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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

H5

[redacted]

Date: MAY 17 2011 Office: PITTSBURGH, PA FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act (INA), 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, with a fee of $630. 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Pittsburgh, Pennsylvania. A subsequent appeal to the Administrative Appeals Office (AAO) was rejected as untimely filed and returned to the field office director for consideration as a motion to reopen or reconsider. The field office director denied the motion. 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 China 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 fraud or willful misrepresentation of a material fact in order to obtain an immigration benefit. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside with her husband and children in the United States.

The field office director found that the applicant failed to establish extreme hardship to a qualifying relative. The field office director also found that the applicant does not point to any procedural error or evidence that the decision was incorrect based on the evidence of record at the time of the initial decision. Accordingly, the field office director denied the motion to reopen or reconsider. *Decision of the Field Office Director*, dated October 27, 2008.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and her husband, [redacted] indicating they were married on December 11, 2001; an affidavit from the applicant; two psychological evaluations for [redacted]; copies of tax returns and other financial documents; numerous letters of support; letters from the couple's accountant; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(6)(C)(i) of the Act provides:

> 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.

Section 212(i) provides:

> (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], 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 permanent resident spouse or parent of such an alien . . . .

In this case, the record shows, and the applicant concedes, that she attempted to enter the United States in December 1994 using her sister's passport. *Record of Sworn Statement in Affidavit Form*, dated December 2, 1994. The applicant was admitted to the United States pending exclusion proceedings. Therefore, the record shows that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willful misrepresentation of a material fact in order to procure an immigration benefit.

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 her children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's husband 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 [redacted]

> [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 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.

In this case, the record contains a psychological evaluation for the applicant's husband, [redacted] According to the psychologist, [redacted] 'suffered from a disturbing childhood where his parents fought and argued and his father disappeared for days at a time." In 1992, [redacted] reportedly came to the United States from China when he was twenty years old. The psychologist states that [redacted] was married for almost five years to his first wife when she left him for another man, causing him to be "absolutely devastated." The psychologist contends [redacted] was able to recover from this deep depression with the support of his current wife, the applicant. The psychologist contends the applicant has two sons from a previous relationship who were born in the United States, but then taken back to China by the applicant's relatives so that the applicant could work. The applicant's children reportedly came back to the United States in May 2003 after the applicant and [redacted] were married and the children believe that [redacted] is their "real father." The psychologist contends the couple had a daughter in October 2003. In addition, the psychologist states the couple owns a restaurant that they operate together. The psychologist states that [redacted] 's anxiety level has increased and he is worried all the time about his wife's immigration situation. He reported having problems sleeping, a reduced

appetite, and difficulties concentrating. The psychologist diagnosed [redacted] with Adjustment Disorder with Mixed Anxiety and Depressed Mood and states that [redacted] risks suffering from Major Depressive symptoms if his wife leaves the country. *Letter from* [redacted] dated May 27, 2006.

A more recent psychological evaluation in the record states that [redacted] has had trouble sleeping and a poor appetite since learning of his wife's possible removal from the United States. The psychologist states that [redacted] first marriage was a failure and that he cannot bear to have another marital separation. According to the psychologist, [redacted] does not feel he could care for the couple's three children, who are ten, eight, and five years old, by himself. [redacted] parents reportedly live in New York, so they cannot help him take care of the children in West Virginia, and [redacted] reported he must work seven days a week to earn a living. In addition, the psychologist contends [redacted] has arthritis in his hands and that, as a result, his wife does a lot of the things he cannot do at home and in their restaurant. Furthermore, the psychologist states that the applicant's two children from a previous relationship were left with relatives in China for about three years when they were both less than two years old. Her son, [redacted] reportedly is hyperactive and his testing strongly indicates he has Attention Deficit/Hyperactivity Disorder (ADHD). The psychologist diagnosed [redacted] with Adjustment Disorder with Mixed Emotional Features of Depression and Anxiety. The psychologist also states that [redacted] testing indicates severe depression and anxiety with poor self-esteem. The psychologist concludes that if the applicant returned to China, [redacted] and the children would be at high risk to become a dysfunctional family. The psychologist recommends that [redacted] consult with a physician for psychiatric medication and that [redacted] be assessed for learning disabilities. *Psychological Evaluation*, dated November 14, 2008.

Upon a complete review of the record evidence, it is not evident from the record that the applicant's husband will suffer extreme hardship as a result of the applicant's waiver being denied. As stated above, the only qualifying relative in this case is the applicant's U.S. citizen husband, [redacted] Significantly, there is no statement or letter from [redacted] in the record. In addition, although the record contains an affidavit from the applicant, the affidavit only addresses her previous engagement and does not address hardship to [redacted]. *Affidavit of* [redacted] dated February 22, 2007. Therefore, neither the applicant nor her husband has specifically addressed how the denial of the applicant's waiver application will cause [redacted] extreme hardship. Furthermore, neither the applicant nor her husband discuss the possibility of [redacted] moving back to China, where he was born, to avoid the hardship of separation, and neither address whether such a move would represent a hardship to him.

If [redacted] decides to stay in the United States, their situation is typical of individuals separated as a result of inadmissibility or exclusion and does not rise to the level of extreme hardship based on the record. Regarding the psychological evaluations, although the input of any mental health professional is respected and valuable, the AAO notes that the evaluations in the record were conducted by different psychologists and were each based on a single interview conducted with [redacted] on May 24, 2006, and November 7, 2008. The record fails to reflect an ongoing relationship between a mental health professional and the applicant's husband. The conclusions reached in the submitted evaluations, being based on single interviews, do not reflect the insight and elaboration commensurate with an established

relationship with a psychologist, thereby diminishing the value of the evaluations on a determination of extreme hardship. Insofar as one of the psychologists contends [redacted] has arthritis, there is no letter from any health care professional to corroborate this claim and as stated above, there is no letter from [redacted] describing his purported arthritis and how he may need his wife's assistance.

To the extent the couple has three U.S. citizen children, as stated above, hardship to the applicant's children can be considered only insofar as it results in hardship to [redacted] the only qualifying relative in this case. There is insufficient evidence in the record to show extreme hardship to [redacted] Although one of the psychologists contends the couple's son, [redacted], has ADHD, there is no evidence, such as a letter from a teacher or school records, to substantiate this claim. The record does not show that the applicant's situation is unique or atypical compared to other individuals in similar circumstances. *See Perez v. INS, supra* (defining extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation).

To the extent counsel contends [redacted] would suffer extreme financial hardship because his wife is essential to their restaurant but "does not accept pay for her work," and [redacted] purportedly could not afford child care if she returned to China, *Brief in Support of Appeal* at 7-8, dated November 24, 2008, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In any event, the AAO notes that according to the applicant's Biographic Information form, she was employed as a cashier at the couple's restaurant from November 2002 until the present. *Biographic Information form (Form G-325A)*, dated November 1, 2004. In addition, although the record contains tax documentation, the applicant does not address the couple's regular, monthly expenses. According to the psychologist, the restaurant the couple owns is "attached to" the family's home. *Psychological Evaluation* at 3, *supra*. There is no evidence addressing the amount of rent, if any, the applicant and her husband pay per month. Although the AAO does not doubt that [redacted] will experience some financial hardship if his wife's waiver application were denied, without more detailed information addressing the couple's total monthly expenses, there is insufficient evidence in the record to determine the extent of his financial hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's husband caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility, 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.