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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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Services

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FILE:



Office: LOS ANGELES, CA

Date:

MAR 09 2010

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the
Immigration and Nationality Act, 8 U.S.C. section 1182(h)

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director (FOD), Los Angeles, California. 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. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) for having been convicted of a Crime Involving Moral Turpitude (CIMT). The applicant is the husband of a U.S. citizen and has two U.S. citizen children. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to remain in the United States.

The FOD concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on November 2, 2009.

On appeal, counsel for the applicant asserts that the FOD misapplied precedent, incorrectly weighed the evidence in the record, and that the applicant's spouse and children would experience extreme hardship if his waiver application is denied.

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, that:

(h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -

....

(1) (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 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

The record indicates that the applicant was convicted of Conspiracy to Commit Offense or Defraud the United States, 18 U.S.C. § 371, for conspiring to file a fraudulent tax return, on May 31, 2007. The applicant's conviction was for an amount over \$100,000, punishable by up to five years imprisonment. A conviction under 18 U.S.C. § 371 is a CIMT. *Matter of M-*, 8 I&N Dec. 535 (BIA)

1960); *Matter of E-*, 9 I&N Dec. 421 (BIA 1961); *Costello v. INS*, 311 F.2d 343 (Ca. 1962).¹ The applicant does not contest this finding.

A waiver of inadmissibility under section 212(h) 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, parent or child of the applicant. Hardship to the applicant is not directly relevant to the determination of extreme hardship under the statute and is considered only insofar as it results in hardship to a qualifying relative, in this case the applicant's U.S. citizen spouse and children.² If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted.

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).

The AAO notes that extreme hardship to a qualifying relative must be established whether he or she relocates with the applicant or remains in the United States, as a qualifying relative is not required to reside outside the United States based on the denial of the applicant's waiver request.

The record contains documents relating to the Form I-130 filed on behalf of the applicant, as well as his previous employment authorization requests. With regard to the applicant's Form I-601 the record includes, but is not limited to, briefs from counsel; a statement from the applicant's spouse; a

¹ The applicant has two additional convictions; On March 10, 2003, he was convicted of Hiring Unauthorized Aliens in violation of 8 U.S.C. § 1324(a)(3)(A), and on June 9, 2003, he was convicted of Harboring Illegal Aliens in violation of 8 U.S.C. § 1324(a)(1)(iii). Neither of these crimes are CIMTs, and, as such, do not render him inadmissible under 212(a)(2)(A)(i)(I). *Matter of Tiwari*, 19 I&N Dec. 875 (BIA 1989).

² The record also indicates that the applicant's father may be a lawful permanent resident of the United States and, therefore, a qualifying relative for the purposes of this proceeding. The record, however, contains no documentation that establishes his status. Accordingly, the AAO will not consider the impact of the applicant's inadmissibility on his father.

psychological assessment of the applicant's spouse by [REDACTED] a translated copy of the applicant's birth certificate; a copy of the applicant's spouse's naturalization certificate; a copy of the applicant's marriage license; copies of school records pertaining to the applicant's children; copies of the applicant's children's birth certificates; copies of bank records, tax returns and other financial documentation for the applicant and his spouse; photographs of the applicant, his spouse and their children; and court records pertaining to the applicant's convictions.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

Counsel for the applicant asserts on appeal that the FOD misapplied relevant precedent and addresses factual distinctions between the cited cases and the applicant's case. The AAO finds, however, that the cases cited by the FOD were not relied upon for their factual relevance or holdings, but for the guidance they provide in defining extreme hardship, the standard that governs this proceeding. *In Re Monreal-Aguinaga*, 23 I&N Dec. 56 (BIA 2001); *Re Cervantes-Gonzalez*, 22 I & N Dec. 560, 565 (BIA 1999).

Counsel further asserts that the applicant's due process rights have been violated by the FOD's failure to properly weigh the evidence, including hardship relating to the applicant's children. The AAO notes the FOD's failure to identify the applicant's children as qualifying relatives, but does not find this error to have resulted in prejudice that prevented the FOD from reaching the appropriate decision in this case. Furthermore, even if the AAO were to agree that the FOD had violated the applicant's procedural due process rights, it is not clear what remedy would be appropriate beyond the de novo consideration of the applicant's waiver application that is provided on appeal.

With regard to extreme hardship, the applicant's spouse asserts that she is completely dependent on the applicant, as are her children, and that they would experience social, financial and emotional hardship if he is excluded and they remain in the United States. In support of the applicant's spouse's assertion of emotional hardship, the record contains a psychological assessment by [REDACTED]. In his evaluation, [REDACTED] recounts the applicant and his spouse's backgrounds and discusses the applicant's spouse's testimony regarding her dependency on the applicant, as well as what he finds to be symptoms of depression, including her tendency to sleep excessively. [REDACTED] concludes that the applicant's spouse is suffering from Adjustment Disorder with Depressed Mood. He further finds that removing the applicant from the United States would have a devastatingly negative psychological impact on his wife and children. [REDACTED] also observes that, although the applicant's spouse denied that she had ever considered suicide, her statements during their interviews point the way to an emotional crisis and depression. He notes that deep depression may lead to suicidal ideation.

While the AAO acknowledges [REDACTED] conclusions, it does not find the submitted evaluation to support the conclusion that the applicant's spouse and/or children would experience extreme emotional hardship if the applicant were to be excluded. Although the input of any mental health professional is respected and valuable, the AAO notes that [REDACTED] report is based on two interviews of the applicant's spouse, one a joint interview with the applicant. Accordingly, it does not find the evaluation of the applicant's spouse to reflect the insight and elaboration commensurate with an established relationship with a mental health professional, thereby rendering its findings speculative and of diminished value to a determination of extreme hardship. Further, in

that the record contains no evidence that [REDACTED] interviewed or evaluated the applicant's children, the AAO will not accept his conclusions concerning their reaction to the applicant's removal.

The AAO also finds that the applicant's spouse's assertions of financial hardship are not sufficiently supported by the record. While the applicant's spouse states that she has stayed at home to care for her children and is dependent on the applicant financially, the AAO notes that the record contains a November 22, 2003 letter from [REDACTED] who indicates that the applicant's spouse is working for him as an assistance manager and has broad managerial skills. It also observes that the applicant's spouse informed [REDACTED] during her 2007 interviews that she had been handling advertising for a restaurant since she was 30 years old, i.e., since 2002. Accordingly, the record fails to establish that the applicant's spouse would be unable to obtain employment in the applicant's absence. Moreover, the record does not demonstrate that the applicant would be unable to find employment in China and financially assist his family from outside the United States. Although the applicant's spouse states that the applicant would have a difficult time finding work in China because he has no formal education or training and would be unable to earn enough money to support himself and his family in the United States, the record contains no documentary evidence in support of these claims. 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)). Even in a light most favorable to the applicant and accepting the applicant's spouse's assertions of financial hardship, the AAO would note that most relatives of excluded aliens will experience some degree of financial hardship, and there is no evidence that the Congress intended to remedy this by suspending the deportation of excludable aliens so that their family members could maintain their standard of living. *See Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978) (noting that the failure to maintain a standard of living was not a basis for extreme hardship). Accordingly, the record does not establish that the applicant's spouse and/or children would experience financial hardship rising above that normally experienced by the relatives of excluded aliens.

The applicant's spouse asserts that it would constitute an extreme hardship on her and her children if they were to relocate to China with the applicant. She states specifically that she has lived in the United States for over 20 years, and that she would find it unbearable to relocate to China. She also states that her children would experience extreme difficulty in adjusting to China and would not have political or religious freedom there. In her interviews with [REDACTED] the applicant's spouse indicated that her children speak some Chinese, but do not read or write Chinese and expressed her doubts that they would survive the rigors of the Chinese educational system. [REDACTED] further reports that the applicant's spouse does not have strong ties to China and, if she relocated with the applicant, she would be deprived of the support system provided by her family in the United States. [REDACTED] states that, in China, the applicant's spouse would need psychotherapy to help her live with her depression and that her children might need the same kind of support, although they might not be able to communicate with a Chinese mental health official.

Having reviewed the record, the AAO does not find it to establish that the applicant's spouse would experience extreme hardship if she relocated to China. While [REDACTED] conclusions that the applicant's spouse would experience depression if she returned to China and would require therapy

are noted, the AAO, for the reasons previously discussed, finds the submitted psychological evaluation to be insufficient proof of extreme emotional hardship. Further, it again observes that the record fails to document that the applicant or his spouse would be unable to obtain employment in China to support their family. However, the Board of Immigration Appeals (BIA) held in *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), that a 15-year-old child who had lived her entire life in the United States and was not fluent in Chinese would suffer extreme hardship if she moved with her parents to Taiwan. In making its decision, the BIA reasoned that “to uproot [her] at this stage in her education and her social development and to require her to survive in a Chinese-only environment would be a significant disruption that would constitute extreme hardship. The AAO finds the BIA’s reasoning in *Kao & Lin* to be persuasive in this case and that the relocation of the applicant’s children to China would result in impacts rising to the level of extreme hardship. However, in that the record fails to establish that they would suffer any impacts beyond those normally experienced by the relatives of excluded aliens if they remained in the United States, the applicant has not demonstrated extreme hardship to a qualifying relative.

The AAO acknowledges that the applicant’s spouse and children will experience hardship as a result of his inadmissibility. However, 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 that the record does not distinguish the hardship that would be suffered by the applicant’s spouse and children from the hardship normally experienced by others whose family members have been excluded from the United States, the applicant has failed to demonstrate extreme hardship to his spouse and/or children under section 212(h) 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(h) of the Act, the burden of proving eligibility rests with the applicant. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.