

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

H2

[REDACTED]

FILE: [REDACTED] Office: DENVER

Date: JUL 07 2009

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Vietnam who 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 having procured admission into the United States by fraud or willful misrepresentation on August 7, 2005. 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).

The district director concluded that the record did not support a finding that the applicant's spouse would suffer extreme hardship as a result of the applicant's inadmissibility to the United States. The application was denied accordingly. *Decision of the District Director*, dated October 4, 2006.

On appeal, counsel states that the applicant did not willfully misrepresent a material fact and that affidavits in the record confirm that the applicant told the translator who prepared her visa application that she was divorced, but the preparer mistakenly marked the box indicating she was married instead of divorced. *Form I-290B*, dated November 3, 2006. Counsel also states that the applicant qualifies for an extreme hardship waiver. *Id.*

The record indicates that the applicant entered the United States on August 7, 2005 with a tourist visa. On October 17, 2005 she was married and on November 27, 2005 she filed an application to register permanent residence. On March 13, 2006 the applicant was interviewed by the U.S. Citizenship and Immigration Services as part of her adjustment application. At the time of the interview the applicant submitted a divorce decree showing that she was divorced on May 5, 2004 from [REDACTED]. The record indicates that on the applicant's nonimmigrant visa application, signed on August 2, 2005, the applicant indicated that she was married and listed her spouse's name as [REDACTED] and his birth date as May 12, 1968.¹

The applicant states that she does not read, write, or speak English and that she hired her secretary to complete the application forms for her. *Applicant's Affidavit*, dated June 20, 2006. She states that she told her secretary that she was divorced and showed her the divorce papers, but she still mistakenly marked the box for married on the application. The applicant also states that there were two other people present while she completed her visa application and that they have submitted affidavits that state that she did tell her secretary that she was divorced when she was completing her visa application. *Id.*

The AAO notes that the record contains two affidavits from co-workers of the applicant, which state that in August 2005 they helped the applicant apply for a visa application to travel to the United States by translating the application for her. *Affidavits from [REDACTED] and [REDACTED]* dated March 16, 2006. They state that at this time, the applicant did tell them that she divorced her

¹ The AAO notes that even if the visa application had accurately indicated that the applicant was divorced, she would have been required to include her former husband's name.

husband a long time ago and she presented her divorce papers to them. They state that the secretary preparing the application, [REDACTED], mistakenly typed a mark in the box for married when she should have typed a mark in the box for divorced. *Id.*

The record shows that the applicant signed and dated the nonimmigrant visa application certifying that she had read and understood all the questions set forth in the application and that the answers she furnished on the form were true and correct. The AAO notes that it is the responsibility of the applicant to have the questions and answers provided on the application translated to her so that she can verify their accuracy. Thus, the AAO must find that the applicant misrepresented herself to be married when applying for a nonimmigrant visa application.

Furthermore, the AAO finds that the applicant's misrepresentation was material in that it shut off a line of inquiry which was relevant to the applicant's eligibility. The Supreme Court, in *Kungys v. United States*, 485 US 759 (1988), found that the test of whether concealments or misrepresentations are "material" is whether they can be shown by clear, unequivocal, and convincing evidence to have been predictably capable of affecting, i.e., to have has a natural tendency to affect, the legacy Immigration and Naturalization Service's (now Citizenship and Immigration Services') decisions. In addition, 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:

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

When adjudicating a nonimmigrant tourist visa application a consular officer must, in accordance with Section 101(a)(15)(B) of the Act, determine that the applicant possesses nonimmigrant intent (i.e.: has a residence in a foreign country which he or she has no intention of abandoning and who is visiting the United States temporarily). The presence of a spouse in the foreign country, as with other ties to that country, is relevant to this inquiry. If the officer had known that the applicant was divorced, her application may have been denied for failure to prove that she had no intention to abandon her residence in Vietnam. Furthermore, the AAO notes that the record indicates that the applicant did not return to Vietnam after the expiration of period of authorized stay as a tourist, but instead married and is now seeking permanent resident status. Therefore, the AAO finds that the applicant procured a visa for entry into the United States by misrepresenting a material fact.

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

- (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 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.

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on the applicant’s U.S. citizen or lawful permanent resident spouse and/or parent. Hardship the applicant experiences due to separation is not considered in section 212(i) waiver proceedings unless it causes hardship to the applicant’s spouse and/or parent.

The concept of extreme hardship to a qualifying relative “is not . . . fixed and inflexible,” and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted). Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The AAO notes that extreme hardship to the applicant’s spouse must be established in the event that he resides in Vietnam and in the event that he resides in the United States, as he is not required to reside outside of the United States based on the denial of the applicant’s waiver request. The AAO will consider the relevant factors in adjudication of this case.

The applicant's spouse states that he is an Amerasian who has lived in the United States for 13 years. *Spouse's Affidavit*, dated June 20, 2006. He states that he has an eighty-year-old mother who lives nearby and three children from a previous marriage who he sees as part of a joint custody agreement. The applicant states that he cannot return to Vietnam to live with the applicant because he is afraid he will face discrimination and violence because he is an Amerasian. He also states that if he were to relocate to Vietnam he would be separated from his children because in accordance with his custody agreement, he cannot take his children out of the state of Colorado. *Id.*

The AAO notes that the record contains an article from *Voice of America*, dated April 30, 2005, which acknowledges the discrimination faced by Amerasians in Vietnam. Because of the discrimination the applicant's spouse suffered in the past while living in Vietnam, and because the applicant's spouse has three children and a mother that he will be forced to separate from in the event of relocation, the AAO finds that the applicant's spouse would suffer extreme hardship upon relocating to Vietnam.

However, the AAO does not find that the record shows that the applicant's spouse would suffer extreme hardship as a result of separating from the applicant. The applicant's spouse states that if he is separated from the applicant he fears he will suffer loneliness and depression. *Spouse's Affidavit*, dated June 20, 2006. He states that the applicant supports him by running the household, cooking all of his meals, and helping to care for his mother and three children. He states that because of his previous marriage, which ended in divorce, he values the good strong relationship he has with the applicant and that if he was separated from the applicant, he would be devastated. *Id.* The current record does not show that the hardship experienced by the applicant's spouse, as a result of being separated from the applicant, would rise to the level of extreme hardship, above and beyond what would normally be experienced by a person whose spouse was facing removal. Furthermore, the applicant's spouse submits no documentation to support his assertions regarding his emotional suffering. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS*, *supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse 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 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.