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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 and Immigration Services

PUBLIC COPY

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[redacted]

Date: MAY 04 2011 Office: PHILADELPHIA, PENNSYLVANIA FILE: [redacted]

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,

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 record reflects that the applicant is a native and citizen of Jamaica 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 procuring admission to the United States through fraud or the willful misrepresentation of a material fact. The applicant is married to a United States citizen and the father of a United States citizen child, a United States citizen stepchild, and a Jamaican citizen child. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 wife, daughter, and stepson.

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated November 5, 2008.

On appeal, the applicant, through counsel, asserts that United States Citizenship and Immigration Services (USCIS) "erred in denying [the applicant's] application for waiver." *Form I-290B*, filed December 4, 2008. Additionally, counsel claims that the applicant's wife suffers from medical and psychological problems. *Id.*

The record includes, but is not limited to, counsel's appeal brief; statements from the applicant, his wife, and ex-wife; documents regarding the applicant's stepson's learning disability; medical documents for the applicant's wife; psychological evaluations on the applicant's wife, daughter, and stepson; paystubs for the applicant and his wife; tax documents; mortgage documents; and articles on violence in Jamaica. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

> (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 Act is inadmissible.
>
> . . . .
>
> (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212 of the Act provides, in pertinent part, that:

> (i) (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the

> spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien...

In the present case, the record indicates that on December 30, 1999, the applicant entered the United States using a passport in another individual's name. Based on this misrepresentation, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The AAO notes that counsel does not dispute 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 children can be considered only insofar as it results in hardship to a qualifying relative. 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-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 (Board) 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) ([redacted] 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 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. *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 first prong of the analysis addresses hardship to the applicant's wife if she relocates to Jamaica. In counsel's appeal brief filed December 29, 2008, counsel states that the applicant's wife suffers from "depression, asthma, sleeping and appetite issues," and "[m]edical facilities in Jamaica are totally unsuitable to help" the applicant's wife and her son. The AAO notes that medical documentation in the record establishes that the applicant's wife has been diagnosed with depression, asthma, and upper respiratory infections. However, the AAO notes that other than counsel's statement, no medical documentation has been submitted establishing that the applicant's stepson suffers from any medical conditions or the severity of his medical conditions. Going on record without supporting evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Similarly, without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel claims that crime and the unemployment rate are very high in Jamaica, and the applicant and his wife could not afford medical treatment there. Counsel states the applicant "would have great difficulty in keeping his family

safe or even maintaining a job in Jamaica." The AAO notes that the applicant submitted two articles on violence in Jamaica. The AAO acknowledges the claims made regarding the difficulties the applicant's wife would face in relocating to Jamaica.

Counsel states the applicant's stepson has a learning disability. The AAO notes that the record establishes that the applicant's stepson is receiving learning support and speech/language therapy. *See Individualized Education Program worksheet*, dated February 15, 2008. Counsel claims that "[t]hese services are not available in Jamaica" for the applicant's stepson. Counsel also claims that the applicant's wife is attending school to obtain her master's degree, and she "would be unable to complete her course of studies in Jamaica." In a letter dated December 9, 2008, the applicant's ex-wife claims that she depends on the applicant financially to help support their daughter because she is not working. The AAO notes that the applicant's daughter may suffer some hardship if the applicant returns to Jamaica; however, the applicant has not shown that hardship to his daughter will create additional challenges for his current spouse. The AAO notes the educational concerns of the applicant's wife and stepson.

Based on the applicant's spouse's mental health problems, losing her employment in the United States, disruption of the applicant's wife's studies and their son's special education services, the security concerns in Jamaica, the applicant's wife's medical issues, and disruption of her medical treatments, the AAO find that the applicant's wife would suffer extreme hardship if she were to join the applicant in Jamaica.

Regarding the hardship the applicant's wife would suffer if she were to remain in the United States, in a statement dated December 2008, the applicant claims that "it would be beyond devastation if [he] would leave the country knowing that [his wife] depend[s] on [him] financially and mentally." In a statement dated December 2008, the applicant's wife states if the applicant "leaves the country it would be like life being taken away from [her]." Counsel states the applicant's wife depends on the applicant "emotionally, socially and financially." In a psychological evaluation dated October 16, 2006, [redacted] diagnosed the applicant's wife with adjustment disorder with mixed anxiety and depressed mood. Dr. [redacted] indicates that if the applicant's wife is separated from the applicant, "her depressive symptomatology will become exacerbated and would probably evolve into Major Depressive Disorder." In an initial treatment plan dated December 10, 2008, the applicant's wife was diagnosed with depression and was recommended to attend individual therapy once a week. Counsel states the applicant's wife "is very ill." As noted above, the applicant's wife was diagnosed with depression, asthma, and upper respiratory infections, and was prescribed an antidepressant. Additionally, [redacted] reports that the applicant's wife suffered a miscarriage with the applicant. The AAO notes the applicant's wife's medical and emotional problems.

The applicant's wife states she depends on the applicant "for a lot of things, including watching [her] son...while [she] attend[s] school at night, because [she] really [does not] have any family members to help [her] out." In a statement dated November 2006, the applicant's wife states her son needs "a father figure in his life." [redacted] reports that the applicant and his stepson are close, and if the applicant returns to Jamaica, "it would represent the second loss of a father" for his stepson. [redacted] indicates that the "loss of a stepfather will serve to exacerbate [the applicant's stepson's] learning problem." As noted above, the applicant's stepson has a learning disability and is receiving therapy in school. The applicant's ex-wife

states the applicant and his daughter are close and she cannot "imagine what will happen to her if he would leave." [redacted] reports that the applicant picks up his daughter "every morning, takes her to school, and picks her up after school.... If [the applicant's daughter] loses [the applicant], she, too, will develop depressed symptomatology and a separation anxiety disorder." The AAO notes that it appears that the applicant's ex-wife and his daughter may currently reside in Florida, while the applicant continues to reside in Pennsylvania. *See statement from the applicant's ex-wife*, dated December 9, 2008 (notarized in Citrus County, Florida). Additionally, the AAO notes the concerns for the applicant's daughter and stepson.

Counsel states the applicant's wife "needs the emotional, physical and financial assistance of [the applicant] in order to provide for the family and herself, study and not be depressed." Counsel states the applicant's wife's "anxiety about [the applicant's] immigration status has impacted her ability to concentrate at school." The AAO notes that no documentary evidence has been submitted establishing that the applicant's wife's schoolwork has been affected by the applicant's immigration issues. Counsel states the "entire family depends on [the applicant's] income to survive." The applicant's wife states they "purchased a home in February 2008" and she cannot afford the payments on her own. She claims that if the applicant returns to Jamaica, she would lose "the house and be forced into homelessness, and be unable to maintain [their] debt including paying to attend college." The AAO notes the financial concerns of the applicant's wife.

As noted above, the applicant's ex-wife claims that she depends on the applicant financially to help care for their daughter. While neither the applicant's ex-wife nor his daughter are qualifying relatives for the purposes of a section 212(i) waiver proceeding, the AAO notes the impact on the applicant's daughter of being separated from her father. Additionally, the AAO notes the claims made regarding the applicant financially assisting his ex-wife; however, there is no documentary evidence in the record establishing that the applicant provides any financial assistance to his ex-wife.

Considering the applicant's spouse's mental health issues, medical issues, financial issues, and the normal effects of permanent separation of a loved one, the AAO finds the record to establish that the applicant's wife would face extreme hardship if she remained in the United States in his absence. Accordingly, the applicant has established extreme hardship to a qualifying relative under section 212(i) of the Act.

The AAO additionally finds that the applicant merits a waiver of inadmissibility 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).

The adverse factor in the present case is the applicant's misrepresentation. The favorable and mitigating factors are the applicant's United States citizen wife, stepson, and daughter; the extreme hardship to his wife if he were refused admission, and the absence of a criminal record.

The AAO finds that, although the immigration violation committed by the applicant is serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.