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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: HONG KONG

Date: **MAY 29 2008**

IN RE:



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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Hong Kong. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Taiwan who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by fraud or willful misrepresentation and under 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 ten years of his last departure from the United States. The applicant is married to a naturalized citizen of the United States and seeks a waiver of inadmissibility in order to reside in the United States with his spouse and United States citizen child.

The Officer in Charge found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the Officer in Charge*, dated March 23, 2006.

On appeal, the applicant asserts that he has demonstrated that his qualifying relative would suffer extreme hardship if he were removed from the United States. *Form I-290B; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant's spouse; an employment letter for the applicant's spouse; statements from friends, a statement from the applicant's child; a school report card for the applicant's child; medical prescriptions for the applicant's spouse; childcare services, health insurance, internet, telephone, music class, cable, newspaper subscription, credit card, and utility bills; earnings statements and W-2 Forms for the applicant's spouse; airline tickets and receipts; published country conditions reports and newspaper articles; a police record for the applicant; and employment letters for the applicant. 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-
 - (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 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.

(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.

In the present application, the record indicates that on March 7, 2000 the applicant attempted to gain admission to the United States at the airport in Detroit, Michigan with a B-1/B-2 visa. *Record of Sworn Statement*, dated March 7, 2000. In secondary inspection, the applicant admitted that it was his intent to resume working in the United States under his B-1/B-2 visa as the Accounting and Information Systems Manager for his previous employer, the Minnesota Horse and Hunt Club. *Id.* The applicant was denied entry and withdrew his application for admission. *Id.*; *Consular interview notes*, dated December 28, 2005. After returning to Taiwan in March 2000, the applicant applied for and received a Canadian visa. *Consular Interview Notes*, dated December 28, 2005. The applicant traveled to Canada and entered the United States without inspection on April 6, 2000. *Id.*; *See also Form I-485, Application to Register Permanent Residence or Adjust Status*. He remained in the United States until February 2003 when he returned to Taiwan. *Consular Interview Notes*, dated December 28, 2005. The applicant filed his Form I-485 on March 21, 2001. *Form I-485*.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002*. The applicant accrued unlawful presence from April 6, 2000, the date he entered without inspection, until March 21, 2001, the date he filed the Form I-485. The AAO notes that the Officer in Charge erred in finding that the applicant was inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year. *Decision of the Officer in Charge*, dated March 23, 2006. Though the record reflects that the applicant was in the United States from 1988 to 1999, during that period he was either in F-1 or H-1B status and did not accrue unlawful presence. The applicant was unlawfully present in the United States for a period of more than 180 days but less than one year. The applicant is therefore inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I). Pursuant to section 212(a)(9)(B)(i)(I), the applicant is barred from again seeking admission within three years of the date of his February 2003 departure. It has been more than three years since the departure that raised the inadmissibility issue. Based on the current facts, he does not require a waiver of inadmissibility based on his prior unlawful presence.

Prior to addressing whether the applicant qualifies for the Form I-601 waiver, the AAO will address the issue of his inadmissibility under section 212(a)(6)(C)(i) of the Act.

On March 7, 2000, the applicant attempted to use a B-1/B-2 nonimmigrant visa to enter the United States when it was his intention to return to employment with the Minnesota Horse and Hunt Club. Counsel asserts that during secondary inspection, the applicant made a timely retraction of his misrepresentation. *Counsel's brief*. The AAO notes that a timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for section 212(a)(6)(C)(i) ineligibility. *9 FAM 40.63 N4.6*. Whether a retraction is timely depends on the circumstances of the particular case. *Id.* In general, it should be made at the first opportunity. *Id.* If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview. *Id.* In the present case, the applicant's retraction was made during his secondary inspection, not during his primary inspection, his first opportunity to correct his misrepresentation. Therefore, the AAO finds that the applicant's retraction was not timely and that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

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

- (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 that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [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 Attorney General [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 section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant himself or his children would experience upon removal is not directly relevant to the determination as to whether the applicant is eligible for a waiver under section 212(i). The only relevant hardship in the present case is hardship suffered by the applicant's spouse if the applicant is removed. If extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that she resides in Taiwan or the United States, as she is not required to reside outside the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

If the applicant's spouse joins the applicant in Taiwan, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse has been in the United States for over sixteen years. *Statement from the applicant's spouse*, dated May 26, 2005. The applicant's spouse states that she is unable to obtain employment in Taiwan. *Statement from the applicant's spouse*, dated March 8, 2006. While the AAO acknowledges this assertion, it notes that the record does not specify what type of employment the applicant's spouse sought during her month in Taiwan.

Apart from the brief, general references to the Taiwanese economy in the 2003 and 2004 Department of State reports on human rights practices in Taiwan, the evidence of record does not address unemployment issues or the economic situation in Taiwan. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The applicant's spouse states that she experienced culture shock when she tried to relocate to Taiwan. *Statement from the applicant's spouse*, dated March 8, 2006. The applicant's spouse also suffers from glaucoma. *Id.* While the AAO notes that the record contains a prescription for eye drops (*See prescription written by [REDACTED] O.D., Minnesota Eye Consultants, P.A.*, dated October 3, 2005), there is no medical statement to indicate the severity of the applicant's medical condition or the extent to which her condition affects her daily life. The record also fails to establish that the applicant's spouse would be unable to receive adequate treatment in Taiwan. The applicant's spouse asserts that it would be difficult to enroll the applicant's daughter into public school in Taiwan, as she is not a Taiwanese citizen and that private school is unaffordable. *Statement from the applicant's spouse*, dated March 8, 2006. Although United States or lawful permanent resident children are not qualifying relatives for this particular case, the AAO, as previously noted, will consider the effect of a child's hardship upon the qualifying relative. The AAO again notes that the record fails to include any documentation to support the assertions made by the applicant's spouse regarding the difficulties her child would face in obtaining education in Taiwan. Furthermore, the record does not document how these difficulties would impact the applicant's spouse, the only qualifying relative in this case. When looking at the aforementioned factors, the AAO does not find that the applicant has demonstrated extreme hardship to his spouse if she were to reside in Taiwan.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse states that neither she nor the applicant has any immediate family members living in the United States. *Statement from the applicant's spouse*, dated March 8, 2006. The applicant's spouse notes that she is already on "shaky ground" in regard to her finances. *Id.*, dated March 8, 2006. The applicant's spouse lists her monthly expenses and notes that her expenses exceed her monthly

take-home pay. *Id.*; *Numerous bills; Earnings statements and W-2 Forms for the applicant's spouse.* Included in her expenses are bills for child care services, as the applicant's spouse is functioning as a single parent without the applicant. *Falcon Heights Invoice for Child Care Services*, dated January 13, 2006. The applicant's spouse states that one of the biggest problems she has to face on a regular basis as a single parent is child care. *Statement from the applicant's spouse*, dated May 26, 2005. In her current temporary nursing position, many times she is asked and required to work into the evening. *Id.* Her daughter's day care facility closes at 6:00pm and the applicant's spouse is often expected to work until 6:00pm or 6:30pm. *Id.* Under these circumstances, she is unable to pick up her daughter when the day care facility closes and often has to beg neighbors to take care of her, as she has no relatives living in Minnesota and her friends and co-workers work the same shifts. *Id.* When she is unable to find someone to care for her daughter, the applicant's spouse has no other choice but to leave work early. *Id.* As she is a temporary-hire nurse, leaving early is not tolerated. *Id.* If the applicant's spouse leaves work early too many times, she is in jeopardy of losing her job. *Id.* According to [REDACTED] of the University of Minnesota Boynton Health Services, the applicant's spouse must work as an on call nurse in her health clinic and does not have the financial rewards of a permanent position. *Statement from [REDACTED]*, dated February 3, 2006. In addition to her monthly expenses, the applicant's spouse pays for roundtrip airline tickets for herself and her daughter to travel to Taiwan to visit the applicant. *See airline ticket receipts and itineraries.* While the applicant has informed his spouse that his job is tenuous and he may not be able to send her money to maintain a separate household in the future, the AAO notes that, as of the date of the appeal, the applicant has sent his spouse money each month to contribute to his family's financial well-being. *Statement from the applicant's spouse*, dated May 26, 2005. As the applicant does send his spouse money each month, the AAO notes that the extent of the financial hardship that the applicant's spouse endures is unclear. The applicant's spouse states that she has been separated from the applicant for over three years and it is the worst thing that has happened to her. *Statement from the applicant's spouse*, dated March 8, 2006. She notes that **if this separation were to be permanent, her life and the life of her daughter would be shattered and ruined.** *Id.* While the AAO acknowledges these statements, it notes that the record does not include documentation from a licensed health care professional regarding the impact that long-term separation from her husband has had or would have on the applicant's spouse. As previously noted, going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, the record does not distinguish her situation, if she remains in the United States, from that of other individuals separated as a result of deportation or exclusion. Accordingly, it does not establish that the hardship experienced by the applicant's spouse would rise to the level of extreme hardship. When looking at the aforementioned factors,

the AAO does not find that the applicant has demonstrated extreme hardship to his spouse if she were to reside in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's qualifying relative caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(i) and 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.