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Services

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[REDACTED]

MAR 22 2010

FILE:

Office: NEW YORK
(CONSOLIDATED)
(CONSOLIDATED)

Date:

IN RE:

Applicant: [REDACTED]

APPLICATION:

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, and 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 pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude. The applicant was further found inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having “falsely testified” before an immigration officer. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his U.S. citizen spouse and children.

The director concluded that although the applicant had established that extreme hardship would be imposed on his qualifying relatives, he did not demonstrate that he merits a favorable exercise of discretion. The director denied the waiver application accordingly. *See Decision of the District Director*, dated November 27, 2009.

On appeal, counsel asserts that the applicant’s children would suffer “loss of a home and loss of clothing and classes and emotional hardship” if the applicant departs. Counsel states, “One must consider his cooperation with INS [legacy Immigration and Naturalization Service] since 1999 which causes him to be subjected to possible harm not just to him but to his wife and 3 children.” Counsel states that the applicant “redeemed himself after he made a mistake [and] should no[t] be held to such a high standard for qualifying for this waiver.” *See Brief in Support of Appeal*, dated December 23, 2009.

In a recent supplemental affidavit the applicant filed with the AAO, the applicant asserts that he is not inadmissible under section 212(a)(6)(C)(i) of the Act because the “false and misleading testimony” in question relates to another individual. *See Affidavit of [REDACTED]*, dated February 8, 2010.

In support of the waiver application, the record contains, but is not limited to, financial documentation, country condition reports, court records, family photographs, the applicant’s marriage certificate, the applicant’s spouse’s naturalization certificate, the applicant’s children’s birth certificates, attestations from the applicant and his spouse, and supporting letters from the applicant’s father, siblings, niece and nephews. The entire record has been reviewed in rendering a decision on the appeal.

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 denying the waiver application, the director stated, “on an application for political asylum in the United States, and during an interview with an asylum officer, you falsely testified that you were married and had children in the People’s Republic of China. You further falsely testified that you were persecuted by the Chinese Government as the result of your marriage and the birth of your

children.” The director determined that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act on this basis. *See Decision of the District Director* at 2 (November 27, 2009).

In the supplemental affidavit the applicant filed on appeal he states that he filed a FOIA request and learned that the asylum application in question does not relate to him. The applicant notes that while the individual in the asylum application has the same name and birth place as him, there are several indications that the individual’s identity differs from his. He states that the asylum application shows that the individual was born on June 5, 1967, while his date of birth is May 8, 1975. He states that the individual had two children born in China, who are now almost 22 and 20 years old. He notes, “It is illogical as a 35 year old male I could have 2 sons 22 and 20. I never had children when I was 13 and 15 years old.” He also notes that in contrast to the individual in the asylum application, he “never had a wife born in 1967 who would be 44 years old.” The applicant states that the individual’s signature on the Form I-589 (asylum application) and accompanying documents contain a signature that differs in appearance from his. He also states that the photographs contained in the application are “clearly and unequivocally of a different individual.” He notes that the Chinese characters that comprises the individual’s name differs from the characters of his name. Finally, he states that his parents’ names differ from the names of the parents listed in the individual’s application. *See Affidavit of* [REDACTED] at 3-5 (February 8, 2010).

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Upon a de novo review of the record, the AAO agrees with the applicant. The record clearly reflects that the asylum application referred to in the director’s decision was not filed by the applicant and does not relate to him. Therefore, the AAO will withdraw the director’s determination that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

We will now address the next issue at hand – the applicant’s inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having committed crimes involving moral turpitude.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before

the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists

of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record shows that the applicant was convicted in the United States District Court for the Southern District of New York on July 27, 1999 of document fraud in violation of 18 U.S.C. § 1546 and 18 U.S.C. § 1028 [REDACTED]. The applicant was sentenced to a term of imprisonment for time served and placed on supervised release for a period of three years.

At the time of the applicant’s conviction, 18 U.S.C. § 1546 provided, in pertinent part:

Fraud and misuse of visas, permits, and other documents

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact--

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate [FN1] such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

(b) Whoever uses--

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

(2) an identification document knowing (or having reason to know) that the document is false, or

(3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both. . . .

The Fifth Circuit Court of Appeals in *Omagah v. Ashcroft* noted that 8 U.S.C. § 1546 encompasses both crimes which involve moral turpitude and those which do not because it punishes a spectrum of offenses, including “(1) simple, knowing possession of illegal documents, (2) possession of illegal documents with an intent to use them, and (3) forgery of illegal documents.” 288 F.3d 254, 261 (5th Cir. 2002). The BIA in *Matter of Serna* addressed whether the first offense – simple, knowing possession of illegal documents – constitutes morally turpitudinous conduct, and held, “the crime of possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude.” 20 I&N Dec. 579, 586 (BIA 1992). In *Omagah*, the Fifth Circuit addressed the second offense on the spectrum – possession of illegal documents with an intent to use them – and noted that it found reasonable “the BIA’s decision to classify, as moral turpitude, conspiracy to possess illegal immigration documents with the intent to defraud the government.” 228 F.3d at 261.

Since a conviction under 8 U.S.C. § 1546 is not categorically a crime involving moral turpitude, we will engage in a second-stage inquiry and review the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 698-699, 703-704, 708 (A.G. 2008). The record of conviction consists of documents such as

the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. 24 I&N Dec. at 698, 704, 708. The record in the instant case contains the judgment of conviction, which reflects that the applicant was convicted of the “sale of fraudulent alien registration cards” in violation of 8 U.S.C. § 1546. Further, the presentence investigation report provides, in part:

LIU admitted to the sale of approximately 10 false alien registration cards between March 1998 and April 1999. Further, LIU advised that he had negotiated the sale of approximately 100 fraudulently obtained or manufactured identification documents between February 1998 and April 1999.

Presentence Investigation Report at note 21.

The AAO finds that the applicant’s conviction involves morally turpitudinous conduct because it involves the intent to defraud the U.S. government. *See Matter of Flores*, 17 I&N Dec. 225, 230 (BIA 1980)(“We believe that the crime of uttering or selling false or counterfeit paper relating to registry of aliens with knowledge of their counterfeit nature inherently involves a deliberate deception of the government and an impairment of its lawful functions.”); *see also Jordan v. De George*, 341 U.S. 223, 232 (1951)(“The phrase “crime involving moral turpitude” has without exception been construed to embrace fraudulent conduct.”).

At the time of the applicant’s conviction, 18 U.S.C. § 1028 provided, in pertinent part:

Fraud and related activity in connection with identification documents and information

(a) Whoever, in a circumstance described in subsection (c) of this section--

(1) knowingly and without lawful authority produces an identification document or a false identification document;

(2) knowingly transfers an identification document or a false identification document knowing that such document was stolen or produced without lawful authority;

(3) knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor) or false identification documents;

(4) knowingly possesses an identification document (other than one issued lawfully for the use of the possessor) or a false identification document, with the intent such document be used to defraud the United States;

(5) knowingly produces, transfers, or possesses a document-making implement with the intent such document-making implement will be used in the production of a false identification document or another document-making implement which will be so used;

(6) knowingly possesses an identification document that is or appears to be an identification document of the United States which is stolen or produced without lawful authority knowing that such document was stolen or produced without such authority; or

(7) knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law;

shall be punished as provided in subsection (b) of this section. . . .

As previously stated, although mere possession of fraudulent immigration documents is not a crime involving moral turpitude, knowing possession with the intent to defraud the United States government is. *See Matter of H- and Y-*, 3 I&N Dec. 236 (CO. 1948); *Matter of Serna*, 20 I&N Dec. 579, 586 (BIA 1992). Section 1028 of title 18 of the United States Code encompasses crimes which involve moral turpitude and those which do not because it punishes simple possession of fraudulent immigration documents as well as the heightened offense of possession with the intent to defraud. Since 18 U.S.C. § 1028 is not categorically a crime involving moral turpitude, we will engage in a second-stage inquiry and review the record of conviction. A review of the judgment reveals that the applicant was convicted of “transferring, using and manufacturing fraudulent identification documents.” The presentence investigation report shows that the applicant was convicted of a violation of 18 U.S.C. § 1028(a)(3), “knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor) or false identification documents.” Since the applicant’s offense involves the intent to defraud the U.S. government, the AAO finds that it is a crime involving moral turpitude.

In conclusion, the AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for his convictions for the sale of fraudulent alien registration cards in violation of 18 U.S.C. § 1546, and for transferring, using and manufacturing fraudulent identification documents in violation of 18 U.S.C. § 1028, crimes involving moral turpitude. The applicant has not disputed this particular ground of inadmissibility on appeal.

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

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family

member. In this case, the relatives that qualify are the applicant's spouse and children. Hardship to the applicant himself is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In denying the application, the director concluded that although the applicant had presented evidence that his spouse and children would suffer hardship if his waiver is denied, he failed to establish that his waiver merits a favorable exercise of discretion. *See Decision of the District Director* at 3 (November 27, 2009). The AAO notes that it is not bound by the director's determination. As previously stated, the AAO maintains plenary power to review each appeal on a *de novo* basis. Therefore, the AAO, in its authority to conduct a *de novo* review of the merits of the application, will first evaluate whether the applicant has demonstrated extreme hardship to his qualifying relatives if his waiver is denied. If extreme hardship is established, the AAO will then assess if the applicant merits a favorable exercise of discretion.

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.

The record reflects that the applicant wed [REDACTED], a naturalized U.S. citizen, on January 14, 2000. The applicant and his spouse have three U.S. citizen children, a nine year old daughter [REDACTED], a seven year old daughter, [REDACTED] and a five year old son, [REDACTED]. The applicant's spouse and children are qualifying family members for section 212(h) of the Act extreme hardship purposes.

The AAO notes that Section 212(h) of the Act provides that a waiver of inadmissibility under section 212(a)(2)(A) of the Act is applicable solely where the applicant establishes extreme hardship to his or her U.S. citizen or lawful permanent resident spouse, parent or child. On appeal, the applicant's current counsel asserts, "A decision denying an I-601 must fully consider the harm to [the applicant's] wife, 3 children, his 2 sisters and their children." Counsel further asserts, "One must consider the harm to his wife and the harm to his tenants in his home, over 6 families who would be homeless if the 2 houses were foreclosed." See *Brief in Support of Appeal* at 5, dated December 23, 2009. However, Congress excluded from consideration extreme hardship to siblings or any other individuals. In the present case, the applicant's spouse and children are the only qualifying relative under the statute, and the only relatives for whom the hardship determination is permissible.

In the brief filed with the waiver application, the applicant's former counsel stated that in 2007 the applicant's youngest child, [REDACTED] moved to China to reside with the applicant's parents. Counsel stated that in March 2008, the applicant and his wife separated after experiencing some difficulties in their marriage. Counsel stated that the applicant's two oldest children are residing with his spouse. Counsel noted that the applicant's spouse filed a summons with notice that she intended to file a complaint for a divorce, but has not proceeded with the complaint. Counsel stated that the applicant has maintained his relationship with his children and there is no formal separation agreement.

The applicant's former counsel further asserted that the applicant maintains rental properties, which have monthly mortgage payments of \$13,000 to \$14,000. Counsel stated that "Most of the mortgage payments are covered with the rental income each month, with [REDACTED] paying balance and separately paying for utilities not included in the rent and general upkeep of the properties." Counsel stated that the applicant's spouse is working part-time assisting in the preparation of tax returns and as a real estate agent, earning approximately \$22,000 per year. Counsel noted that the applicant's spouse and children rely on the applicant to provide monthly support of \$1,125.00.

Finally, the applicant's former counsel asserted that the applicant would not be able to provide financial support for his family if his waiver is denied and he returns to China. Counsel contended that the applicant "would not be able to maintain the rental property and if forced to sell, or be foreclosed, in this economy, with little equity in the property, it would be a tremendous loss to his whole family, perhaps financial ruin." Counsel stated that if the applicant returns to China, his children would suffer hardship because they "rely on him as a devoted father and for monthly

maintenance.” Counsel stated that the applicant “believes that the reason his wife never filed for divorce is because there is hope from both of them.” *See Form I-601 Brief*, dated February 9, 2009.

The applicant’s affidavit filed on appeal further emphasizes the financial support he provides his wife and children in the United States. He states that he and his spouse own two properties. He states that his wife and children reside in one of the properties, which consists of a “three family house” that has three tenants. He states that the second house is a “two family house” that also has three tenants. He states that his spouse does not have the “managerial skills” for the maintenance of their properties and is not a “real estate manager or rent collector.” He states that he pays the bills and collects three rental incomes. He states that he pays the difference between the rental income and the mortgages and he pays bills associated with the upkeep of the property. He states that he purchases his children’s clothing and extracurricular activities and gives his spouse \$1,125.00 in monthly support. He states that if he moved to China, his spouse would have to sell the properties, which would affect them economically. *See Affidavit of* [REDACTED] at 4-6, dated December 23, 2009.

The AAO acknowledges that the applicant’s return to China will cause some financial loss to his spouse and children if they remain in the United States. The question is whether this loss rises to the level of financial hardship. The applicant states in his December 23, 2009 affidavit that his youngest child continues to reside with his parents in China while his two older children reside with their mother. The applicant asserts that he works full-time as a chef to allow his spouse to work part-time “to be a stay at home mother.” However, the record does not establish that if the applicant’s spouse had to work full-time, the inconvenience she and her children would suffer would amount to hardship. For instance, the record does not demonstrate that the applicant’s spouse would not be able to arrange after-school childcare if she were employed full-time. Nor does the record demonstrate that the applicant’s spouse’s full-time income would not prove sufficient to support her two daughters.

Further, the record does not support the applicant’s assertion that his spouse would be unable to manage their rental properties. The applicant states, “It is incorrect to assume my wife is capable of doing this.” However, he fails to indicate the reason she would be incapable of gaining the skills to manage rental properties. The applicant indicates in his statement that “Without my paying the difference between the rental income and mortgage payments and taxes and utility bills we would lose both houses.” The applicant fails to indicate whether he has attempted to sell the rental property not occupied by his spouse to recoup the financial loss. He also fails to indicate whether his spouse could pay the mortgage on her residential property if she takes full-time employment and collects rental income from the three tenants who reside at her property.

Moreover, the record does not contain documentation of the applicant and his spouse’s current employment and earnings. The most recent tax return in this file is from 2005, and shows that the applicant and his spouse had a joint income of \$26,759. The record contains an Affidavit of Support Under Section 213A of the Act (Form I-864), signed by the applicant’s spouse on October 16, 2006. According to this affidavit, the applicant’s spouse earned an annual salary of \$30,000.00 as an employee of [REDACTED]. The employment verification letter from [REDACTED] dated October 12, 2006 states that the applicant’s spouse is a sales person who is employed on commission. The applicant included with the affidavit of support an employment verification letter dated October 12, 2006 issued by his employer, [REDACTED] which states that the applicant

has been employed as a part-time chef earning a monthly salary of \$1,600. The AAO observes that these documents demonstrate the applicant and his spouse's financial status in 2005 and 2006. The applicant has failed to submit recent tax returns and earnings and deductions statements to show their current financial situation. 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)). The applicant's assertions regarding financial hardship to his spouse and children cannot be given full weight in the absence of supporting evidence.

The applicant asserts that his departure from the United States would be "devastating" to his children "emotionally, socially, educationally and psychologically." See *Affidavit of* [REDACTED] at 2, dated December 23, 2009. The AAO acknowledges that the applicant's daughters will experience emotional hardship if they remain in the United States without their father, but the applicant has failed to demonstrate that this hardship, when combined with other hardship factors, will be extreme. The AAO recognizes the significance of family separation as a hardship factor, but concludes that the hardship described by the applicant, and as demonstrated by the evidence in the record, is the common result of removal or inadmissibility and does not rise to the level of extreme hardship. 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.

The AAO observes that the applicant's former counsel asserted in his February 9, 2009 brief, "If [the applicant and his spouse] were to reconcile, but the waiver not granted, the family would necessarily have to relocate to China." See *Form I-601 Brief* at 3. However, in the December 23, 2009 appeal brief, the applicant's current counsel asserts, "The decision did not consider that the departure of [REDACTED] would mean that his wife and 3 children would depart with him." See *Brief in Support of Appeal* at 5. The applicant's current counsel has failed to indicate the changed circumstances that would warrant the applicant's spouse and children, who for two years have remained separated from the applicant, to reunite with him and relocate to China.

The record reflects that the applicant separated from his spouse in March 2008. U.S. government security checks reveal that on July 25, 2008, a protection order was issued against the applicant, restraining him from having contact with his spouse. The applicant states in his recent affidavit filed with the appeal that he is still separated from his wife and children. The applicant states that he lives the majority of the week with his sister, two blocks away from his spouse's residence. See *Affidavit of* [REDACTED] at 4, dated December 23, 2009. The applicant and his spouse have now been physically separated for two years. The record contains only one supporting letter filed by the applicant's spouse dated October 31, 2005; she has not submitted any additional supporting documentation since this date. There is no evidence from the applicant's spouse that she intends to reconcile with the applicant. The AAO must consider the realities of the facts in this case, and cannot make a hypothetical determination of hardship to the applicant's spouse if the totality of the evidence in the record demonstrates that she would remain separated from the applicant and not relocate with him to China.

The applicant asserts, "If I depart, [my children] would likely depart with me since I support them financially." See *Affidavit of* [REDACTED] at 4, dated December 23, 2009. The applicant has based this determination on his ability to financially support his children. However, he has not shown that his spouse's inability to support his children. As previously noted, the record does not demonstrate that the applicant's spouse, who is a real estate agent and tax preparer, would be unable to financially support her children. Moreover, the record shows that the applicant does not have physical custody of any of his three children. The applicant's daughters are currently residing with his spouse. There is nothing in the record that demonstrates that they would leave their mother and relocate with him to China.

The applicant's son is residing in China with the applicant's parents. The applicant states that he believes that if he were to divorce his spouse, he would have full legal and physical custody of his son and his spouse would have custody of his daughters. See *Affidavit of* [REDACTED] at 6, dated December 23, 2009. The applicant has allowed his U.S. citizen son to reside in China for three years, and has not discussed any hardship his son has faced during this long-term period of residence. Therefore, the AAO cannot find hardship to the applicant's son, who is currently residing in China, if the applicant's waiver is denied and he relocates with his son to China.

The applicant asserts that he "would be persecuted under the family planning policy" if he returned to China. He states that his "possible sterilization is such a lasting egregious permanent harm and act of persecution that it must be considered as a factor in determining whether [he] warrant[s] a waiver in the exercise of discretion." The applicant notes that, "This harm was not fully assessed and addressed in the decision denying the I-601." See *Affidavit of* [REDACTED] at 10, dated December 23, 2009. For purposes of a section 212(h) waiver, harm to the applicant will be considered only insofar as it results in harm to a qualifying family member. In this case, the applicant and his spouse have been separated for two years. Evidence in the record indicates that if the applicant returns to China, his spouse and two daughters would not accompany him. There is no documentation in the record from the applicant's spouse indicating that she intends to reconcile with the applicant. Moreover, the AAO does not have a sufficient basis to determine whether the applicant would experience forced sterilization under China's one child policy for having three U.S. citizen children, two of whom permanently reside in the United States with their mother.

Therefore, the AAO finds that in this case, the record does not contain sufficient evidence to show that the hardships faced by the applicant's spouse and children, 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 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 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.