



U.S. Citizenship
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FILE:

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Office: BALTIMORE

Date:

NOV 19 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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of the 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 entry into the United States by fraud or willful misrepresentation. The applicant is married to a naturalized U.S. citizen 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 her U.S. citizen spouse and children.

The record reflects that on April 30, 2004, the applicant filed an Application for Waiver of Ground of Excludability (Form I-601) with the District Office. The director denied the applicant's Form I-601 application on January 23, 2006, concluding that the applicant failed to meet her burden in establishing that the refusal of her admission would result in extreme hardship to her U.S. citizen spouse and children. The director noted that the applicant's Application to Register Permanent Residence or Adjust Status (Form I-485) was denied on April 2, 2004, prior to the filing of her Form I-601 application.

A Form I-601 application for a waiver of inadmissibility is viable when filed with a pending immigrant visa application or adjustment of status application. *See* 8 C.F.R. § 212.7(a). Upon the denial of the applicant's Form I-485 adjustment application, she no longer had an underlying application to support the filing of her Form I-601. However, the record reflects that former counsel filed a motion to reopen the applicant's Form I-485 concurrently with the filing of her Form I-601. Although the district director failed to issue a decision on the motion to reopen, a decision on the Form I-601 was issued on its merits, indicating that the Form I-485 was reopened for purposes of adjudicating the Form I-601. Therefore, the AAO will consider the appeal of the decision denying the Form I-601.

On appeal, counsel asserts that the director failed to consider the psychological effect of the applicant's departure on her children. Counsel states that the director failed to properly consider the hardship the applicant's spouse would suffer having to care for three motherless children of such a tender age. Counsel contends that the director's decision was capricious because it did not fully consider this situation.

In support of the application, the record contains, but is not limited to, a copy of the applicant's marriage certificate, a copy of the applicant's spouse's naturalization certificate, copies of the applicant's children's birth certificates, an affidavit from the applicant's spouse, financial documentation, and letters from the applicant's friends. The entire record was reviewed and considered in rendering this decision.

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 November 10, 2003, the director issued a Notice of Intent to Deny (NOID) the applicant's Form I-485 application. The director found the applicant to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for seeking to procure admission into the United States with a fraudulent document.

On December 8, 2003, former counsel issued a rebuttal to the NOID. Former counsel asserted that the applicant did not intentionally commit fraud or materially misrepresent herself before the customs officer (immigration inspector) at the airport. Former counsel contended that when the applicant was questioned about her passport she informed the officer that the passport was not hers and she paid money for it.

On April 2, 2004, the director denied the applicant's Form I-485 application. In denying the application, the director stated that the applicant's record reflects that the applicant presented a fraudulent passport to an immigration officer upon her arrival, and only admitted that the passport was fraudulent after she was questioned by the inspection officer. The director determined that the applicant is inadmissible to the United States pursuant to section 212(a)(6)(C) of the Act on this basis.

Upon review of the record, the AAO concurs with the director's determination. The Board of Immigration Appeals (BIA) in *Matter of Y-G-*, 20 I&N Dec. 794, 797 (BIA 1994), determined that an alien with fraudulent admission documents who "testified that when he came to the United States, he did not lie, but instead gave his real name, stated that the documents he possessed were not his own, and gave the address of family members who would help him" was not inadmissible under section 212(a)(6)(C)(i) of the Act. The record in the instant case reflects that the applicant admitted her documents were fraudulent only after an immigration inspector questioned her about their authenticity. The immigration inspector's memorandum to the file provides, "Subject arrived via CI Air on Sept 06 1993 and presented a Singapore passport with the number [REDACTED] and a B1/B2 visa for the United States issued in Singapore with number [REDACTED]. Both the passport & visa are

counterfeit. The visa is counterfeit because it is a rubber stamp.” Nothing in the record indicates that the applicant admitted the falseness of her passport immediately and voluntarily. *See Ymeri v. Ashcroft*, 387 F.3d 12, 18-20 (1st. Cir. 2004). Therefore, the AAO agrees with the director’s determination that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant has not disputed her inadmissibility on appeal.

A section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C) of the Act is 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 deportation is irrelevant to section 212(i) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant’s husband. 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 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 BIA 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 United States 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).

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.

The record reflects that the applicant wed [REDACTED], a native of China who is a naturalized U.S. citizen, on March 12, 1999. The applicant’s spouse is a qualifying family member for section 212(i) of the Act extreme hardship purposes. The applicant and her spouse have a nine-year-old U.S. citizen child, [REDACTED] and a seven-year-old U.S. citizen child, [REDACTED]. At the time the applicant filed her Notice of Appeal (Form I-290B), she was pregnant with her third child, with an August 2, 2006 expected date of delivery. Hardship to the applicant’s children will be considered insofar as it results in hardship to the applicant’s spouse.

On appeal, counsel asserts that the director failed to consider the psychological effect of the applicant's departure on her children. Counsel states that the director failed to properly consider the hardship the applicant's spouse would suffer having to care for three motherless children of such a tender age. Counsel contends that the director's decision was capricious because it did not fully consider this situation. The record contains an affidavit the applicant's spouse initially filed with the waiver application, dated April 24, 2004. The applicant's spouse states in his letter that if his wife is sent back to China, his daughters will cry and look for their mother everyday. He states that he cannot imagine the future of a child who does not have a mother with her when she grows up. He states that his daughters are still young and will not understand the reason their mother is gone.

The AAO recognizes that the applicant's spouse and children will suffer emotionally as a result of their separation from the applicant. Their situation, however, is typical of individuals separated as a result of removal or inadmissibility and does not rise to the level of extreme hardship based on the record. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. The point made in this and prior 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 be above and beyond the normal, expected hardship involved in such cases. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991); *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship).

The applicant's spouse states that he and his wife have a house and own a Chinese carry-out restaurant, Top China, in Baltimore, Maryland. He states that he and his wife are the only people who work together in the restaurant during the weekdays, and they have one more person work for them during the weekends. He states that his wife takes care of the cash register, cooks, packs orders, and deals with miscellaneous matters. He states that since it is only a carry-out restaurant, they do not pay high wages, and therefore, it is hard to find workers. He states that if his wife has to go back to China, it will definitely create a financial situation that affects their life seriously.

The AAO will consider financial hardship as a factor contributing to a finding of extreme hardship. However, such assertions must be documented in the record. In the present case, the applicant's spouse's assertion that another individual would not be able to perform his wife's duties at their restaurant is purely speculative. The applicant's spouse has failed to provide concrete examples of his failed attempts at hiring new employees to assist with his restaurant. Further, the AAO notes that the financial loss that would result from hiring a new employee does not, alone, rise to the level of extreme hardship. U.S. courts have held that demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members

and financial difficulties alone do not establish extreme hardship); *Shoostary v. INS*, 39 F.3d 1049 (9th Cir. 1994) (“the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances.”).

Finally, the applicant's spouse states that he hopes his daughters can receive their education in the United States. He states that he believes that the education system in the United States is much better than China. He states that he does not want his daughters to go back to China with their mother because they were both born in the United States, and the United States is where they call “home,” while China is unfamiliar to them.

The AAO notes that the aforementioned statements address the hardship that the applicant's children would suffer if the applicant were refused admission. Section 212(i) of the Act provides that a waiver of inadmissibility under section 212(a)(6)(C)(i) of the Act is applicable solely where the applicant establishes extreme hardship to his or her U.S. citizen or lawful permanent resident spouse or parent. Congress excluded from consideration extreme hardship to an applicant's child. In the present case, the applicant's spouse is the only qualifying relative under the statute, and the only relative for whom the hardship determination is permissible.

The AAO notes further that the applicant's spouse has only discussed the hardship he would suffer if he remains in the United States separated from the applicant. The applicant's spouse has not asserted, or submitted evidence to demonstrate, that he would suffer extreme hardship in his native country of China if he relocated with his children there. Accordingly, the AAO cannot determine that the applicant's spouse would suffer extreme hardship if he relocated to China.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's spouse, 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(i) 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(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.