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



U.S. Citizenship
and Immigration
Services

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H5

FILE:

Office: PROVIDENCE, RI
(consolidated therein)

Date: **MAR 11 2010**

IN RE:

Applicant:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the
office that originally decided your case. Any further inquiry must be made to that office.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Providence, Rhode Island, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Senegal who was found to be 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 entered the United States through fraud or willful misrepresentation. The record indicates that the applicant is married to a naturalized United States citizen and the mother of two United States citizen children. She is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with her United States citizen husband and children.

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Field Office Director*, dated August 31, 2007.

On appeal, the applicant, through counsel, contends that the Field Office Director erred in denying the applicant's waiver application because "the refusal of admission to the United States for [the applicant] would result in extreme hardship for her United States Citizen husband." *Form I-290B*, filed September 19, 2007. Additionally, counsel claims that "[i]t is further noteworthy, in the context of reasons for appeal, that [the applicant] and [her husband] immediately amended their Federal and State income tax forms covering four consecutive years, solely because this was requested by the Service." *Id.* The AAO notes that the reason the applicant and her husband amended their income tax returns is because they had underpaid their taxes during the period 2002-2005.

The record includes, but is not limited to, counsel's appeal brief, an affidavit from the applicant's husband, a psychological test report on the applicant's husband, property and mortgage documents, a prescription note for the applicant's daughter, and a medical letter relating to the applicant. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

- (i) In general.-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.
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- (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212 of the Act provides, in pertinent part, that:

- (i) (1) The Attorney General [now the Secretary of Homeland Security, “Secretary”] may, in the discretion of the [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 [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...

In the present case, the record indicates that on September 26, 1995, the applicant entered the United States by presenting another individual’s passport and visa. On April 26, 2001, the applicant’s lawful permanent resident husband filed a Form I-130 on behalf of the applicant. On November 18, 2004, the applicant’s Form I-130 was approved. On September 19, 2005, the applicant’s husband became a United States citizen. On January 3, 2006, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On September 13, 2006, the applicant filed a Form I-601. On August 31, 2007, the Field Office Director denied the applicant’s Form I-485 and Form I-601, finding the applicant had entered the United States by fraud and had failed to demonstrate extreme hardship to her qualifying relative.

The AAO notes that counsel does not dispute that the applicant misrepresented herself in order to gain entry into the United States. Accordingly, the AAO finds that the applicant willfully misrepresented a material fact in order to obtain an immigration benefit and is inadmissible under section 212(a)(6)(C) of the Act.

A section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C)(i) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant would experience upon removal is not directly relevant to a section 212(i) waiver proceeding. The AAO also notes that the record contains references to the hardship that one of the applicant’s children would suffer if the applicant were denied admission into the United States. Section 212(a)(6)(C)(i) of the Act provides that a waiver, under section 212(i) of the Act, is applicable solely where the applicant establishes extreme hardship to her citizen or lawfully resident spouse or parent. Unlike a waiver under section 212(h) of the Act, Congress does not mention extreme hardship to United States citizen or lawful permanent resident children. Therefore, hardship to the applicant’s children is not considered in section 212(i) waiver proceedings except to the extent that it creates hardship for a qualifying relative. 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).

The concept of extreme hardship to a qualifying relative “is not...fixed and inflexible,” and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to

section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has also held:

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).

U. S. courts have stated, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[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.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO notes, however, that the courts 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). The common results of deportation are insufficient to prove extreme hardship as extreme hardship has generally been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. *See Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *see also Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). Only “in cases of great actual or prospective injury...will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984).

On appeal, counsel for the applicant states that the applicant’s daughter visited Senegal on one occasion and “was forced to return to the United States because of her asthma and the lack of necessary treatment for her in Senegal.” The AAO notes that the record establishes that the applicant’s daughter has asthma. However, the AAO finds that other than counsel’s statement, there is no evidence in the record that demonstrates that the applicant’s daughter’s asthma forced her return to the United States because she could not obtain treatment in Senegal. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19

I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the AAO notes that an applicant's children are not qualifying relatives for the purposes of a 212(i) waiver proceeding.

The record contains documentation in the form of a letter from [REDACTED], dated December 16, 2009, that establishes that the applicant has recently undergone medical testing, which has resulted in findings consistent with papillary carcinoma of the thyroid. While the AAO again notes that the applicant is not a qualifying relative in this matter, it, nevertheless, acknowledges the additional burdens that her illness and need for medical treatment would create for her husband upon relocation. When added to the normal hardships of physically relocating a family with young children outside the United States, the AAO concludes that assuming responsibility for the care of his seriously ill wife would result in extreme hardship for the applicant's spouse who cannot read or write in any language and whose ability to communicate is limited to his ability to speak Wolof and some French.

The applicant must also prove that her husband would experience extreme hardship if he remains in the United States without her as is not required to reside outside the United States as a result of the denial of her waiver request.

Counsel states that if the applicant is denied admission to the United States, she would be unable to take care of her husband and children, "one of [whom] is afflicted with a chronic asthmatic condition." Counsel further states that the applicant's husband is unable to care for himself and his home and family due to his cognitive disorder. The applicant's husband states that due to his condition, "it is extremely difficult for [him] to learn and manage certain family duties." The applicant's husband further states that the applicant "is responsible for handling all of the legal and financial aspects of [their] home" and that she is needed "to provide the emotional, educational physical and economical support for [him] and [his] children."

In support of these claims, counsel submits a 2005 evaluation of the applicant's husband prepared by [REDACTED] in support of the applicant's husband's prior request for a waiver of the English and/or Civics requirements for U.S. citizenship. [REDACTED] diagnosed the applicant's husband with a reading disorder, a disorder of written expression and borderline intellectual functioning. [REDACTED] further stated that the applicant's husband's learning disabilities had impaired his ability to remember and concentrate, that he also had difficulty with abstract reasoning and that his limited level of cognitive functioning had left him impaired. [REDACTED] also reported that the applicant's husband was unable to read in any language and had only a limited ability to speak or understand English.

Having considered the record before it, the AAO finds that the applicant has established that her husband would experience extreme hardship if her waiver request were to be denied and he remained in the United States. The record documents the cognitive impairment of the applicant's husband and his inability to read or write in English, as well as his inability to communicate orally in English or to comprehend spoken English. It further indicates that the applicant's husband does not have family in the United States on whom he can rely for assistance. When these factors are added to the normal hardships

that would be experienced by any single parent assuming all the responsibilities of a household, the AAO finds the record to establish that the applicant's husband would face extreme hardship in he remained in the United States in her absence.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. 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).

The adverse factors in the present case are the applicant's prior misrepresentation for which she now seeks a waiver, and her periods of unlawful presence and employment. The favorable and mitigating factors are the applicant's United States citizen husband and children, the extreme hardship to her husband if she were refused admission, and the absence of a criminal record.

The AAO finds that, although the immigration violations committed by the applicant were serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C)(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. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.