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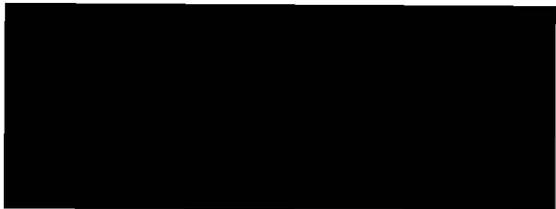
Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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Services

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FILE:



Office: PHOENIX, AZ

Date:

JUN 3 2009

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:

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 Field Office Director, Phoenix, Arizona and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of China 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 attempted to procure admission into the United States by fraud or willful misrepresentation. The applicant is married to a lawful permanent resident and is the mother of two U.S. citizen children. She seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i) to remain in the United States with her family.

The field office director concluded that the record did not establish that a qualifying relative would suffer extreme hardship if the applicant were removed from the United States. He denied the application accordingly. *Decision of the Field Office Director*, dated April 9, 2009.

On appeal, counsel contends that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act as she immediately retracted her misrepresentation. Alternately, he asserts that U.S. Citizenship and Immigration Services (USCIS) failed to consider all the favorable factors in the applicant's case. *Counsel's brief*, dated May 1, 2009.

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.

The record reflects that on August 10, 1992, the applicant presented a photo-substituted Chinese passport with a counterfeit nonimmigrant visa to a U.S. immigration inspector at Kennedy International Airport. While counsel does not contest this finding, he asserts that the applicant retracted her misrepresentation immediately upon arriving in secondary inspection and is, therefore, not subject to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). He contends that the facts of the present case are virtually identical to those in *Matter of Y—G—*, 20 I&N Dec. 794 (BIA

1994), where the Board of Immigration Appeals (BIA) found the applicant to have admitted to his true name and circumstances upon arriving in the United States and, therefore, was not subject to section 212(a)(6)(C)(i) of the Act .

The AAO acknowledges that a timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for section 212(a)(6)(C)(i) ineligibility. *9 FAM 40.63 N4.6*. Whether a retraction is timely, however, depends on the circumstances of the particular case. *Id.* In general, it should be made at the first opportunity. *Id.* If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview. *Id.* A timely retraction has been found in cases where applicants used fraudulent documents only *en route* and did not present them to U.S. officials for admission, but, rather, immediately requested asylum. *See, e.g., Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991); *cf. Matter of Shirdel*, 18 I&N 33 (BIA 1984). In the present case, the applicant's retraction was made during her secondary inspection, not during her primary inspection, her first opportunity to correct her misrepresentation. Therefore, the AAO finds that the applicant's retraction was not timely and that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

Counsel also claims that, as the applicant used her fraudulent passport and visa to come to the United States to seek asylum, her waiver application should be considered in a more generous light. Counsel points to the exceptions made to the grounds of inadmissibility in the cases of asylum seekers and also notes that waiver standards for such individuals do not require applicants to establish extreme hardship to a qualifying relative. He further contends that, as an asylum seeker, the applicant was unable to obtain a passport from the Chinese government legally and that this important factor was not considered by USCIS in reaching a decision on the applicant's Form I-601.

The AAO acknowledges that asylees seeking adjustment of status are not subject to the extreme hardship required in a section 212(i) waiver proceeding. However, the applicant in the present matter is not seeking adjustment of status as an asylee under section 209 of the Act but as the spouse of a lawful permanent resident. Therefore, the standard applied to the waiver applications of asylees seeking adjustment is not relevant to this proceeding. Further, counsel's contention that the applicant was unable to obtain a passport legally from her government is not supported by the record. There is no statement from the applicant or other evidence in the record indicating that she attempted to obtain a passport through legal channels or that she, prior to her departure, was at risk in China. In the sworn statement the applicant gave at the time of her August 10, 1992 attempt to enter the United States, she testified that she would be at risk if she returned to China solely on the basis of having departed without permission.

The AAO now turns to a consideration of the record as it relates to the applicant's claim to extreme hardship.

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 a qualifying family member, in this case, the applicant's spouse. Hardship suffered by the applicant and her children as a result of her inadmissibility is not directly relevant to a determination

of extreme hardship and will be considered only to the extent that it affects the applicant's spouse . Should extreme hardship be 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 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 alien 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. The age of the qualifying relative may be an additional relevant factor. See *Matter of Pilch*, 21 I&N 627, 630 (BIA 1996). In examining whether extreme hardship has been established, the BIA has held:

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).

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.

The record includes the following evidence in support of the applicant's claim that her spouse would suffer extreme hardship if he were to be removed from the United States: counsel's brief; statements from the applicant and her spouse; medical documentation relating to the applicant's spouse; and country conditions information on China.

The first part of the extreme hardship analysis requires the applicant to establish extreme hardship to her spouse in the event that he relocates to China. On appeal, counsel contends that USCIS has failed to consider the applicant's spouse's family ties to the United States, the financial impact of his departure from the United States and that as a Chinese citizen he would be forcibly sterilized if he returned to China. In a February 27, 2009 affidavit, the applicant's spouse states that he has been suffering from unspecified medical conditions since 1999 and has been under treatment for a herniated disk, sciatica and spinal stenosis since 2006. He asserts that relocating to China would interrupt his medical treatment and that he would not be able to obtain the advanced medical care he has been receiving in the United States. The applicant's spouse also contends that he would be unable to find comparably-paid employment in China and that, as the applicant's household registration is in the Chinese countryside, he and his daughters would have to relocate to rural China, which is very different than urban China. Such a move, he states, would leave his children's health unprotected. The applicant states that if she is returned to China, her children, as U.S. citizens, would be unable to attend school. The applicant further contends, that she and her children would not have a legal identity because they would not have a household registration booklet. Were she able to obtain a household registration for herself and her children, the applicant asserts, she would face sterilization and a fine as someone who has violated China's one-child family planning policies.

The AAO notes that the record contains numerous online media reports and other documentation that establish the poor quality of health care and the lack of medical insurance in rural China. Additional materials report rising health care costs and flaws in China's rapidly expanding economy. The record, however, does not support the applicant's spouse's claim that he and his children would have to live in rural China. The Form G-325A, Biographic Information, submitted by the applicant indicates that she was born in Fuzhou City, a city of more than six million, and that her parents continue to reside there. Accordingly, the record does not support the applicant's spouse's claim that the applicant's household registration would be in the Chinese countryside and that, as a result, he would be required to reside in rural China. The AAO also notes that the record fails to support counsel's claim that the applicant's spouse has family in the United States. Instead, the record reflects that the applicant's spouse's parents, like the applicant's parents, reside in Fuzhou City.

The record also fails to indicate that the applicant's spouse would be unable to obtain employment in China. Country conditions materials in the record offer proof that China's population experiences great income disparity, particularly between rural and urban areas, and that increasingly those living in rural areas must migrate to China's cities in order to make a decent living. However, the descriptions of economic disparity in China do not establish that the applicant's spouse would be unable to obtain employment for comparable pay if he relocated with the applicant. Further, even if the applicant's spouse were unable to obtain comparably-paid employment in China, a qualifying relative's inability to maintain his or her current standard of living upon relocation does not constitute extreme hardship. *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996).

With regard to the health of the applicant's spouse, the record documents that he began receiving treatment from a licensed acupuncturist for lower back pain on February 25, 2009. While the acupuncturist states that the applicant's spouse suffers from a herniated disk, sciatica and spinal stenosis, the record does not establish that he is qualified to make these diagnoses and it contains no

other medical evidence that documents these conditions. Moreover, although the acupuncturist states that the applicant's spouse cannot do a lot of work in or outside his home and must rest, he fails to offer any detail as to the limitations placed on the applicant's spouse by his back problems. The AAO also notes that, although the spouse claims that relocation to China would mean he would be unable to obtain the advanced medical treatment he has in the United States, the medical documentation in the record indicates only that he is being treated with acupuncture with electric stimulation, traditional Chinese massage and infra-red heat. While the published reports in the record indicate that China is struggling with exorbitant and rising medical costs, a poor public healthcare system and the limited availability of modern medical technology and treatment, they do not address access to traditional Chinese medicine, the type of treatment being received by the applicant's spouse. Accordingly, the record does not provide a clear indication of the medical problems facing the applicant's spouse or how they limit his ability to function on a daily basis. Further, the record does not establish that he could not continue to receive acupuncture treatment in China.

While the record contains documentation relating to the Chinese government's family planning policies, the AAO does not find it sufficient to support the claims made by counsel and the applicant regarding the Chinese government's treatment of the applicant and her spouse should they return to China with their two children. The documentation in the record, which includes numerous Chinese government policy statements, media reports and analyses of China's one-child policy, dates from the 1970s to 1999, and was submitted in support of a prior asylum claim filed by the applicant. No more recent country conditions reports on China's family planning policies were submitted in support of the applicant's appeal. Therefore, although the AAO notes counsel's claim that the applicant's spouse would be sterilized upon return to China, it finds the record's dated country conditions materials to be insufficient proof of counsel's claim. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The 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). For this same reason, the AAO also finds the applicant's claims that she would be forcibly sterilized if she returned to China with her children to be unsupported by the record. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See *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)). Moreover, the AAO notes that hardship to the applicant is not considered in I-601 waiver proceedings, except to the extent that it would affect her spouse.

For the reasons just noted, the AAO does not find the record to establish that the applicant's spouse would experience extreme hardship if he returned to China with the applicant.

The second part of the analysis requires the applicant to establish extreme hardship in the event that her spouse remains in the United States following her removal. In his February 27, 2009 affidavit, the applicant's spouse states that the applicant has been caring for him since he began to have health problems and that she has assumed all the household chores so that he is able to rest after a day of work. He also reports that his doctor told him that his medical treatment would be lengthy and that

he would need the applicant to help him. The applicant's spouse further asserts that married individuals are healthier and happier than unmarried people, that he was born with very traditional values and that his tradition would "shun" the separation of a husband and wife. As previously discussed, the record does not contain sufficient evidence to establish the exact nature of the applicant's spouse's medical problems or the limitations these medical problems place on his ability to function on a daily basis. Neither does it include any documentation that supports the applicant's spouse's claim that he requires the applicant's care. The record also fails to offer any documentary evidence in support of the applicant's spouse's claim that his traditions do not accept the separation of a husband and wife or how he would be affected if these traditions were broken by the removal of the applicant. The record does include a report from the U.S. Department of Health and Human Services that supports the assertions made by the applicant's spouse that married individuals are healthier than their unmarried counterparts. However, while the AAO acknowledges this evidence, it is not proof that the applicant's spouse would experience extreme hardship if he and the applicant were separated.

When reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors cited above, the record does not support a finding that the applicant's spouse would face extreme hardship if the applicant were removed and she remained in the United States. Rather, the record demonstrates that he would experience the distress and difficulties normally associated with the removal of a spouse. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection, and emotional and social interdependence. While separation nearly always results in considerable hardship to the individuals and families involved, the Congress, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," did not intend that a waiver be granted in every case where a qualifying relationship and, thus, familial and emotional bonds exist. The point made in this and prior AAO decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(i) of the Act, be above and beyond the normal, expected hardship involved in such cases.

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 removal from 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.