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

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DEC 21 2004

FILE: [redacted] Office: LOS ANGELES DISTRICT OFFICE Date:

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a 40-year-old native and citizen of Ghana who was found inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(6)(C)(i). The record reflects that the applicant is the spouse of a U.S. citizen. He seeks a waiver of inadmissibility in order to remain in the United States with his wife and adjust his status to that of a lawful permanent resident under INA § 245, 8 U.S.C. § 1255, as the beneficiary of an approved immediate relative petition filed on his behalf by his U.S. citizen wife.

The district director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse and denied the application accordingly. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C)(i) of the Act provides:

> In general.—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.

8 U.S.C. § 1182(a)(6)(C)(i). The district director based the finding of inadmissibility under this section on the following facts, summarized as set forth below:

> [The applicant] entered the United States at the New York International Airport on April 14, 1992 by obtaining and using a photo-substitute Ghanaian passport and an altered United States visa under the nam[redacted] [sic]. This shows willful misrepresentation of a material fact to a United States Immigration Officer. [The applicant was] then referred for a secondary inspection for a more in-depth interview. During the secondary inspection [the applicant] requested political asylum, stating [he] feared harm upon [his] return. [The applicant was] subsequently referred to an Immigration Judge on April 14, 1992 and failed to appear.

Decision of the District Director (September 17, 2003) at 2. On appeal, counsel contends that the district director failed to adequately address the arguments presented below asserting that the applicant did not make a material misrepresentation to any immigration official and was therefore not inadmissible. The AAO notes that, although counsel indicated that a more detailed brief would be submitted within 30 days of filing the appeal, as of this date, the record does not contain the brief. Therefore, the record is considered complete, and the AAO shall render a decision based upon the evidence before it at the present time.

Counsel asserts that the applicant obtained a passport with a visa already attached, and he therefore never appeared before a U.S. Embassy or other official nor did he make a material misrepresentation to such an officer to obtain the fraudulent document. Second, counsel claims that the applicant did not misrepresent his identity upon arrival in the United States but rather, immediately came forward and requested asylum using his true identity.

Records of the former Immigration and Naturalization Service (INS) in the file indicate that the applicant "presented a Ghanaian passport in the name of to an Immigration Inspector for admission. *Memo to File by Immigration Inspector* (Form (April 14, 1992). The applicant was charged with fraud and placed into exclusion proceedings contemporaneously with the applicant's acts. *See Notice to Applicant for Admission Deferred for Hearing Before Immigration Judge* (Form I-122) (April 14, 1992).

The burden of proving admissibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. While counsel contends that the applicant never presented fraudulent documents to U.S. officials for entry into the United States, the record contains sufficient evidence that the applicant did in fact make a material misrepresentation by presenting the fraudulent passport to U.S. officials in order to procure admission to the United States. It was after this material misrepresentation that he was sent for further inspection, where he admitted his true identity and requested the opportunity to apply for asylum. This case is therefore distinguished from cases in which aliens used fraudulent documents only *en route* and did not present them to U.S. officials for admission, but, rather, immediately requested asylum. *See, e.g., Matter of D-L- & A-M-,* 20 I&N Dec. 409 (BIA 1991); *cf. Matter of Shirdel,* 18 I&N 33 (BIA 1984). In the applicant's case, it appears he only revealed his true identity after having unsuccessfully attempted to procure admission by fraud.

Counsel cites *Matter of R-R-*, 3 I&N 823 (BIA 1949), as support for the contention that, where an individual timely and voluntarily recants his false statements, he has not engaged in false testimony. The BIA in that case was making a determination of whether the alien in question had committed an unlawful act of perjury, where an essential element of such offense was that "the offense must be otherwise complete," for purposes of INA § 101(f)(6), 8 U.S.C. § 1101(f)(6), which provides that an individual who has given false testimony cannot be found to be a person of good moral character. The BIA found that the perjury was not complete in *Matter of R-R-* because the alien timely and voluntarily retracted his false statements before the immigration official became aware through other means of the falsity of his statement. As it appears that the applicant in this case was taken into secondary inspection and confronted with the fraudulent nature of his passport, he cannot be said to have been acting "voluntarily and timely" prior to the official's awareness of the fraudulent nature of his passport. For the same reasons, this case is distinguished from *Matter of M-,* 9 I&N Dec. 118 (BIA 1960), also cited by counsel, in that the applicant in that case voluntarily retracted his own statement before it was complete and before the official became aware of the fraudulent nature of his statements. The district director's determination of inadmissibility is therefore affirmed. The question remains whether he qualifies for a waiver.

Section 212(i) provides, in pertinent part:

> (i) (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 permanent resident spouse or parent of such an alien . . ."

8 U.S.C. § 1182(i)(1). A section 212(i) waiver is therefore dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the alien himself is not a permissible consideration under the statute.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted). In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the BIA)) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case. Once 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).

The record reflects that the applicant's spouse [redacted]s a 41-year-old naturalized citizen, born in Ghana. She became a U.S. citizen in 1996. Her mother is deceased. Her father (claimed to be a U.S. citizen, although no supporting evidence is contained in the record) lives in New York. Her brother lives in the United States, although there is no indication of his immigration status on the record. Her paternal grandparents are quite elderly and live in Ghana. They rely on the financial support of their family members abroad. She and the applicant married in 1996. There are no children of the marriage, although Ms. [redacted] claims to have another child from a prior relationship. She asserts that the applicant has been particularly supportive of her and her son during difficult times, and emphasizes the emotional loss she would face if she and her son were separated from the applicant. *See Extreme Hardship Waiver Documentation Report by Mary Elizabeth Hargrow, Ph.D.* (August 15, 2003) The applicant's mother and father apparently continue to reside in Ghana.

The most recent financial documents on the record were submitted in connection with the *Affidavit of Support* (Form I-864). They show that, in 1997, supplied about 36% of the household income of approximately $56,000. She works as a nursing assistant; the applicant is a high school mathematics and information technology teacher. She and the applicant purchased a home in Los Angeles in 2002. Ms. expresses concern that she may lose the house and moving out of the area will require her to change her son's school. She is also jointly responsible for a debt of over $30,000 the couple assumed to pay for the applicant's graduate school educational expenses. There is no record of the couple's finances, including evidence of the cost of the mortgage or student loan debt, for the past seven years. The AAO cannot accurately make a hardship finding in the absence of such evidence.

She claims that she has suffered two miscarriages during her marriage to the applicant, and is undergoing medical examinations to determine the cause. There is no medical documentation on file to support her claims. She is experiencing depression and related symptoms including loss of appetite, frequent crying, fatigue, inability to concentrate, insomnia, feelings of worthlessness and inappropriate guilt, daily headaches, dizziness, intense feelings of shame and embarrassment, anger, and irritability. *See Extreme Hardship Waiver Documentation Report by Mary Elizabeth Hargrow, Ph.D.* (August 15, 2003), at 4. Although it is predicted that her depression will worsen if her husband is refused admission and despite these extensive symptoms, there is no evidence on record of any treatment plan. The AAO therefore does not find that suffers from a significant medical condition relevant to the hardship determination.

The record silent as to country conditions and their impact, if any, on ability to relocate to Ghana to avoid separation from the applicant. It appears that the applicant's spouse faces, as all spouses facing deportation or refusal of admission of a spouse, the decision of whether to remain in the United States or relocate to avoid separation. The BIA has held, "[t]he mere election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed." *See Matter of Mansour,* 11 I&N Dec. 306, 307 (BIA 1965).

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant spouse faces extreme hardship if the applicant is refused admission. Rather, the record demonstrates that she will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States. Congress provided for a waiver of inadmissibility, but under limited circumstances. In limiting the availability of the waiver to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai,* 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish

extreme hardship. *See INS v. Jong Ha Wang,* 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

While the Ninth Circuit places particular emphasis on consideration of the impact of separation of the family, the waiver is nevertheless not to be granted in every case where possible separation is at issue. *See Ramirez-Durazo v. INS,* 794 F.2d 491, 499 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient."); *Shooshtary v. INS,* 39 F.3d 1049 (9th Cir. 1994) (stating, "the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances.") In this case, the record does not contain sufficient evidence to show that the hardship faced by the qualifying relative rises beyond the common results of deportation to the level of extreme.

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under INA § 212(i), 8 U.S.C. § 1186(i).

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.