of*

In support, a psychological evaluation has been provided to establish that the applicant's spouse is suffering from and dealing with clinical symptoms of depression and anxiety that are directly related to her husband's current immigration case and his prolonged absence. *See Affidavit of Ph.D.* In addition extensive documentation has been provided concerning the applicant's child's medical and mental health issues. A letter from , Pediatric Gastroenterologist, states that the applicant's child is suffering from fecal incontinence most likely due to functionality and related to behavior issues. *See Letter from Pediatric Gastroenterologist,* dated November 11, 2011. Documentation also establishes that the applicant's child suffers from acid reflux disease and gastritis and was most recently treated in July 2011 at Henry Ford Macomb Hospitals. A letter has also been provided confirming that the applicant's child is being seen in therapy as a result of suffering from Adjustment Disorder with anxiety as well as Attention Deficit Hyper Activity Disorder (ADHD). As noted, the applicant's child is exhibiting attachment problems because of the direct loss/removal of his father. *Letter from New Oakland Child-Adolescent and Family Center,* dated September 1, 2011. Evidence of medications prescribed to the applicant's child to treat his conditions has also been submitted. Moreover, a copy of the Individualized Education Program (IEP) and numerous reports with respect to the applicant's child have been provided to establish his academic and social needs in relation to his ADHD diagnosis

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In regards to the financial hardship referenced, counsel has submitted copies of numerous money transfers made by the applicant's spouse to her husband in Albania to establish that she is supporting her husband abroad. In addition, evidence of the applicant's spouse's extensive debt obligations has been submitted. Finally, documentation in the record establishing the applicant's employment as a cook prior to his departure from the United States has been provided. *See Letter from*

The record reflects that the cumulative effect of the emotional and financial hardship the applicant's spouse would experience due to the applicant's inadmissibly rises to the level of extreme. The AAO thus concludes that were the applicant unable to reside in the United States due to his inadmissibility, the applicant's spouse would suffer extreme hardship if she remains in the United States.

With respect to relocating abroad, the applicant's spouse explains that she would experience emotional and financial hardship. To begin, the applicant's spouse details that she was born in Italy and has been residing in the United States since 1963. In addition, she notes that her three children reside in the United States and she is very close to them and long-term separation from them would cause her hardship. She maintains that she has no family ties in Albania and has only traveled there once to visit her husband. She contends that she is unfamiliar with the country, culture, customs and language and will be unable to obtain gainful employment. Finally, she expresses concern about making ends meet in Albania and being able to properly care for her son as result of the problematic economic and health care conditions in Albania. *Supra* at 1-2.

The record establishes that the applicant's spouse was born in Italy, has been residing in the United States for over 49 years, since she was a toddler, and has no ties to Albania. Moreover, the record indicates that the applicant's spouse has been gainfully employed, earning over $32,000 in 2001. Tax documents further establish that both her son with the applicant and her adult daughter from her previous marriage are listed as her dependents. *See Form 1040 for 2011.* Were she to relocate abroad, the applicant's spouse would have to leave her children, her siblings, her gainful employment, her community and the professionals familiar with her son's medical and mental history and treatment plan. She would also be concerned about the substandard economy and its impact on her quality of living.[1] It has thus been established that the applicant's spouse would suffer extreme hardship were she to relocate abroad to reside with the applicant due to his inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of

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[1] The U.S. Department of State confirms that Albania's per capita income is among the lowest in Europe and medical care is below Western standards. *Country Specific Information-Albania, U.S. Department of State*, dated August 27, 2012.

the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The favorable factors in this matter are the extreme hardship the applicant's U.S. citizen spouse would face if the applicant were to remain in Albania, regardless of whether she accompanied the applicant or stayed in the United States; the applicant's gainful employment in the United States and community ties. The unfavorable factors in this matter are the applicant's periods of unlawful presence and unauthorized employment while in the United States, his placement in removal proceedings and his two convictions in 2006 for Operating Under the Influence of Liquor.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

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As referenced above, the field office director denied the applicant's Form I-212 concurrently with the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility, it will withdraw the field office director's decision on the Form I-212 and render a new decision.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be granted as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility and permission to reapply for admission, 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 applications approved.

ORDER: The appeal is sustained. The applications are approved.