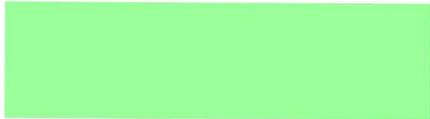


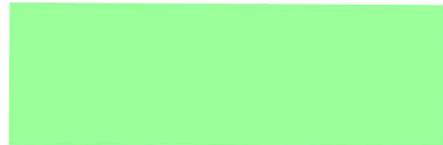


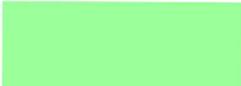
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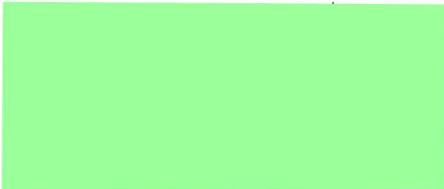
Date: **APR 26 2013** Office: NEW YORK



IN RE: Applicant: 

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:



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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, and was dismissed by the Administrative Appeals Office (AAO) on appeal. The matter is now before the AAO on a second motion. The motion will be granted, but the underlying application remains denied.

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 District 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 District Director denied the waiver application accordingly. See *Decision of the District Director*, dated November 27, 2009.

The AAO determined that the applicant was not inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for fraud or misrepresentation. The AAO further found that none of the applicant’s qualifying relatives experienced extreme hardship in the scenarios of relocation and separation and dismissed the appeal. See *AAO Decision*, March 25, 2010.

On this second motion, counsel contends that the applicant’s fiancée, with whom he has three children, is a qualifying relative who would experience psychological and financial hardship in the events of separation and relocation to China. Counsel moreover states that the applicant’s spouse, parents, and children would also experience extreme hardship given his inadmissibility.

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, his fiancée, and his spouse, psychological evaluations, and supporting letters from the applicant’s father, siblings, niece and nephews. The entire record has been reviewed in rendering a decision on the motion.

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.)

On appeal, the AAO found that the applicant's 1999 convictions for violations of 18 U.S.C. § 1546 and 18 U.S.C. § 1028 (Case No. 99CR 592 DAB), constituted convictions for crimes involving moral turpitude. The applicant does not contest this finding on motion. The AAO therefore affirms 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.

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

Section 212(h) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

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 v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (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.

Counsel contends that the applicant's fiancée, [REDACTED] should also be considered as a qualifying relative, and that she, the mother of three of his children, would experience extreme hardship given his inadmissibility.

Section 101(a)(15)(K) of the Act defines "fiancé(e)" as:

the fiancée or fiancé of a citizen of the United States (other than a citizen described in section 204(a)(1)(A)(viii)(I)) and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

Section 214(d) of the Act, 8 U.S.C. 1184(d), states in pertinent part that a fiancé(e) petition:

shall be approved only after satisfactory evidence is submitted by the petitioner to establish that the parties have previously met in person within 2 years before the date of filing the petition, have a bona fide intention to marry, and *are legally able* and actually willing to conclude a valid marriage in the United States within a period of ninety days after the alien's arrival, . . . [emphasis added].

As the applicant is still married and not legally able to conclude a valid marriage to [REDACTED], no Form I-129F, Petition for Alien Fiancé has been filed on behalf of the applicant and therefore, the applicant has not been classified as Ms. Lin's fiancée under section 101(a)(K)(15) of the Act. *See 22 C.F.R. §41.81*. Without such a classification, the applicant's fiancée cannot be considered as a qualifying relative for purposes of a waiver under section 212(h) of the Act, and hardship to her cannot be considered except as it may affect the applicant's children.

Counsel further contends that the applicant's six children would experience extreme hardship upon separation from the applicant. The applicant explains he has three children with his spouse, named [REDACTED].¹ The applicant adds that he has three children with [REDACTED]. The spouse indicates he supports all his children financially, and without his financial support, all of them would suffer. Documentation is submitted with respect to his own income, his spouse's, and [REDACTED] income. The applicant's spouse also submits a letter, stating that although she no longer lives with the applicant, she cannot afford to pay for the children's necessities without the applicant's financial support, and that the children need the applicant present as a father figure. Federal income tax returns are submitted in support of assertions on financial difficulties, and a child support order as well as copies of checks made payable to the

¹ The record reflects that Perry resides in China with the applicant's parents.

State Child Support Processing Center and the applicant's spouse are submitted in support. additionally indicates in a letter that she does not work, and did not even file federal income tax returns in 2011. She concludes that, without the applicant's financial support, she would have significant difficulties paying for their three children's needs as well.

claims that financially supporting their three children is more difficult than normal due to their son's medical problems. Medical records regarding birth are present in the record, indicating he was a premature baby who remained at the hospital for a month after birth, and that he suffers from apnea, jaundice, and that he had respiratory distress syndrome and hypotension issues which were resolved. further contends that she has psychological difficulties, and would be too depressed to adequately take care of her three children alone in the event that the applicant returned to China. A licensed psychologist opines in an evaluation that suffers from major depressive disorder with postpartum onset. The psychologist moreover indicates that the son exhibits significant cognitive and adaptive delays, and that according to criteria set forth by the State Department of Health, meets the minimal criteria for a disability. The psychologist concludes if the applicant and were separated, even though the children would still be able to access medical and educational resources, they would deteriorate rapidly, particularly because of his potential disability.

contends her three children would experience extreme hardship upon relocation to China. She indicates that her children are all U.S. citizens, and have never been to China. adds that will not be able to obtain the care he will require in the future given his medical and psychological issues. She further claims that all her children will not be eligible to receive an education or basic health care because they would not be eligible for residency permits, or *hu kuo*. The psychologist contends that the children would have difficulty obtaining the legal right to reside in China, given that they are U.S. citizens. Articles on country conditions and immigration to China are submitted in support.

The applicant has demonstrated his children with, in particular will experience extreme hardship upon relocation to China. The record reflects that the children were all born in the United States, and are unfamiliar with the customs, educational system, and culture in China. Furthermore, there is evidence of record demonstrating that they receive benefits here, including educational, medical, and food assistance benefits which may not be available to them in China. Moreover, although there is insufficient evidence of record to demonstrate that the psychologist's assertions on the consequences of *hu kuo* would apply to the children, the AAO notes that relocation would also entail separation from other family members, such as the children's grandparents. There is also some indication that the applicant would be unable to earn sufficient income in China to financially support the children there.

In light of the evidence of record, the AAO finds the applicant has established that his children's difficulties would rise above the hardship commonly created when families relocate as a result of inadmissibility or removal. In that the record demonstrates that the financial, medical, or other impacts of relocation on the applicant's children are in the aggregate above and beyond the hardships normally experienced, the AAO concludes that they would experience extreme hardship if the waiver application is denied and the applicant's children with relocate to China.

The record moreover contains sufficient evidence to demonstrate that the applicant's children with [REDACTED] would experience emotional and financial hardship without the applicant present. The record contains documentation indicating that [REDACTED] has consistently been unable to earn enough money to provide for her children without the applicant's financial support. Furthermore, even with the applicant's support, evidence of record indicates that the applicant's children have received benefits from the state of [REDACTED] such as assistance with baby formula. Given this new evidence of record, the AAO finds that the applicant's children with [REDACTED] would experience financial hardship without the applicant present in the United States.

The applicant has furthermore shown that the children with [REDACTED] would experience psychological and other difficulties without the applicant present. The newly-submitted psychological evaluation indicates that [REDACTED] has suffered herself from major depressive disorder, which was exacerbated by the applicant's immigration situation, and that she is at risk of suicide. The record further indicates that given [REDACTED] fragile emotional state, the children would suffer if [REDACTED] were the only parent in the household. Moreover, the record reflects that the child [REDACTED] has had several medical problems, and that the applicant's presence will be required to help deal with his cognitive and adaptive delays.

The AAO therefore finds there is sufficient evidence of record to demonstrate that [REDACTED] children's hardship would rise above the distress normally created when families are separated as a result of inadmissibility or removal. In that the record establishes that the financial, medical, psychological / emotional or other impacts of separation on the applicant's children with [REDACTED] are cumulatively above and beyond the hardships commonly experienced, the AAO concludes that they would suffer extreme hardship if the waiver application is denied and the applicant returns to China without these children with [REDACTED]

Considered in the aggregate, the applicant has established that his U.S. Citizen children would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Morales*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin*, *supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin*, *supra*, is only for the purpose of the approach taken

in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the extreme hardship to the applicant's children [redacted] family ties in the United States, residence of some duration in the United States, letters attesting to the applicant's moral character, and some evidence of hardship to himself and other family members if he is excluded or deported. The unfavorable factors include some evidence the applicant was employed without authorization, the applicant's 1999 document fraud convictions and the activities underlying those convictions.

The applicant's criminal activities constitute serious violations of immigration law. The presentence investigation report indicates that not only did the applicant sell 10 fraudulent alien registration cards between March 1998 and April 1999, but also that he negotiated the sale of approximately 100 fraudulently obtained or manufactured identification documents between February 1998 and April

1999. As such, the record indicates that the applicant was involved with multiple instances of immigration fraud in a time span of over a year. Though the applicant has provided the U.S. government with some assistance related to those activities, the record does not contain sufficient evidence demonstrating that, in light of these criminal activities, a favorable exercise of discretion is warranted.

Thus, while the AAO acknowledges the hardship that the applicant's children will face as a result of a denial of the applicant's waiver request, it does not find the favorable factors in the present matter to outweigh the negative and will not favorably exercise the Secretary's discretion.

In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has not met that burden. Accordingly, although the motion is granted, the underlying application remains denied.

ORDER: The motion is granted, but the underlying application remains denied.