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U.S. Department of Homeland Security  
U.S. Immigration and Citizenship Services  
Office of Administrative Appeals MS 2090  
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Washington, DC 20529-2090  
**U.S. Citizenship  
and Immigration  
Services**



H2

[Redacted]

FILE: [Redacted] Office: PHILADELPHIA, PA Date: APR 07 2011

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 by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of the United Kingdom. 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 crimes involving moral turpitude. The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his 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.

A request for evidence was issued by the AAO in order to determine whether the applicant was also inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for failing to disclose his convictions when he sought admission into the United States as a visitor under the Visa Waiver Program.

In response to the request for evidence, counsel states that the applicant did not fraudulently or willfully misrepresent a material fact. Counsel cites *Falaja v. Gonzalez*, 418 F.3d 889, 897-99 (8<sup>th</sup> Cir. 2005), and avers that to prove a misrepresentation was willful, the misrepresentation must be deliberate and voluntary. Further, counsel cites *Bryan v. United States*, 524 U.S. 184, 193 (1998), and states that the U.S. Supreme Court defines acting “willfully” as acting with an evil-mind, which is to act with the knowledge that one’s conduct was unlawful. Counsel refers to provisions of the United Kingdom’s Rehabilitation of Offenders Act of 1974, and states that the applicant believed that since his conviction record was expunged he was no longer required to disclose his criminal convictions. Counsel further states that although the United Kingdom’s laws do not apply in the United States, the applicant is not an attorney and, based on his understanding of United Kingdom law, did not believe that he was required to answer affirmatively to prior convictions once he was past the rehabilitation period. Counsel asserts that the applicant did not act with evil intent, and did not deliberately misrepresent his conviction record.

On appeal, the applicant states in the affidavit dated March 18, 2008 that he entered the United States in Philadelphia, Pennsylvania on January 9, 2003 as a visitor under the Visa Waiver Program, and that he was convicted on July 2, 1980 for shoplifting, on January 2, 1981 for handling stolen goods (receiving), and on June 17, 1983 for burglary and theft (non-dwelling). He asserts that it was his understanding that at the time of his entry into the United States on January 9, 2003, that since it was 20 years from the date of his crimes, under British law the criminal convictions were expunged. Thus, the applicant avers that he believed that he answered truthfully that he did not have a criminal record when he sought entry into the United States on January 9, 2003.

We observe that the applicant does not dispute that he is inadmissible for having committed crimes involving moral turpitude. However, the applicant claims that he is not inadmissible for willful misrepresentation of his criminal record.

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.

To find the applicant inadmissible under section 212(a)(6)(C)(i) of the Act, his failure to disclose his criminal record must be a material misrepresentation and by the misrepresentation he must have sought to procure admission into the United States. In *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1960; AG 1961), the Attorney General indicates that a misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well result in proper determination that he be excluded.

The Attorney General states that “[w]hile a misrepresentation as to identity will generally have the effect of shutting off an investigation, so also will misrepresentations as to place of residence, prior exclusion or deportation from the United States, criminal record, Communist Party membership, etc.” *Id.* at 448.

Section 212(a)(6)(C)(i) of the Act renders inadmissible 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 the Act.

Based on the record, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant's misrepresentation of his criminal record was made in connection with his entry or admission into the United States. The applicant states, “[b]elieving that my record was expunged, I believed that I was answering truthfully and honestly upon my entry into the United States on January 9, 2003, that I did not have a criminal record.” The applicant admits that he knew that he had a criminal record, and he does not indicate that he was unaware that his crimes were crimes involving moral turpitude. However, the applicant states that because he believed his crimes were expunged under British law, he was not required to disclose them.

However, we note that the provisions of the United Kingdom's Rehabilitation of Offenders Act of 1974 cited by counsel relate to disclosure of convictions before judicial authorities in Great Britain. We find that the record establishes that the applicant's misrepresentation of his criminal history was willful – it was deliberately made with knowledge of its falsity. The immigration officer would not have known of the applicant's convictions unless the applicant divulged them. We point out that counsel cites *Bryan* and states that acting “willfully” in the case means to act with an evil-mind and with the knowledge that one's conduct was unlawful. However, the construction of the term “willful” in *Bryan* is distinguishable from the instant case. The term “willful” in *Bryan* is analyzed in the context of a criminal law and whether a defendant had knowledge of a federal licensing requirement. In the instant case, the term “willful” is in the context of federal immigration law and whether an applicant is inadmissible for making a willful misrepresentation under section

212(a)(6)(C)(i) of the Act. Because the construction of the term “willful” in immigration law is distinguishable from that of criminal law, we find that counsel’s claim that the applicant must act with an evil mind and with knowledge that his conduct was unlawful, which is based on the term “willful” in the context of a criminal statute, is unpersuasive. Lastly, we point out that foreign expungements are generally not given effect under federal immigration law. *See Matter of Adamo*, 10 I&N Dec. 593, 596-97 (BIA 1964).

Based upon the foregoing discussion, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

We observe that the applicant does not dispute that he is inadmissible for having committed crimes involving moral turpitude. However, because we have determined that the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for misrepresentation, he will need to demonstrate eligibility for the grant of a waiver under section 212(i) of the Act.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant’s U.S. citizen spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, U.S. Citizenship and Immigration Services (USCIS) then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant’s inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme

hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals (Board) stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

*Id.* See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The record contains letters by the applicant’s wife describing the hardships that she will experience if she remains in the United States without her husband. The applicant’s wife states in the letter dated July 11, 2006, that she met the applicant in 2002, and married him on April 12, 2003. The

applicant's wife indicates that she has a close relationship with her husband, and that the applicant has bonded with her children and grandchildren. The applicant's wife avers that she has received treatment for a degenerative condition in her left knee, and that her doctors have indicated that she requires a knee replacement. The applicant's wife further states that her children will not have the time to take care of her during her recovery; however, she will be taken care of by the applicant. The applicant's wife asserts that the applicant, who is 46 years old, had a stroke in February 2006 and required intensive physical therapy. In the letter dated February 1, 2008, the applicant's wife states that in 2007 she started to have extreme pain in her lower back, and her doctor found she has a herniated disc. The applicant's wife indicates that she had shots in her back and physical therapy for the herniated disc, and may require surgery. Lastly, the applicant's wife states that she has diabetes and glaucoma in her left eye.

In the instant case, the alleged hardship factor is the emotional impact to the applicant's wife as a result of separation from her husband. The record contains letters by the applicant's wife in which she attests to the close relationship that she has with her husband and how she will be significantly affected without him. The applicant's wife's assertions about knee problems are consistent with the note dated June 8, 2006 by [REDACTED] which indicates that the applicant's wife will require a total knee replacement; her handicap sticker; and [REDACTED] record dated October 23, 2007, conveying that the applicant's wife has multilevel degenerative disc. In view of the substantial weight that is given to the separation of spouses from one another in the hardship analysis, and in consideration of the evidence of the emotional impact that separation from the applicant will have on his spouse, we find that the applicant's wife would experience extreme hardship if she remains in the United States without him. However, the applicant makes no claim of hardship to his spouse if she were to join him to live in the United Kingdom. Thus, as we cannot find that the applicant's wife would experience extreme hardship in the United Kingdom, the hardship she may experience in the United States would be a matter of choice, and not a result of inadmissibility.

Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under sections 212(h) and 212(i) of the Act.

Because the applicant is statutorily ineligible for relief, no purpose is served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) and 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. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.