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

U.S. Citizenship and Immigration Services

H5

[redacted]

FILE: [redacted] Office: PHILADELPHIA, PA Date: DEC 02 2010

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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,

Tang Syed
for
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and a citizen of [redacted] who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i) for attempting to procure admission (adjustment of status) into the United States through willful misrepresentation of a material fact. He is the spouse of a U.S. citizen and has one U.S. citizen daughter. The applicant is seeking a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i) in order to reside in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on July 7, 2008.

On appeal, counsel for the applicant asserts that the applicant's spouse will suffer extreme hardship if the applicant is removed from the United States, and that sufficient documentation has been submitted to establish the applicant is eligible for a waiver. *Form I-290B*, received August 5, 2008.

Section 212(a)(6)(C) Misrepresentation, states in pertinent part:

> (i) 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 chapter is inadmissible.

The record indicates that the applicant presented a fraudulent Form I-94 when seeking to adjust status based on his Form I-485, and thus sought to procure adjustment of status by willfully misrepresenting a material fact. Therefore the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

The record includes, but is not limited to, documents filed in relation to the applicant's Form I-130 and Form I-485; a brief from counsel; statements from the applicant's spouse; a statement form the applicant; a statement from [redacted] copy of an Internet periodical on Postpartum Depression, printed October 15, 2007; a statement from [redacted] dated July 23, 2008; copy of Internet periodical describing the women's psychiatric disorders program at [redacted] statement from an acquaintance of the applicant's spouse; a copy of the [redacted] published December 20, 2006; copies of periodicals on sexual violence against women in [redacted] copy of Internet periodical on violence in [redacted] copy of a birth certificate for the applicant's daughter; medical records and invoices for medical services; statement from [redacted] dated October 9, 2007; and a copy of an Internet product information page on infant baby

formula. The entire record was reviewed and all relevant evidence considered in rendering this decision.

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

> (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 waiver of inadmissibility under section 212(i) 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. Hardship to the applicant or his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. 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).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d 1419,1422 (9th Cir. 1987).

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

On appeal, counsel for the applicant asserts that the applicant's spouse will experience physical, emotional and financial hardship if the applicant is removed. *Brief in support of appeal*, dated September 23, 2008. Counsel explains that the applicant's spouse suffers from severe postpartum depression, that the applicant's daughter has a protein allergy to cow's milk resulting in a need for heightened physical caretaking, that the applicant's spouse's grandmother has severe medical conditions and relies on both the applicant and his spouse during periods of physical rehabilitation,

and that the applicant's spouse's mother has problems with drug addiction and needs her daughter's assistance.

The applicant's spouse has submitted several statements explaining that she has severe postpartum depression and that she frequently cares for her grandmother when she suffers from strokes. Counsel also asserts that the applicant's spouse has significant family ties to the United States which would be severed if she relocated to [redacted] that the applicant's spouse has no family ties in [redacted], that the country conditions in [redacted] – including high unemployment, cost of living, sexual violence against women and lack of adequate medical facilities – would present extreme hardship to the applicant's spouse upon relocation. The record contains medical records establishing that the applicant's spouse has severe postpartum depression, enduring periods of incapacitation due to her illness and twice attempting suicide in 2008. *Statement* [redacted] October 8, 2007; *statement from* [redacted] July 23, 2008. The statement from [redacted] advises that the applicant's spouse not travel abroad due to her condition.

The record also contains a statement from a physician regarding his daughter's health, indicating that she has a severe protein allergy to cow's milk, and advising that she not travel until she has completed a regime of inoculations. *Statement of* [redacted] October 9, 2007. Although children are not considered qualifying relatives in this proceeding, the AAO would note that this condition would compound the physical hardship on the applicant's spouse.

The applicant's spouse further asserts that she would not be able to relocate to [redacted] because of its inadequate health care facilities, un-affordable housing, high unemployment, civil unrest and her family ties in the United States. With regard to hardship upon relocation, the record contains country conditions materials which detail the socio-economic conditions in [redacted]

When considering the lack of ties to [redacted] separation from family in the U.S. who depend on her assistance, and the psychological and physical hardship factors for the applicant's spouse and her daughter, the AAO finds that the applicant's spouse would experience extreme hardship upon relocation to [redacted]

With regard to hardship upon separation, the AAO would note that the severe postpartum depression of the applicant's spouse constitutes a substantial hardship factor. The evidence establishes the nature and severity of the condition, which occasionally results in a physical incapacitation of the applicant's spouse. *Statement of the applicant's spouse*, October 15, 2007; cf. *Statement* [redacted], October 8, 2007; *statement from* [redacted], July 23, 2008. This leads to a physical dependency – not only in caring for the applicant's spouse but in caring for their daughter as well – that also constitutes a hardship factor on the applicant's spouse. The applicant's spouse explains that that she depends on the applicant physically to care for their daughter during periods when she is incapacitated, that she has depended on the applicant emotionally during previous bouts of depression and attempts at suicide. As mentioned above, hardship to an applicant's children are not directly relevant to a determination of extreme hardship in these proceedings, but in light of the applicant's spouse's mental condition this need for a heightened standard of care for the applicant's

daughter would have an impact on the applicant's spouse if the applicant were not present to assist her emotionally and physically.

The applicant's spouse asserts in her July 16, 2008, statement that the applicant is the primary income earner for their family and that her mother and grandmother need physical assistance due to medical issues. While the record does not contain sufficient evidence to establish these assertions, there is sufficient documentation to establish that the applicant's spouse has incurred significant medical bills in treating her conditions.

When these hardships factors are considered in the aggregate, it is clear they rise above the hardships commonly associated with separation from an inadmissible family member. The AAO finds that the applicant's spouse would experience extreme hardship if she remained in the United States.

As the record establishes that a qualifying relative will experience extreme hardship upon relocation and separation, the AAO may now consider the applicant's waiver as a matter of discretion.

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 section 212(h)(1)(B) 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, "[B]alance 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 AAO finds that the unfavorable factors in this case include the applicant's willful misrepresentation and periods of unauthorized stay. The favorable factors in this case include the presence of the applicant's spouse, the presence of his U.S. citizen daughter, the extreme hardship that will impact his spouse if he is removed, the character testimony by an acquaintance of the applicant and his spouse and the lack of any criminal record during his residence in the United States. The positive factors outweigh the negative factors in this case.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.