

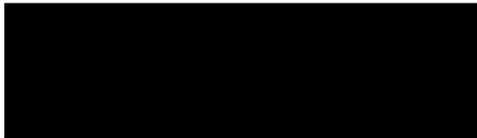
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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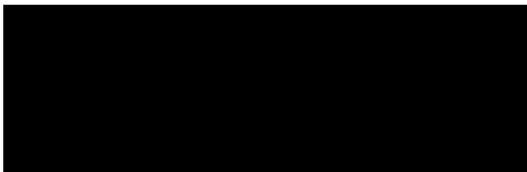
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IN RE:



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

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,

fr

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of China who attempted to gain admission to the United States with a counterfeit reentry permit on October 16, 1993 at John F. Kennedy Airport, New York. He was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to gain entry into the United States through fraud or misrepresentation.¹ The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130), and his wife, a United States citizen, is his petitioner. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States.

The District Director concluded that the applicant failed to establish that a bar to his admission to the United States would result in an “extreme hardship” to the qualifying relative and denied the application accordingly. *See Decision of the District Director* dated July 31, 2009.

On appeal, the applicant’s attorney provided a brief in support of the applicant’s waiver application. In the brief, the applicant’s attorney asserts that the qualifying spouse would encounter emotional, medical and financial hardships upon separation from the applicant. Moreover, the applicant’s attorney contends that the qualifying spouse is firmly settled and owns a restaurant and property in the United States and her parents and children live in the United States. The attorney also asserts that the applicant’s children would face educational hardships and “living status” issues if the applicant returned to China or if they joined their father in China. In a supplemental statement, the applicant also asserts, as a father of two children, that he fears returning to China because he “will be forcible sterilized due to [his] violation of China’s birth control policy.”

The record contains the following documentation: the original Application for Waiver of Grounds of Inadmissibility (Form I-601), the Notice of Appeal (Form I-290B), letters from the applicant’s attorney, medical documentation regarding the qualifying spouse, a psychiatric evaluation, statements from the applicant, an appeal brief, Form I-130, the qualifying spouse’s naturalization certificate, copies of a deed to a property (without references to the applicant or the qualifying spouse), a business certificate for the applicant, birth certificates for the applicant and qualifying spouse’s children, a marriage certificate, an affidavit from the qualifying spouse, evidence submitted in conjunction with the applicant’s asylum applications and an Application to Register Permanent Residence or Adjust Status (Form I-485), as well as the accompanying materials submitted in conjunction with the application including financial documentation. The entire record was reviewed and considered in rendering a decision on the appeal.

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

¹ In addition, in a supplemental statement, the applicant admits that he filed an asylum application based on his involvement in a student movement, which was “not true.”

(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, 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. The applicant's wife 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-Morales*, 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 the 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 a qualifying relative, 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. *See 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 applicant’s qualifying relative is his wife, and as aforementioned, the Form I-130 has already been approved. The documentation provided that specifically relates to the qualifying spouse’s hardship includes an appeal brief and letters from the applicant’s attorney, medical documentation regarding the qualifying spouse, a psychiatric evaluation, statements from the applicant, a business certificate for the applicant, birth certificates for the applicant and qualifying spouse’s children, an affidavit from the qualifying spouse, evidence submitted in conjunction with the applicant’s asylum applications and the documentation submitted with Form I-485. The entire record was reviewed and considered in rendering a decision on the appeal.

As aforementioned, the applicant's attorney asserts that the qualifying spouse would encounter emotional, medical and financial hardships upon separation from the applicant. Moreover, the applicant's attorney contends that the qualifying spouse is firmly settled and owns a restaurant and property in the United States and that her parents and children live in the United States. The attorney also asserts that the applicant's children would face educational hardships and "living status" issues if the applicant returned to China or if they joined their father in China. In a supplemental statement, the applicant also asserts, as a father of two children, that he fears returning to China because he "will be forcible sterilized due to [his] violation of China's birth control policy."

The AAO finds that the applicant's spouse would suffer extreme hardship as a consequence of being separated from the applicant. With respect to the qualifying spouse's emotional issues, the psychiatric evaluation indicates that the qualifying spouse has been suffering from "chronic depression since 2002 following the birth of her first child," with the death of her mother in September 2001 and the stress of taking care of the newborn triggering the depression. The evaluation also describes a suicide attempt by the applicant due to her depression and feelings of hopelessness.

In addition, the applicant's attorney asserts that the applicant's wife has health issues, namely chronic Hepatitis B, which is, according to her doctor, "a serious infectious disease with potential complications of cirrhosis and liver cancer." Medical documentation including various letters from the qualifying spouse's doctor and medical records were submitted to confirm the qualifying spouse's medical issues.

The applicant's attorney also contends that the qualifying spouse would suffer financial hardship if the applicant returned to China, as he is providing the major part of the income. However, although the qualifying spouse indicates in her affidavit that she is a stay at home mother and only works in their jointly owned restaurant when their children are in school, there is no documentation to confirm that the applicant is the main financial provider in their family or that without his presence the qualifying spouse would face financial hardship. Nonetheless, the record reflects that the cumulative effect of the emotional and medical hardships the applicant's spouse would experience in the United States without her husband rises to the level of extreme.

The AAO further concludes that the applicant has demonstrated that his spouse would suffer extreme hardship in the event that she relocates to China. As noted above, the applicant's wife suffers from Hepatitis B, "a serious infectious disease with potential complications of cirrhosis and liver cancer," and her physician states that she requires "comprehensive medical management and frequent follow up every three months." Her physician further states that she is taking a medication that is prescribed in cases where the virus is multiplying and damaging the liver, and an information sheet on this medication indicates that her infection could worsen if she stops taking it. The record further indicates that the applicant's wife had resided in the United States since 1988, when she was fourteen years old, and her siblings and father also reside in the United States. When considered in the aggregate and in light of her history of chronic depression, the hardships that would result if the applicant's wife relocated to China, including separation from her family members and having to readjust to conditions in China after over twenty years in the

United States and the disruption of the ongoing medical care she is receiving for her Hepatitis B infection, rise to the level of extreme hardship.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in this matter are the extreme hardships the applicant's United States citizen spouse and children would face if the applicant is not granted this waiver, regardless of whether they accompanied the applicant or remained in the United States, his business and property ties to the United States and the apparent lack of a criminal record. The unfavorable factors in this matter are the applicant's use of fraudulent document to attempt to enter the United States, his past

unlawful presence and employment in the United States, and his failure to appear at his exclusion hearing in January 1994, and the filing of an asylum application containing false information.

Although the applicant's violations of the immigration laws are serious and cannot be condoned, the positive factors in this case outweigh the negative factors. The AAO therefore finds that a favorable exercise of discretion is warranted. 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.

ORDER: The appeal is sustained.