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: MAR 2 7 2013 Office: ACCRA, GHANA FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to Section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v), and Section 212(i) of the Act, 8 U.S.C. § 1182(i), and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the 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 waiver application was denied by the Field Office Director, Accra, Ghana, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of The Gambia who was found to be inadmissible to the United States 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 10 years of his last departure from the United States; section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or misrepresentation; and section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for seeking admission after having been ordered removed. The applicant seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i), and permission to reapply for admission pursuant to section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii). His qualifying relative is his U.S. citizen spouse.

The Field Office Director concluded that the applicant had failed to demonstrate extreme hardship to his qualifying spouse and denied the application accordingly. *See Decision of Field Office Director*, dated December 14, 2011.

On appeal, counsel for the applicant asserts that the qualifying spouse has suffered extreme hardship since the applicant's departure for The Gambia in 2011 and that she will continue to suffer extreme hardship if the waiver application is denied. Counsel notes that the qualifying spouse suffers from depression, anxiety, and panic attacks. Additionally, counsel states that the qualifying spouse has struggled to meet her financial obligations since the applicant's departure and that she will suffer extreme financial hardship if the waiver application is denied. *See Counsel's Brief.*

Counsel also asserts that the applicant's step-son is a qualifying relative who would suffer extreme hardship if the waiver application were denied. *Id.* However, children are not qualifying relatives for purposes of a waiver under sections 212(a)(9)(B)(v) and 212(i) of the Act. Therefore, hardship to the applicant's step-son will be considered only to the extent that it causes hardship to the qualifying spouse.

The record contains, but is not limited to: statements from the applicant, the qualifying spouse, the applicant's step-children, and the qualifying spouse's sister; psychological evaluations and medical records regarding the qualifying spouse; copies of bills, mortgage statements, and other financial records; letters from the employers of the applicant and the qualifying spouse; letters of support from friends and family; and country conditions information. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9) 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-
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> . . . .
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> (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.
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> (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.

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:

> (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.

In the present case, the record reflects that the applicant claims to have entered the United States on December 29, 2003 by presenting a passport and U.S. visa that belonged to another person. On August 30, 2004, the applicant filed an application for asylum. In proceedings relating to that application, he testified under oath that he had misrepresented his identity at the port of entry. On April 8, 2008, an immigration judge denied the applicant's request for asylum and ordered him removed to The Gambia. On October 23, 2008, the applicant married the qualifying spouse. On March 6, 2009, the Board of Immigration Appeals denied the applicant's appeal of

his asylum application. On March 23, 2009, he filed a Form I-485, Application to Register Permanent Residence or Adjust Status. Based on the applicant's failure to respond to a request for evidence, USCIS denied his Form I-485 on August 10, 2009. On January 24, 2011, the applicant departed the United States while subject to an order of removal.

There is no record of the exact date of the applicant's entry into the United States. Although he claims to have entered using the passport of a friend on December 29, 2003, he acknowledged during his asylum proceedings that he and the friend whose photograph appeared in the passport do not resemble one another. He claims that he was admitted despite the fact that an immigration officer closely examined the passport he had presented. Additionally, there are no records of an entry under the friend's name. Furthermore, the immigration judge and the asylum officer found the applicant's testimony and evidence regarding his entry date to be unreliable. One reason for the denial of the applicant's asylum application was his failure to establish his date of entry and therefore that he had filed his application within one year. Therefore, the AAO cannot establish whether the applicant was unlawfully present in the United States between the time he entered the country, the filing of his asylum application, and his subsequent appeal. *See* section 212(a)(9)(B)(iii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii)(II). However, at a minimum, the applicant was unlawfully present in the United States from August 10, 2009, when his Form I-485 was denied, to February 8, 2011, when he departed for The Gambia. *See* section 212(a)(9)(B)(iv) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iv). Therefore, the applicant accrued one year or more of unlawful presence and is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for a period of 10 years from his departure from the United States. The applicant does not contest this finding of inadmissibility on appeal.

Additionally, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for having procured admission to the United States through fraud or misrepresentation. He has testified under oath that he entered the United States by misrepresenting his identity and presenting a visa that did not belong to him. He also does not contest this finding of inadmissibility on appeal.

The applicant is eligible to apply for a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act as the spouse of a U.S. citizen. In order to qualify for a waiver, however, he must first prove that the refusal of his admission to the United States would result in extreme hardship to his qualifying relative. Hardship to the applicant or to his U.S. citizen step-children or other family members is not directly relevant under the statute and will be considered only insofar as it results in hardship to the applicant's spouse. 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 of Immigration Appeals (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 U.S. 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 v. INS*, 138 F.3d 1292, 1293 (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 qualifying spouse states that separation from the applicant has been extremely difficult for her. She contends that she has a history of depression, anxiety, and panic attacks but that her mental health steadily improved after she began a relationship with the applicant. However, she states that once it became apparent that the applicant would have to depart the United States for The Gambia, her mental health declined and she has since suffered increased panic attacks, anxiety, and depression. She indicates that she has sometimes been so depressed that she could not get out of bed and that she recently lost her job due to poor attendance. She asserts that the applicant provides her with essential emotional support and guidance and that she has felt very depressed and lonely in his absence. She fears that without the support of the applicant, her mental health will decline further and that she will lose her home, her car, and the ability to care for her family.

The qualifying spouse also asserts that she has suffered financially since the applicant departed the United States. She indicates that the applicant earned a higher salary than she did and that without his contributions, her household income in 2011 was $28,257. She notes that her two adult children, her two grandsons, ages six and one year, and her disabled sister live with her and depend on her for financial support. The qualifying spouse further states that since the applicant's departure, she has fallen behind on the mortgage payments for the house she and the applicant purchased together in 2008. She notes that in January 2012, she received letters regarding potential foreclosure. She also contends that she and the applicant have significant credit card debt, outstanding medical bills, and overdue car payments. Additionally, she states that she is the primary caregiver for her sister, who is disabled and who depends on the qualifying spouse.

The qualifying spouse also states that relocation to The Gambia would cause her extreme hardship. She indicates that she has severe asthma which would be aggravated by the climate and air pollution in The Gambia. She also notes that she relies on a nebulizer machine for assistance in breathing during an asthma attack and that the machine requires electricity, which is unavailable or unreliable in many parts of The Gambia. She alleges that she would join the applicant in his village of Kuraw, Kemo, where there is no electricity or running water. The qualifying spouse also fears that she would be unable to obtain the necessary medical treatment for her asthma and mental health conditions in The Gambia. Furthermore, she contends that separation from her children, grandchildren, sister, and other relatives in the United States would be extremely difficult for her and would cause her depression and anxiety to worsen. However, she fears that her children would be unable to relocate to Gambia with her. She explains that her son is gay and that he would be in danger in The Gambia, where the president has publicly threatened homosexuals. Additionally, she notes that her daughter has two young sons, the father of one of whom has written a letter declaring his unwillingness to allow his son to move to The Gambia. She also fears that her children, who are both in college, would be unable to continue their education in The Gambia. Finally, the qualifying spouse notes that she is responsible for caring for her disabled sister, who has limited mobility and requires significant daily assistance as well as financial support. The qualifying spouse indicates that no other family members are available to care for her sister and that she is very close to her sister, so separation from her would be extremely difficult emotionally.

The AAO finds that the qualifying spouse will suffer extreme hardship if she continues to be separated from the applicant. The record contains several psychological assessments which support the qualifying spouse's claim that she suffers from serious mental health issues, including depression, anxiety, and panic attacks, which have negatively affected her daily functioning. The most recent evaluation indicates that the qualifying spouse has a documented "history of mood disturbance" since childhood which "has directly disrupted her career and thereby has damaged her financial stability." *See Psychological Report,* dated January 31, 2012. The evaluation therefore states that "the ability for her to be connected with her spouse is in her best interest and in the best interest of her family." *Id.* Another psychological evaluation notes that the qualifying spouse has a "long history of depression, anxiety and mood swings" with a diagnosis of Major Depressive Disorder and panic disorder. *See Initial Psychiatric Evaluation,* , dated January 27, 2011. A third evaluation reports that the qualifying spouse has had "extreme mood swings with periods of insomnia alternating with periods of depression when she could not get out of bed" and "significant anxiety and maladaptive coping strategies." *See Psychological Evaluation,* dated February 25, 2010. Furthermore, the qualifying spouse's employer notes in a letter that she noticed a decline in the qualifying spouse's work performance related to her stress over the applicant's immigration situation. *See Letter from*

Additionally, the qualifying spouse's sister confirms that she lives with the qualifying spouse and relies on her for significant financial support due to the fact that she is disabled and only receives a small Social Security check per month. She also states that the applicant used to assist in her care and that it has been difficult for the qualifying spouse to care for her alone. *See Letter from* *see also Social Security Benefit Statement.* The qualifying spouse's children also note in their letters that they rely on the qualifying spouse and the applicant for housing as well as financial and emotional support. *See Letter from* , dated August 16, 2011, and *Letter from*

The evidence also supports the qualifying spouse's claim of financial hardship. The record contains notices from January 2012 indicating past due mortgage payments on the house jointly owned by the qualifying spouse and the applicant. The record also contains copies of numerous credit card bills and utility statements indicating large balances, as well as a medical bill for over $800.

The record therefore demonstrates that the qualifying spouse relies on the applicant for emotional and financial support, as well as assistance in caring for her dependent family members. In the aggregate, the qualifying spouse's serious mental health problems, her financial difficulties, and her family obligations would cause extreme hardship for her if she were to continue living separately from the applicant. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996).

The AAO also finds that the qualifying spouse would suffer extreme hardship if she were to relocate to The Gambia. The qualifying spouse was born and raised in the United States and she is unfamiliar with the culture and living conditions in The Gambia. In light of the qualifying

spouse's serious mental health difficulties, adjusting to life in The Gambia would likely be difficult for her. Additionally, the qualifying spouse is responsible for supporting her children, grandchildren, and sister, and she would likely be forced to abandon them if she were to relocate. In addition to the financial, logistical, and even medical difficulties that could result for the qualifying spouse's family members if she were to leave them in the United States without support, separation from those individuals would cause emotional stress for the qualifying spouse, thereby negatively affecting her mental health.

Finally, the qualifying spouse may be unable to obtain necessary medical care in The Gambia. The most recent report on The Gambia by the Department of State indicates that "[m]edical facilities in The Gambia are very limited" and that emergency treatment is unreliable. *U.S. Department of State, Country Specific Information: The Gambia*, dated June 1, 2011. The record reflects that the qualifying spouse requires regular medical care for her mental health as well as her asthma. A letter from a Nurse Practitioner who regularly treats the qualifying spouse confirms that she "uses an at home nebulizer that requires electricity to help control her asthma." *See Letter from* *GNP*, dated July 30, 2010.

In the aggregate, the AAO finds that the qualifying spouse's mental health and medical issues, close connection to and responsibility for her family members, and unfamiliarity with The Gambia would cause extreme hardship for her if she were to relocate. Accordingly, the AAO finds that the applicant has met his burden of demonstrating extreme hardship to a qualifying relative as required by sections 212(a)(9)(B)(v) and 212(i) of the Act.

In that the applicant has established that the bars to his admission would result in extreme hardship to a qualifying relative, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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).

Matter of Mendez, 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).

One favorable factor in this case is the extreme hardship the qualifying spouse would suffer if the applicant's waiver application were denied. Additionally, the record reflects that the applicant has played an important role in the qualifying spouse's family. Both of the applicant's step-children indicate in their letters that they have appreciated his support, and his step-son in particular notes that the applicant has been the only father figure in his life. The record also reflects that the applicant has been a father figure to his step-grandson and that he has assisted his sister-in-law, both of whom live in his home. Furthermore, the applicant is a Certified Nursing Assistant who previously held a steady job in the United States. Letters from two of the applicant's former employers describe the applicant as a hard worker who cared deeply for his patients and who was considered a valuable member of his team. *See Letter from* dated September 24, 2010, and *Letter from* dated August 25, 2010. The unfavorable factors in this case are the applicant's unlawful presence in the United States and his attempt to procure admission through misrepresentation of a material fact.

Although the applicant's violations of immigration law are serious and 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.

The AAO notes that the Field Office Director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision. The Form I-212 was denied solely based on the denial of the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act, it will withdraw the Field Office Director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act provides:

> (A) Certain aliens 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.

(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 alien convicted of an aggravated felony) is inadmissible.

(ii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's 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 alien's reapplying for admission.

On April 8, 2008 the applicant was ordered removed from the United States. As such, he is inadmissible under section 212(a)(9)(A)(ii) of the Act and must request permission to reapply for admission.

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.

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