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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

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[redacted]

DATE: NOV 0 9 2011 OFFICE: TAMPA, FL FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v) and 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, 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.

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Tampa, Florida, and 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 Italy who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for misrepresenting a material fact to gain entry into the United States. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and under Section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated January 6, 2009.

On appeal, counsel for the applicant states that the director erred in denying the application and asserts that the applicant has established extreme hardship to his U.S. citizen spouse. Counsel submits a brief. *See Form I-290 and attachments.*

The evidence of record includes, but is not limited to, an undated statement from [redacted] the applicant's spouse, submitted with the Form I-601 application, describing the hardship claimed; two briefs from counsel submitted with the Form I-601 and on appeal; and a sworn statement from the applicant. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> (i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> . . . .
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

In the present application, the record indicates that, on May 12, 1996, the applicant sought entry into the United States under the Visa Waiver Pilot Program. He was admitted for one day, but was subsequently granted satisfactory departure until September 20, 1996. However, the applicant did not depart the United States until sometime in 1999.

Accordingly, the applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until sometime in 1999 when he departed the United States.

It is noted that the applicant returned to the United States in December 2004 and the record does not demonstrate that prior to his return he obtained a waiver under section 212(a)(9)(B)(v) of the Act. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Counsel does not dispute that the applicant accrued over one year unlawful presence. She contends, however, that the applicant should not be subject to the ten-year bar because he was subsequently admitted under the Visa Waiver Provisions. Counsel contends that the holding in *Matter of Areguillin,* 17 I&N Dec. 308 (BIA 1980) implies that certain grounds of inadmissibility can be cured by inspection and admission, and that the converse of 8 C.F.R. § 245.1(a) and (b)(3) is that an individual who has been admitted or paroled is eligible for adjustment of status.

Contrary to counsel's contention, the holding in *Matter of Areguillin,* is not relevant in this case. As discussed above, prior to his entry in December 2004, the applicant had accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions, until sometime in 1999 when he departed the United States. The applicant's inadmissibility was triggered when he departed the United States in 1999 after he had accrued over one year unlawful presence. Also, counsel is misguided in contending that the converse of the regulations section 8 C.F.R. § 245.1(a) and (b)(3) is that an individual who has been admitted or paroled is eligible for adjustment of status. As discussed above, the applicant is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. It is noted that the instructions to the Form I-601, which carry the weight of regulation, require individuals who have previously been unlawfully present in the United States and are seeking adjustment to Lawful Permanent Resident status to file the Form I-601. It is also noted that even if the applicant had sought a non-immigrant visa in 2004 and 2006, and received a waiver of his inadmissibility for unlawful presence, that waiver would have been granted under section 212(d)(3) of the Act and would not waive his inadmissibility as an immigrant under section 212(a)(9)(B)(v) of the Act.

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).

It is well established that fraud or willful misrepresentation of a material fact in the procurement or attempted procurement of a visa, or other documentation, must be made to an authorized official of the United States Government in order for inadmissibility under section 212(a)(6)(C)(i) of the Act to be found. *See Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994); *Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991); *Matter of Shirdel*, 19 I & N Dec. 33 (BIA 1984); *Matter of L-L-*, 9 I & N Dec. 324 (BIA 1961).

The director noted that during the applicant's interview on June 4, 2008, the applicant testified, and that the record reveals, that a fraudulent ADIT stamp, which signifies temporary evidence of lawful admission of permanent residence status, was placed in the applicant's passport, however, the applicant was never accorded that such status by the Service. The director, therefore, found the applicant to be also inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, for misrepresenting a material fact to gain entry into the United States.

It appears from the record that the applicant sought admission to the United States only under the Visa Waiver Program and there is nothing in the record to indicate that he ever used the ADIT stamp to obtain any benefit under the Act. There is no evidence that the applicant presented the false ADIT stamp to a U.S. government official and there is no evidence he attempted to obtain a benefit under the Act by use of the ADIT stamp. The AAO finds, therefore, that the applicant is not inadmissible under Section 212(a)(6)(C)(i) of the Act.

The AAO now turns to a consideration of the applicant's eligibility for a waiver of his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B)(v) of the Act and section 212(i) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

> The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act 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 can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

Counsel asserts that the applicant's spouse will suffer emotional hardships as a result of separation. She states that the applicant's spouse considers her family the priority in her life and she depends on her family for emotional support, and contends that the applicant's spouse has suffered a panic attack, and cannot bear being separated from her family or her husband. Counsel also states that the applicant's and his spouse's desire to have children would be disrupted.

The applicant's spouse states that she and her husband are close to her family and together they do things for the family. She states that in 1999 her mother was diagnosed with emphysema and suffers from heart problems, asthma, high blood pressure, and depression, and is constantly medicated; that she and the applicant have enrolled her nephew in the basketball league at the local YMCA; that periodically they take her grandfather home from the nursing home; and that they volunteer at the Mofitt Cancer Center and at the WMNF community radio in Tampa. However, the record lacks evidence to establish that the applicant's spouse's mother is ill, requires medication, and requires the applicant's spouse's assistance; and there is no evidence as to how the applicant's absence would affect his spouse's care of her mother. The record also lacks evidence to establish that the applicant's spouse's grandfather is ill, in a nursing home or requires the applicant's spouse's assistance; and there is no evidence as to how the applicant's absence would affect his spouse's care of her grandfather. In addition, the record does not include evidence as to how the applicant's absence would impact his spouse as it pertains to her nephew's enrollment in the basketball league and her involvement as a community service volunteer.

The AAO finds that even when these hardship factors are considered in the aggregate, together with hardships that normally result from separation, the applicant has failed to establish that his U.S. citizen spouse will suffer hardship in the United States beyond what would normally experienced as a result of separation.

Counsel contends that relocation to Italy would deprive the applicant's spouse of achieving her career goals to serve as a United States Peace Corps volunteer and to pursue a career in education; that the applicant's does not have family in Italy; that she has lived her entire life in the United States; and that the couple desires to have children and their future and happiness are here in the United States.

The applicant's spouse states that it would be difficult if she relocates to Italy with the applicant. She states that she does not have family in Italy; that she has never been to Italy and she does not speak the Italian language; that she would not be able to find work easily there; and that she would not be able to help her parents, sibling and grandparents financially and emotionally. However, the record does not provide details such as the extent of financial and emotional support the applicant's spouse would be required to provide for her family members here, and there is no evidence in the record to indicate her family's financial need. Also, the applicant does not indicate the income he would earn in Italy and the household expenses they would incur to maintain a household in Italy. Without these details, the AAO cannot assess the nature and extent of hardships, such as the financial hardship, if any, the applicant's spouse would experience if she relocates to Italy with the applicant.

While the applicant's spouse will suffer hardship due to separation from her family and friends, and her unfamiliarity with the Italian language, it has not been established that these hardships would be beyond that which would normally be experienced as a result of the applicant's inadmissibility.

The AAO finds, therefore, that the applicant has failed to establish that the hardships his U.S. citizen spouse will suffer in Italy if she relocates there with him will be extreme.

Having found the applicant statutorily ineligible for relief, 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)(9)(B)(v)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.