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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: CINCINNATI, OH Date: NOV 16 2010

IN RE: [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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Cincinnati, Ohio and 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 native and citizen of Mali 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 having attempted to obtain a benefit under the Act through fraud or the willful misrepresentation of a material fact. The record indicates that the applicant is married to a U.S. citizen and the father of a U.S. citizen.[1] He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his family.

The Field Office Director found that the applicant had failed to establish that the bar to his admission would result in extreme hardship for his spouse and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Field Office Director's Decision*, dated October 15, 2008.

On appeal, counsel contends that the Field Office Director relied on an erroneously issued protection order to question the bona fides of the applicant's marriage. He further asserts that although the applicant may not be the biological father of the daughter born to his spouse in 2006, he is the only father she has ever known. *Form I-290B, Notice of Appeal or Motion*, dated November 11, 2008.[2]

In support of the waiver application, the record includes, but is not limited to, counsel's letter; a statement from the applicant's spouse; medical documentation relating to the applicant's mother-in-

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[1] The child born to the applicant's spouse in 2006 was born while she was married to the applicant. Under Kentucky Revised Statutes (KRS) § 406.11, "[a] child born during lawful wedlock, or within ten (10) months thereafter, is presumed to be the child of the husband and wife." No evidence in the record establishes that the applicant is not the biological father of this child.

[2] Counsel also appeals the Field Office Director's denial of the Form I-485, Application to Register Permanent Residence or Adjust Status. The AAO does not, however, have jurisdiction over an appeal from the denial of a Form I-485 adjustment application filed under section 245 of the Act. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner. As a "statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy," the creation of appeal rights for adjustment application denials meets the definition of an agency "rule" under section 551 of the Administrative Procedure Act. The granting of appeal rights has a "substantive legal effect" because it is creating a new administrative "right," and it involves an economic interest (the fee). "If a rule creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself, then it is substantive." *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992) All substantive or legislative rule making requires notice and comment in the Federal Register.

law; conviction records and a protection order relating to the applicant; and media articles on the treatment of individuals who suffer from Albinism in Mali and other African nations. The entire record was reviewed and considered in reaching a decision on the application.

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.

In her decision, the Field Office Director stated that she had found the applicant to be inadmissible under section 212(a)(6)(C)(i) of the Act for having misrepresented material facts in order to gain immigration benefits, noting that the applicant had previously filed an application under a fictitious identity and had failed to disclose his complete criminal record in applying for adjustment of status.

The record reflects that in filing the Form I-485, Application to Register Permanent Residence or Adjust Status, the applicant indicated that he had never been arrested or charged with any crimes and that during his adjustment interview, he also initially claimed to have no criminal record. Officer notes documenting this interview reveal that the applicant ultimately testified that he had previously been arrested for writing bad checks, but claimed the checks had been written by an imposter. Documentation subsequently provided by the applicant establishes that, in 2006, he was convicted in Kentucky of misdemeanor theft by deception, including cold checks under $300, and was fined.

Although the AAO agrees that the applicant attempted to conceal his conviction for theft when he applied for adjustment of status, we do not find this misrepresentation to bar his admission to the United States under section 212(a)(6)(C)(i) of the Act as it is not a material misrepresentation. A misrepresentation is generally material for immigration purposes only if by it the alien receives a benefit for which he or she would not otherwise be eligible. *See Kungys* v. *United States,* 485 US 759 (1988); see also *Matter of Tijam,* 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez,* 10 I&N Dec. 409(BIA 1962; AG 1964) and *Matter* of *S- and B-C-,* 9 I&N Dec. 436 (BIA 1950; AG 196 1).

The Supreme Court in *Kungys,* found that the test of whether concealments or misrepresentations were material was whether they could be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, i.e., to have had a natural tendency to affect, the legacy Immigration and Naturalization Service's (now United States Citizenship and Immigration Services' (USCIS)) decisions. *Matter of S- and B-C-,* 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements of a material misrepresentation are as follows:

A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

a. the alien is excludable on the true facts, or
b. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (AG 1961).

The applicant was convicted of theft by deception for writing bad checks under KRS § 514.040, a crime involving moral turpitude. Writing bad checks where an intent to defraud is an element of the violation is a crime involving moral turpitude. *See Matter of Colbourne*, 13 I&N Dec. 319 (BIA 1969); *see also Matter of Zangwill,* 18 I&N Dec. 22 (BIA 1981) and *Matter of Balao*, 20 I&N Dec. 440 (BIA 1992). However, the record also indicates that the applicant's crime was prosecuted as a Class A Misdemeanor for which the maximum sentence was 12 months, and that he was not sentenced to any time in prison, but was fined. As a result, the AAO finds that the applicant's conviction falls under the petty offense exception in section 212(a)(2)(A)(ii)(II) of the Act and does not bar his admission to the United States under section 212(a)(2)(A)(i)(I). In that the applicant's conviction for theft would not have prevented his adjustment had he revealed it on the Form I-485 or at his adjustment interview, the AAO finds that his concealment of this conviction is not a material misrepresentation for the purposes of section 212(a)(6)(C)(i) of the Act.

The AAO does, however, find the applicant's use of a false identity in seeking a prior immigration benefit to bar his admission to the United States under section 212(a)(6)(C)(i) of the Act. The record establishes that the applicant entered the United States on December 24, 1999 using his true name and his Malian passport, but applied for asylum in March 2001 under a different identity and nationality, claiming to have entered the United States on September 11, 2000. The AAO observes that identity and nationality are central to a determination of whether an asylum applicant is eligible for protection. Moreover, the applicant's use of a false identity and nationality in filing for asylum effectively precluded the legacy Immigration and Naturalization Service from determining that he was not eligible to file an affirmative asylum claim under 8 U.S.C. § 208(a)(2)(B) of the Act, which requires an asylum applicant to apply within one year of his or her arrival in the United States. Accordingly, the AAO finds that the applicant's use of a false identity and nationality shut off a line of inquiry that might well have resulted in a determination that he was not eligible to apply for the benefit he sought. They are, therefore, material misrepresentations and bar his admission to the United States under section 212(a)(6)(C)(i) of the Act. The applicant does not contest this finding.

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 U.S. citizen child 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 United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez,* 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 (BIA) 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 BIA 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 BIA 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 BIA 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 BIA 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 BIA 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 at 1422.

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.

The AAO now turns to the question of whether the applicant in the present case has established that his U.S. citizen spouse would experience extreme hardship as a result of his inadmissibility.

Following the applicant's adjustment interview, counsel submitted additional documentation in response to the Field Office Director's request for evidence. In his July 10, 2008 letter, counsel asserts that the applicant merits a waiver as a result of the extreme hardship that would be faced by his spouse and daughter, [redacted], upon relocation. Counsel states that [redacted] has Albinism and suffers from several other related health problems, and that these conditions would be exacerbated by the intense African sun. Counsel also contends that Albinos face discrimination in Africa and are at physical risk. Counsel further states that the applicant's spouse is the primary caregiver for her four children and her mother who suffers from Fibromyalgia, and that her responsibilities as a mother and daughter would not allow her to follow the applicant to Mali. In support of these assertions, counsel submits a June 5, 2008 affidavit from the applicant's spouse, online media articles on the treatment of Albinos in Africa and medical reports for the applicant's mother-in-law.

The applicant's spouse states that she has four children and that she cannot relocate to Mali with the applicant as there is no one to care for her children in the United States. She also states that she cannot take her two-year-old daughter, [redacted], to Africa because of the health risks she would face there. The applicant's spouse asserts that [redacted] was born with Albinism and that she also suffers from Nystagmus, an impairment of her vision, as a result of her condition. The applicant's spouse states that the African sun would damage [redacted] eyes and skin. She also asserts that individuals with Albinism are at risk in Africa, facing threats, discrimination and even death because of their appearance. She contends that superstitious Africans kill Albinos, even children, for their body parts. [redacted], the applicant's spouse asserts, would never be able to have a normal life in

Africa as she would be house-bound during the day to avoid the sun and would always have to be watched over to protect her from individuals who might otherwise harm her.

The applicant's spouse also states that she is the primary caregiver for her children. She indicates that while her mother sometimes babysits for her, her mother could not care for her children if she were to relocate to Mali. The applicant's spouse states that her mother's Fibromyalgia gets worse each year and that her mother's healthcare needs now result in her spending one night a week at the applicant's house.

Having reviewed the evidence of record, the AAO does not find it to demonstrate that the applicant's spouse would be unable to relocate to Mali with her children. The record contains online articles from *The Washington Times, The New York Time* and *The Seattle Times* that document the difficulties and risks faced by Albinos in Tanzania and Mali, including the hunting of Albinos for their body parts. While the AAO acknowledges the dangers that a child with Albinism could face in Africa, it does not find the record to document that the applicant's spouse's two-year-old daughter suffers from this condition. No medical records for the applicant's spouse's daughter or statements from doctors who have treated or are treating her are provided by the applicant. As a result, the AAO does not find the record to establish that [redacted] has Albinism or any other health problems that would prevent her from relocating to Mali with her mother. We note the submitted photographs but do not find them to be proof of [redacted] medical conditions. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in 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)). Accordingly, the record does not contain sufficient evidence to establish that the applicant's spouse would be unable to relocate with her children to Mali. Moreover, the AAO does not find the record to establish that the applicant's spouse has four children, as only one birth certificate has been submitted by the applicant.[3] While the applicant's spouse claimed three dependent children on her 2006 taxes, she reported only one dependent on the 2007 Form I-864, Affidavit of Support Under Section 213 of the Act, she submitted in support of the applicant's adjustment application. The AAO also notes that at the time of the applicant's May 20, 2008 adjustment interview, his then pregnant spouse indicated that she had only two children, aged 8 and 12 years.

The record also fails to establish that the applicant's spouse's responsibilities to her mother would prevent her from relocating to Mali. The applicant has submitted medical reports for his mother-in-law that establish she has been diagnosed with Fibromyalgia and depression, and that at the time of these reports, she had recently resigned from her job because she was unable to perform physical labor. There is, however, nothing in this documentation that demonstrates that the applicant's mother requires any assistance or care as a result of her condition or that she receives any care from her daughter. The record contains no documentary evidence that demonstrates how being separated from her mother as a result of relocation would affect the applicant's spouse emotionally.

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[3] Although the AAO notes that the record indicates that the applicant's spouse was pregnant at the time of his May 20, 2008 adjustment interview, no documentation establishes the birth of this child to the applicant and his spouse.

Based on the record before us, the AAO does not find the applicant to have submitted sufficient evidence to establish that relocation would result in extreme hardship for his spouse.

If the applicant's spouse remains in the United States without him, counsel contends, the applicant's removal would cause an extreme disruption of a loving family. The applicant's spouse states that her life will fall apart if the applicant is removed to Mali. The record, however, provides no further discussion of these assertions, failing to indicate the specific impacts a disruption of the applicant's family would have on his spouse or in what ways the applicant's spouse's life would fall apart in the applicant's absence.

The AAO notes that the Field Office Director indicated in her decision that the applicant had stated at the time of his adjustment interview that he was the sole financial provider for his family and that his spouse would suffer financial hardship in his absence. The record, however, contains insufficient evidence to establish that the applicant's spouse would be unable to meet their family's financial obligations if he is removed from the United States.

Although the applicant's spouse claims to have four children who were 12 years, 8 years, 2 years and 4 months of age in 2008, the record, as previously discussed, documents only one of these children. Therefore, the AAO is unable to consider the impact of caring for four children on the applicant's spouse's ability to obtain full-time employment in his absence or to conclude that upon his removal she would be financially responsible for four children. The AAO also notes that while the record demonstrates that the applicant's spouse earned approximately $13,750 as a nursing assistant in 2006, the last year in which she was employed, it fails to indicate whether this income represents full- or part-time employment. Moreover, there is no documentation in the record that establishes the family's financial obligations, beyond the May 2008 rental agreement that indicates a monthly rent payment of $560. As a result, the record does not provide sufficient evidence to demonstrate the applicant's spouse's financial situation if he is removed from the United States.

In that the record fails to document the hardships claimed by the applicant, the AAO finds that he has failed to prove that his spouse would suffer extreme hardship if his waiver application is denied and she remains in the United States.

When considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the hardships described in the record do not support a finding that the applicant's spouse would face extreme hardship if the applicant is refused admission. Therefore, the applicant has failed to establish statutory eligibility for a waiver under section 212(i) of the Act. As the applicant is statutorily ineligible for relief, the AAO finds 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 section 212(a)(6)(C) 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.