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U.S. Citizenship
and Immigration
Services

H-2

[Redacted]

FILE:

[Redacted]

Office: PANAMA CITY, PANAMA

Date:

MAR 13 2009

(Consolidated)

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), 8 U.S.C. section 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 or reopen, 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 Acting Officer in Charge (OIC), Panama City, Panama. The denial was appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen/reconsider. The matter will be reopened. The previous decision of the AAO will be affirmed and the waiver application denied.

The applicant is a native and citizen of India who was found 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 to the United States by fraud or willful misrepresentation. The applicant is the beneficiary of an approved Petition for Alien Relative (I-130) filed by his lawful permanent resident (LPR) spouse, [REDACTED], and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with his spouse.

The record reflects that the applicant was first admitted to the United States in B-2 visitor status on August 25, 1990 and granted a period of authorized stay expiring on February 24, 1991. On April 23, 1994, the applicant allegedly married [REDACTED] in the United States. The applicant has disputed that he was ever married to [REDACTED]. In a letter to the OIC dated September 9, 2004, the applicant's spouse stated that the applicant never met [REDACTED] but only gave "a copy of his passport to an Indu Lawyer by the name of [REDACTED] for the purpose of obtaining a working permit." On August 8, 1995, [REDACTED] filed a Form I-130 naming the applicant as beneficiary. An Application to Register Permanent Resident or Adjust Status (Form I-485) purportedly signed by the applicant was filed on the same date. On July 30, 1996, the District Director of the New York District found that documents submitted in support of the Form I-130, the birth certificate of Ms. [REDACTED] and the marriage certificate, were fraudulent, and denied the Form I-130 and Form I-485 accordingly. On August 6, 1996, the applicant purchased the [REDACTED] in Brookhaven, Mississippi. The applicant subsequently departed the United States.

The record reflects that the applicant was issued a B-2 visa on January 16, 1998 at the U.S. Embassy in Panama. The applicant was admitted to the United States in B-2 status on January 22, 1998 and again on March 26, 1998, with a period of authorized stay expiring on September 25, 1998. The applicant applied for and was granted an extension of stay through April 8, 1999. On January 8, 2000, the applicant was apprehended by the Border Patrol at his business and placed in removal proceedings as deportable for remaining in the United States without authorization in violation of section 237(a)(1)(B) of the Act. On February 7, 2000, the immigration judge granted the applicant "pre-hearing" voluntary departure until April 7, 2000. On March 21, 2000, the applicant requested an extension of the required departure date on the grounds that he needed more time to train his father-in-law to operate his business. The request was granted through May 30, 2000. On May 20, 2000, the applicant departed the United States.

The applicant and his spouse were married on February 15, 1987 in India. The applicant's spouse filed the Form I-130 petition on or about September 6, 2002. The petition was approved on or about May 28, 2003. The applicant filed an Application for Immigrant Visa and Alien Registration (Form

DS-230) and an Application for Waiver of Grounds of Inadmissibility (Form I-601) on or after September 16, 2003.

The OIC found the applicant inadmissible under 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 under 212(a)(6)(C)(i) of the Act, for misrepresenting his immigrant intent in procuring a B-2 visa to travel to the United States. *Decision of OIC*, dated November 15, 2004. The OIC concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. *Id.*

In its prior decision, the AAO determined that the applicant had been unlawfully present in the United States for less than one year, and was thus not inadmissible under section 212(a)(9)(B)(i)(I) because he was seeking admission more than three years after his departure from the United States. *AAO Decision*, dated May 12, 2006 at 3. The AAO determined that the applicant is inadmissible under section 212(a)(6)(C)(i) for misrepresenting a material fact in seeking to procure a visa. *Id.* The AAO reviewed the evidence in the record, which included affidavits, a psychological evaluation, letters of recommendation, and other documentation, and determined that the applicant had failed to show that the bar to the applicant's admission would result in extreme hardship to his spouse as required by section 212(i) of the Act. *Id.* at 3-5.

In support of the motion to reopen, counsel submits a psychological evaluation of the applicant's spouse dated September 14, 2006 from [REDACTED]; school records for the applicant's children; letters from the applicant's children; and a letter dated May 25, 2006 from [REDACTED] physician to the applicant's spouse. Counsel asserts that this evidence demonstrates that the applicant's spouse is suffering and will continue to suffer extreme hardship if the applicant is not granted a waiver of inadmissibility. *Brief in Support of Motion to Reopen/Reconsider*, dated June 7, 2006. Counsel further contends that if the applicant's spouse relocated to India or Panama to join the applicant, she would be forced to sell her motel, which supports the family. *Id.* Counsel further contends that the applicant's children are adapted to the United States, and that relocating to Panama would have a "deleterious effect" on their well-being. *Id.*

The regulation at 8 C.F.R. § 103.5 states in pertinent part:

(a) Motions to reopen or reconsider

(2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.

(3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

(4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed

Although the evidence submitted by counsel presents new facts that warrant reopening the matter, the AAO finds that this evidence is nonetheless insufficient to establish extreme hardship to the applicant's spouse and to overcome the reasons given in the AAO's previous decision for denying the waiver application.

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.

In *Matter of S- and B-C-*, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961), the elements of material misrepresentation are defined as follows:

A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

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 result in proper determination that he be excluded.

As stated above, the record reflects that the applicant had previously purchased and was operating a motel in the United States when he procured a nonimmigrant visa on January 16, 1998 to travel to the United States. If it had been known that the applicant had been residing and operating a business in the United States, and intended to continue doing so rather than to merely visit the United States as a tourist, he would have been denied a nonimmigrant visa on the basis that he was an intending immigrant. The applicant has not disputed on the present motion that he is inadmissible under section 212(a)(6)(C) of the Act.

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.

A waiver of inadmissibility under section 212(i) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant and his children is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The only qualifying relative is the applicant's U.S. citizen spouse. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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 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).

U.S. courts have stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a

series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

In her evaluation, [REDACTED] indicates that the applicant’s spouse is “significantly depressed at this time and needs the help of her husband.” Dr. [REDACTED] indicates that he has been treating the applicant for chronic recurrent pain in her upper back since January 2006, which he believes is due to overuse at work. Dr. [REDACTED] further states that he has advised the applicant’s spouse to get help in lifting and moving heavy objects, but that “the financial realities of her business will not allow her to hire additional help.”

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant’s spouse faces extreme hardship if the applicant is not granted a waiver of inadmissibility.

In rendering its prior decision, the AAO considered a psychological evaluation from [REDACTED], who also indicated that the applicant’s spouse suffers from depression. The AAO stated that the “record contains no medical or other documentation that would establish that the applicant’s wife is more negatively affected by the applicant’s absence than other spouses of removed individuals.” The AAO acknowledges that the applicant has now submitted sufficient evidence showing that his spouse suffers from depression and chronic back pain, and that these conditions are related to her separation from the applicant, and the loss of his assistance in managing the hotel they own. The AAO finds that the applicant is currently experiencing extreme hardship that would be alleviated if the applicant were present in the United States.

However, the applicant has not demonstrated that his spouse would experience extreme hardship if she relocated to Panama or India to live with the applicant. The record shows that the applicant’s spouse is a native of India and has lived in both India and Panama, where the applicant currently resides. The AAO acknowledges that the applicant’s spouse would likely have to sell her hotel if she left the United States, but she has not demonstrated that she and the applicant would be unable to support themselves and their children outside the United States. Regardless, the mere loss of current employment or the inability to maintain one’s present standard of living or pursue a chosen profession does not constitute extreme hardship. *Matter of Pilch*, 21 I. & N. Dec. 627, 631 (BIA 1996).

Neither has the applicant demonstrated that the impact of conditions in Panama or India on their children would result in extreme hardship to his spouse. 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)). Likewise, without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. 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).

As stated in the previous decision, the AAO acknowledges that the applicant's spouse would be separated from members of her immediate family if she left the United States, but concludes that this hardship is the common result of removal or inadmissibility. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). 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.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to his lawful permanent resident spouse as required under section 212(i) of the Act. 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(i) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. The previous decision of the AAO will be affirmed and the waiver application denied.

ORDER: The previous decision of the AAO is affirmed and the waiver application denied.