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

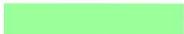


U.S. Citizenship
and Immigration
Services



DATE: **JAN 03 2013**

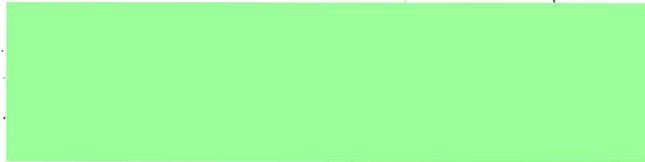
Office: VIENNA, AUSTRIA

FILE: 

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by 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 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 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 and child.

In a decision, dated August 2, 2011, the field office director found that the applicant had shown that his inadmissibility would have an adverse effect on his family, but that this adverse effect was no greater than would be expected upon the prolonged absence of a loved one due to inadmissibility and denied the application accordingly.

On appeal, counsel states that the applicant has established that his spouse would suffer extreme hardship as a result of his inadmissibility. Counsel also submits additional documentation regarding country conditions in Albania.

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 (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), 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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions.-

(II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 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.

(iv) Tolling for good cause.-In the case of an alien who-

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application, the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(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.

The record indicates that the applicant entered the United States without inspection in 2001. On December 5, 2001 the applicant applied for asylum. His asylum case was referred to an immigration judge and after failing to attend his removal hearing, the applicant was ordered removed in absentia on March 14, 2002. The applicant filed a Motion to Reopen this removal order, which was granted on March 28, 2002. On April 9, 2003, the immigration judge denied the applicant's asylum application and he was again ordered removed. The applicant appealed his removal to the Board of Immigration Appeals (BIA), who affirmed the immigration judge's decision on July 23, 2004. The applicant then petitioned the Second Circuit Court Appeals to review the decision in his asylum case. The Second Circuit denied his petition for review on May 19, 2006. The applicant was removed from the United States on April 7, 2007. The AAO notes that the record indicates that the applicant has a period of unauthorized employment in April 2002. The record shows that the applicant was employed as a cook from April 1, 2002 to October 2004, but was not eligible to apply for employment authorization until May 4, 2002. The applicant is

therefore inadmissible under section 212(a)(9)(B)(i) of the Act for having been unlawfully present in the United States. The applicant's qualifying relative is his U.S. citizen spouse.

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-I-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 v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998)(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 contains references to hardship the applicant's child would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(a)(9)(B)(v) of the Act, and hardship to the applicant's child will not be separately considered, except as it may affect the applicant's spouse.

The record of hardship includes: a letter from counsel, country conditions documentation, medical documentation, financial documentation, photographs of the applicant's life in Albania, a statement from the applicant's spouse, and statements from the applicant's spouse's family members.

The AAO finds that the applicant's spouse is suffering extreme emotional and financial hardship as a result of being separated from the applicant. The record indicates that the applicant's spouse is currently raising her four year old daughter in her parents' house where she and her daughter live in the basement. The record indicates that the applicant's spouse is participating in Michigan welfare programs, including Medicaid and the Women, Infants, and Children program (WIC), works in retail, and earns approximately \$300 every two weeks. The record indicates that in 2010 the state of Michigan seized the applicant's spouse's tax return to pay toward the student loans she had been unable to pay. The applicant's spouse states that she has been offered better paying positions at her work, but cannot accept because of the working hours and her inability to find child care for her daughter during that time. The record also indicates that before the applicant's arrest and removal the applicant and his spouse were renting an apartment of their own and the applicant's income was helping to support them.

The record also establishes that the applicant is suffering extreme emotional hardship as a result of separation. Numerous medical documents in the record refer to the applicant's spouse suffering depression; the applicant's spouse saw a licensed counselor in 2007, 2008, and 2010 for her anxiety and depression; the applicant's spouse's gynecologist has diagnosed her with post-partum depression; and the record includes documentation of the applicant's spouse being prescribed a psychotropic medication. The applicant, her mother, and her sister describe the applicant's spouse as being a very happy person before her husband was removed and that now she is depressed, has no energy, experiences anxiety, and cannot control her anger. Thus, taking into consideration the drastic change in both the applicant's spouse's financial and emotional states as a result of the

applicant's removal, we find that the applicant has shown that his U.S. citizen spouse will suffer extreme hardship as a result of separation.

We also find that relocation to Albania would be extreme emotional, financial, and physical hardship to the applicant's spouse. The record establishes that the applicant's spouse was born in the United States, cannot speak Albanian, and, except for the applicant, has no ties to Albanian culture. The record shows that the applicant has significant family ties to the Michigan area, where her family resides, with her mother, father, siblings, nieces, and nephews all living in close proximity. The applicant's spouse states she would suffer emotionally if she were to separate from them and move to Albania with her daughter. The record also indicates that as a sales clerk the applicant's spouse has very little skills to find employment in Albania, especially because she does not speak the language. Medical documentation in the record establishes that the applicant's spouse and daughter suffer from eczema and psoriasis, which the applicant's spouse describes as very painful. The applicant's spouse also suffers from a blood condition that can be dangerous during a pregnancy. The applicant's spouse states that she is very concerned about the medical care that would be available to her in Albania. Country conditions documentation in the record indicates that Albania is one of the poorest countries in Europe, that per capita income is approximately \$4,200 per year, and that the unemployment rate is 13.52%, with almost 60% of the workforce employed in agriculture. The documentation also indicates that medical care is below western standards and medical facilities outside the capital have very little capabilities. Thus, we find that taking together the applicant's spouse's family ties to the United States, her lack of any ties to Albania, the unlikelihood that she will find employment in Albania, the limited medical care in Albania, and the fact that the applicant's spouse would be relocating with a young child, the applicant has shown that his spouse would suffer extreme hardship as a result of relocation.

Considered in the aggregate, the applicant has established that his U.S. citizen spouse would face extreme hardship if the applicant's waiver request is denied.

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 favorable factors in the applicant's case include the hardship the applicant's U.S. citizen spouse and child are suffering in his absence; the lack of any criminal record in the United States; and, as attested to by his spouse and his mother-in-law, the applicant's attributes as a loving husband and generous person. The unfavorable factors include the applicant's unlawful entry into the United States, his unlawful residence and unauthorized employment in the United States, and his failure to comply with his final removal order.

Although the applicant's violations of 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 her burden and the appeal will be sustained.

ORDER: The appeal is sustained.