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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**

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[REDACTED]

FILE:

[REDACTED]

Office: ATLANTA

Date:

NOV 04 2009

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under sections 212(i) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(i) and 1182(h)

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).

Michael Shumway

for

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant, [REDACTED] is a native and citizen of Nigeria. She was found to be inadmissible to the United States pursuant to sections 212(a)(6)(C)(i) and 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(2)(A)(i)(I). The applicant seeks a waiver of inadmissibility pursuant to sections 212(i) and 212(h) of the Act, 8 U.S.C. §§ 1182(i) and 1182(h), in order to remain in the United States with her United States citizen spouse and parents.

The director concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel asserts that the applicant has never submitted a document to the Service that she knew to be fraudulent. Counsel further asserts that the applicant has received a full and unconditional pardon from the Georgia Board of Pardons and Paroles for her criminal convictions. Counsel states that even if the applicant is required to obtain a waiver pursuant to section 212(i) or 212(h), she has made a showing of extreme hardship as required by the Immigration and Nationality Act.

In support of the application, the record contains, but is not limited to, medical documentation, affidavits from the applicant's parents, a pardon from the Georgia State Board of Pardons and Paroles, and records related to the applicant's birth. The entire record was reviewed and considered in rendering a decision on the appeal.

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

- (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:

- (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(a)(2)(A) of the Act states, in pertinent part:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if—

....

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

Sections 212(i) and 212(h) of the Act waivers of the bar to admission, resulting from the respective violations of sections 212(a)(6)(C)(i) and 212(a)(2)(A)(i)(I) of the Act, are dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the alien herself experiences upon refusal of admission is irrelevant to sections 212(i) and 212(h) waiver proceedings. 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 record establishes that the applicant submitted a fraudulent Nigerian birth certificate in support of the Petition for Alien Relative (Form I-130) filed on her behalf by her U.S. citizen spouse and her Application to Adjust Status (Form I-485). The director denied the applicant's Form I-485 application and her spouse's Form I-130 petition, accordingly. The applicant subsequently obtained a record of her birth from the Delta State Hospitals Management Board, Sapele Medical Zone, Central Hospital, Nigeria. According to the U.S. Department of State's Reciprocity Schedule for Nigeria, acceptable identity/parentage documents are infant baptismal certificates and hospital or maternity clinic records of birth.¹

¹ http://travel.state.gov/visa/frvi/reciprocity/reciprocity_3640.html

On October 18, 2001, the applicant's spouse filed a second Form I-130 petition, which was approved on September 20, 2004. The applicant filed a Form I-485 application based on the underlying approved Form I-130 petition on July 22, 2005. On December 20, 2006, the director denied the applicant's Form I-485 application. In denying the application, the director stated that the applicant was previously denied adjustment of status because she submitted a fraudulently obtained birth certificate to the Service to obtain a benefit. The director concluded that the applicant is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act on this basis.

On appeal, counsel contends that the applicant had no intent to present fraudulent documents. Counsel states that the matters regarding the applicant's birth certificate have been ongoing for many years, and during this time, the applicant has maintained her innocence. Counsel states that the applicant has obtained affidavits from officials explaining what happened as well as affidavits from family members who explained the circumstances of her birth. Counsel states that all of these documents establish her identity and the fact that she has not intentionally presented any fraudulent obtained documents.

The AAO does not find the applicant's submission of a fraudulent birth certificate, whether or not intentional, to be a material misrepresentation. The Board of Immigration Appeals (BIA) articulated the test for materiality in *Matter of S- and B-C-* as "(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 have resulted in a proper determination that he be excluded." 9 I&N Dec. 436, 447 (BIA 1960). Pursuant to the first part of this test, the applicant is not excludable based on the true facts. The AAO notes that the true facts of the applicant's birth were accurately recorded on the fraudulent birth registration. Further, the misrepresentation is not material under the second part of the test because the record does not show that her presentation of a fraudulent birth certificate shut off a line of inquiry relevant to her eligibility that could have resulted in her exclusion from the United States. A misrepresentation is generally material only if by it the alien received a benefit for which she would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988). The applicant did not provide false information or conceal her identity, but rather, presented a false document containing her correct identifying information. Therefore, the applicant's submission of a fraudulent birth certificate is not a material misrepresentation that renders the applicant inadmissible under section 212(a)(6)(C)(i) of the Act.

The director also found the applicant inadmissible for having been convicted of two crimes involving moral turpitude. The applicant has not disputed this determination on appeal. The record reflects that on August 13, 1998, the applicant was convicted in DeKalb Superior Court, Georgia, of *theft by deception* (computer theft) (Count 1) and *theft by shoplifting* (Count 2). The applicant was sentenced to three years probation for each count and a fine of \$500 restitution (). On August 16, 2001, the applicant's sentence was terminated. The AAO has reviewed the statutes, case law and other documents related to these convictions, as well as the relevant precedent decisions from the Board of Immigration Appeals and the courts. The AAO concurs with the director that the applicant has been convicted of two crimes involving moral turpitude and is therefore inadmissible under section 212(a)(2)(A)(i) of the Act.

On appeal, counsel asserts that the applicant has not committed crimes involving moral turpitude because she received a pardon from the Georgia Board of Pardons and Paroles, so she is not required to obtain a waiver pursuant to section 212(h) of the Act. Counsel contends that the Supreme Court decision in *Ex parte Garland*, 71 U.S. 333, 380 (1866), holds that a full pardon “releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense.” Counsel states that in *Matter of Tajer*, 15 I&N Dec. 125 (BIA 1954), BIA held that a pardon by the Georgia Board of Pardons and Paroles is full and unconditional and it is executively granted. Counsel states that the applicant received a pardon for her convictions from the Georgia Board of Pardons and Paroles. Counsel states that according to the U.S. Supreme Court and the State of Georgia, the applicant no longer stands convicted of these crimes. Counsel contends that it was in error for the director to find that the same crimes make the applicant inadmissible to the United States. As supporting evidence, counsel furnished the applicant’s pardon from the Georgia State Board of Pardons and Paroles for her August 13, 1998 convictions for *theft by deception* and *theft by shoplifting*.

The AAO does not find counsel’s reasoning persuasive. In an analogous case, *Yuen v. INS*, the Ninth Circuit Court of Appeals addressed the applicability of the U.S. Supreme Court’s decision in *Ex parte Garland* to a deportation case involving a narcotics offense and held:

It is true that, in *Ex parte Garland*, 71 U.S. 333, 18 L.Ed. 366, upon which petitioner heavily relies for his authority on the effect of a pardon, there is broad language to the effect that Congress cannot fix punishment beyond the reach of executive clemency, or consequences which attach to a conviction beyond the reach of executive clemency. But the Court was there speaking of federal executive clemency, not state. Moreover, *Garland* and like cases deal with the effect of a pardon in releasing an offender from punishment. Accepting as true the premise that a pardon, full and unconditional, federal or state, exempts the convicted person from punishment, it does not thereby exempt such person from deportation. . . .

406 F.2d 499, 501-02 (9th Cir. 1969).

Furthermore, the BIA’s decision in *Matter of Tajer* involved an alien who was charged with deportation, not inadmissibility. Section 237(a)(2)(A)(vi) of the Act, 8 U.S.C. § 1227(a)(2)(A)(vi), provides for a waiver of certain grounds of *deportability* on the basis of executive pardons, but section 212 of the Act contains no equivalent waiver provision pertaining to the criminal grounds of *inadmissibility*. As the applicant’s case is not a waiver application under section 237(a)(2)(A)(vi) of the Act, her pardon does not waive her inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

Finally, the AAO notes that in *Matter of Pickering*, the BIA held that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains “convicted” for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). It appears from the record that the applicant’s pardon was not based on any defect in the

conviction or in the proceedings underlying the conviction. Thus, the applicant remains “convicted” within the meaning of section 101(a)(48)(A) of the Act, 8 U.S.C. §1101(a)(48)(A).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

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).

The AAO notes that in *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, “the most important single hardship factor may be the separation of the alien from family living in the United States”, and that, “[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.” (Citations omitted). Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO notes further, however, that 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, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

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.

On appeal, counsel asserts that the applicant's father has degenerative heart failure, hypertension and severe arthritis. Counsel states that the applicant's father takes eight medications a day and receives transcutaneous electrical nerve stimulation treatment each day for pain. Counsel states that the applicant administers this nerve treatment to her father. Counsel states that the applicant also provides nutritious meals for her father's special diet and she transports him to doctor's appointments and other locations. Counsel states that the applicant's mother has hypertension and the applicant cares for her. Counsel states that the applicant's parents live with the applicant and the applicant pays their bills and food.

The record contains affidavits from the applicant's mother and father, both dated January 20, 2006. The applicant's mother states that she has been diagnosed with hypertension and takes daily medication for this condition. She states that in November 2004 she broke her foot and still feels pain in her foot from this injury. She states that the applicant provides transportation for her to go to work, doctor's appointments, the pharmacy, and other locations. She states that the applicant picks up and pays for her medication. She states that the applicant pays the home mortgage and food. The applicant's father states that he has pain in his knee from arthritis. He states that in 1998 he was diagnosed with hypertension and in 1999 he was diagnosed with degenerative heart failure. He states that as a result of his health problems he takes eight medications daily and has transcutaneous electrical nerve stimulation treatment for daily for pain. He states that he has lived with his daughter for the past seven years, and she prepares his meals for his special diet. He states that the applicant administers the transcutaneous electrical nerve stimulation treatment he takes to manage his pain to ease his daily pain. He states that the applicant provides transportation to his doctor's appointments, the pharmacy, and other locations.

The AAO will consider medical hardship to the applicant's parents as a factor in establishing extreme hardship, but such hardship must be documented in the record. Here, the applicant has failed to demonstrate with sufficient and relevant documentation that her parents are suffering from medical condition(s) that amount to a finding of extreme hardship if the applicant is denied admission to the United States. As corroborating evidence the applicant submitted copies of her father's medical records, which consist of an electrocardiogram (ECG) report, lab reports and physician notes. The AAO observes that the record does not contain any type of medical correspondence interpreting the findings of the ECG and lab tests and their significance. Similarly, the physician notes, which appear to contain data on the applicant's father's medical history, diagnosis, and treatment plans, are written in medical jargon with illegible handwriting. As such, the AAO cannot determine whether these documents corroborate the applicant's parents' assertions. The record does not contain legible correspondence from the applicant's parents' treating physician(s) detailing their medical conditions, treatment plans, and the need for a caretaker. 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)). While the applicant's parents' unsupported assertions are relevant and have been considered, they are of little weight in the absence of supporting evidence.

The AAO has considered the assertions regarding financial hardship to the applicant's parents and observes that the applicant's parents are residing not only with the applicant, but also with her husband. Further, the applicant indicated on her waiver application that she has a U.S. citizen sister, [REDACTED] who resides in Duluth, Georgia. The record does not mention whether the applicant's parents would reside with the applicant's husband, if he remained, or her sister if the applicant is denied a waiver and is compelled to depart the United States. Moreover, according to the applicant's mother's affidavit, she is currently employed. The record does not demonstrate the applicant's parents' expenses and the applicant's mother's income. As such, the AAO does not have sufficient documentation to fully assess the applicant's parents' financial situation. As stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Although the applicant's parents' unsupported assertions are relevant and have been considered, they cannot alone be considered probative for purposes of these proceedings.

Counsel asserts that the applicant's parents do not have family ties outside the United States. Counsel states that they have no intention of returning to Nigeria. Counsel states that they would find it extremely difficult to readjust to life in Nigeria after being in the United States for so long. However, this is insufficient to demonstrate that they would experience extreme hardship if they relocated there.

The AAO notes first that United States court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. The Ninth Circuit Court of Appeals in *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), held 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. Second, counsel's assertion that the applicant's parents would find it extremely difficult to readjust to life in Nigeria after being in the United States for so long is a broad generalization. Counsel has failed to quantify the anticipated hardship the applicant's parents would suffer in their native county of Nigeria with concrete examples or references to specific concerns. Accordingly, the AAO cannot conclude that the applicant's parents would suffer extreme hardship if they relocated to Nigeria.

Finally, the AAO notes that the applicant listed her U.S. citizen husband, [REDACTED] as a qualifying relative on her waiver application; however, she failed to present any evidence of hardship to her husband if she departs the United States as a result of her inadmissibility. Therefore, based on the current record, the AAO cannot determine whether the applicant's spouse would suffer extreme hardship if the applicant's waiver is denied and he remains in the United States without the applicant or relocates with her to Nigeria.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's qualifying family members, 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 eligibility for a waiver of inadmissibility under section 212(h) of the Act. 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(h) of the Act, the burden of establishing that the application merits approval 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.