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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

DATE: FEB 06 2012 Office: PHILADELPHIA FILE: [redacted]

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The matter will be returned to the field office director for continued processing.

The applicant is a native and citizen of China who was found inadmissible to the United States pursuant to 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 procured numerous benefits, including a B-1 nonimmigrant visa, entry to the United States with said visa, and change of status to F-1, by fraud or willful misrepresentation. In addition, the applicant was found to be inadmissible under section 212(a)(2)(D) of the Act, 8 U.S.C. § 1182(a)(2)(D), for prostitution and commercialized vice. The applicant is applying for a waiver of inadmissibility pursuant to sections 212(i) of the Act, 8 U.S.C. § 1182(i) and 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with her U.S. citizen spouse.

The field office director found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated July 20, 2009.

Section 212(a)(2) states in pertinent part:

> (D) Prostitution and commercialized vice.
>
> Any alien who-
>
> > (i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status [is inadmissible].
>
> . . . .
>
> (F) Waiver authorized.- For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

Section 212(h) states in pertinent part:

> (h) The Attorney General may, in his discretion, waive the application of [subparagraph] . . . (D) of subsection (a)(2) . . . if-
>
> > (1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-

> (i) the alien is inadmissible only under subparagraph (D)(i). . . of such subsection . . . or
>
> . . . .
>
> (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 . . . .

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

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General (Secretary), waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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...

With respect to the field office director's finding that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, for fraud or willful misrepresentation, the record establishes that the applicant misrepresented her marital status when she applied for a B-1 Visa in February 1997. Specifically, the applicant claimed to be married when in fact she was divorced. On appeal, counsel asserts that the applicant represented herself as married for the sole reason that she needed to save face in order to survive in traditional Chinese society, and thus did not intend to misrepresent herself for the sole purpose of obtaining a nonimmigrant visa. *Brief in Support of Appeal,* dated September 17, 2009.

The principal elements of a misrepresentation that renders an alien inadmissible under section 212(a)(6)(C)(i) of the Act are willfulness and materiality. In *Matter of S- and B-C-*, 9 I&N Dec 436 (BIA 1960 AG 1961), the Attorney General established the following test to determine whether a misrepresentation is material:

> A misrepresentation . . . 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 have resulted in a proper determination that he be excluded. *Id.* at 447.

The Supreme Court has addressed the issue of material misrepresentations in its decision in *Kungys v. United States,* 485 U.S. 759 (1988). In that case, which involved misrepresentations made in the context of naturalization proceedings, the Supreme Court held that the applicant's misrepresentations were material if either the applicant was ineligible on the true facts, or if the misrepresentations had a natural tendency to influence the decision of the Immigration and Naturalization Service. *Id.* at 771.

To establish eligibility for a non-immigrant B1/B2 visa, section 101(a)(15) of the Act states, in pertinent part:

> a. an alien...having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleaure.

The U.S. Department of State Foreign Affairs Manual further provides:

> The applicant must demonstrate permanent employment, meaningful business or financial connections, close family ties, or social or cultural associations, which will indicate a strong inducement to return to the country of origin.

DOS Foreign Affairs Manual, § *41.31 N. 3.4.*

By stating that she was married, when in fact she was divorced, when applying for a nonimmigrant visa in February 1997, the applicant led the American Embassy in Beijing to believe that she had close family ties, namely, a husband, in her home country. By omitting the fact that she was divorced, she cut off a line of inquiry which was relevant to the applicant's request for a visitor visa. As such, the AAO concurs with the field office director that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, for fraud and/or willful misrepresentation with respect to her nonimmigrant visa application at the American Embassy in Beijing in February 1997.

The field office director further found that the applicant had misrepresented herself on two additional occasions: 1) when she applied for a change of status to F-1 in December 1997 without the required English proficiency or intent to attend the academic institution and 2) when she obtained a fraudulent entry stamp in January 1998. As the AAO has already determined that the applicant is subject to section 212(a)(6)(C)(i) of the Act and requires a waiver of inadmissibility under section 212(i) of the Act, for her misrepresentation with respect to obtaining the B-1 visa in 1997, as

outlined in detail above, it is not necessary to evaluate whether the incidents referenced also amount to misrepresentation under section 212(a)(6)(C)(i) of the Act.

As for the field office director's finding that the applicant is also inadmissible under section 212(a)(2)(D) of the Act, for prostitution and commercialized vice, counsel asserts that although the applicant was arrested on two separate occasions, in November 1999, under the name ' and in July 2000, under the name both cases were dismissed by the Criminal Court of the City of New York, Kings County, and thus, she is not inadmissible under 212(a)(2)(D). The AAO notes that because the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act and demonstrating eligibility for a waiver under section 212(i) of the Act also satisfies the requirements for a waiver of inadmissibility under section 212(h), the AAO will not determine whether the applicant is inadmissible under section 212(a)(2)(D) of the Act.

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. The applicant's U.S. citizen spouse is the only qualifying relative in this case. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (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 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. 627, 632-33 (BIA 1996); *Matter of Ige,* 20 I&N Dec.

880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The applicant's U.S. citizen spouse contends that he will suffer emotional and financial hardship were he to remain in the United States while his spouse relocates abroad due to her inadmissibility. In a declaration, the applicant's spouse explains that he fled Vietnam in 1981 as a 22-year old refugee and relocated to the United States in 1982 and he states that as a result of the trauma of leaving behind a good part of his family, he asserts that a long-term separation from his wife would cause him to suffer extreme hardship. He notes that since he left his family in Vietnam many years ago, he is scared of having his life uprooted again were his wife to relocate abroad. He asserts that his wife gives him strength and a home and because of her, he has stability and happiness in his life. *Affidavit of* [redacted] dated June 23, 2008. In a supplemental affidavit, the applicant's spouse explains that he previously owned two businesses, a nail salon and a tailoring business, but as a result of the bad economy, he was forced to close the alteration business at the end of 2008. The applicant's spouse contends that his wife plays an integral role in his nail salon, his sole remaining business, as she is responsible for running all the day-to day operations of the nail salon, including providing nail services. Were she to relocate abroad, he explains that the nail salon would lose a lot of business if not have to close entirely. Finally, the applicant's spouse outlines that as a result of the economic downturn, he owes over $95,000 on a line of credit and over $30,000 to credit card

companies and recently had to borrow from his son. He concludes that he is not able to keep the nail salon business running without his wife and were she to relocate abroad, he will not be able to make ends meets. *Supplemental Affidavit of* dated September 16, 2009.

In support, a psychological evaluation has been provided from confirming that the applicant's spouse suffered a series of severe stresses throughout the course of his life, including fleeing his home country and adjusting to a new culture, and the potential loss of his wife would likely cause him to relapse into another major depressive episode. concludes that the applicant's spouse's ability to cope is precarious and he relies heavily on sharing his life with his wife. recommends counseling. *Psychological Evaluation from* dated December 7, 2008. In addition, evidence of the applicant's spouse's ownership of has been provided. Moreover, evidence of numerous bills owed by the applicant's spouse has been submitted. Further, articles describing the trauma and loneliness experienced by Vietnamese refugees like the applicant's spouse have been provided by counsel. Finally, numerous letters have been provided establishing the critical role the applicant plays in her husband's sole business, the nail salon, providing nail services and running the day to day operations.

The record reflects that the cumulative effect of the emotional and financial hardship the applicant's spouse would experience due to the applicant's inadmissibly rises to the level of extreme. The AAO thus concludes that were the applicant unable to reside in the United States due to her inadmissibility, the applicant's spouse would suffer extreme hardship if he remains in the United States.

With respect to relocating abroad to reside with the applicant as a result of her inadmissibility, the applicant's spouse explains that he has no ties to China, as he was born in Vietnam, and he would thus experience extreme hardship acclimating as he is unfamiliar with the country, customs, culture and language. In addition, the applicant's spouse explains that he has been residing in the United States since 1982 and long-term separation from his community, his three children from his previous marriage, his nail salon business and his homes would cause him hardship. He notes that because of his background, having to flee his home country and a good part of his family, it is vitally important for him to be able to see and spend time with his children and granddaughter. Finally, the applicant's spouse explains that were he to relocate abroad, he would have to sell his properties at a loss, he would leave over $100,0000 in unpaid debt and he would have no prospects of finding gainful employment as he does not have a degree or the education needed to get a skilled job in China, nor does he speak or write in Chinese.

The record establishes that the applicant's U.S. citizen spouse was born in Vietnam and has been residing in the United States for over 29 years. He has no ties to China. Were he to relocate abroad, he would have to leave his children and grandchild, his home, his community and his business. Moreover, he would not be able to speak or write the language. It has thus been established that the applicant's spouse would suffer extreme hardship were he to relocate abroad to reside with the applicant due to her inadmissibility.

Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The favorable factors in this matter are the extreme hardship the applicant's U.S. citizen spouse would face if the applicant were to reside in China, regardless of whether he accompanied the applicant or remained in the United States, community ties, home and business co-ownership, gainful employment and numerous letters in support. The unfavorable factors in this matter are the applicant's fraud and/or willful misrepresentation, as outlined above, and periods of unauthorized presence and employment while in the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in her application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C)(i) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The waiver application is approved. The field office director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.