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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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FILE:

Office: PROVIDENCE, RI

Date:

NOV 16 2010

IN RE:

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:

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 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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 Acting Field Office Director, Providence, Rhode Island and the matter 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 Netherlands (born in St. Martin) 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 attempted to obtain a benefit under the Act through fraud or the willful misrepresentation of a material fact. The record indicates that the applicant is married to a U.S. citizen and the father of a U.S. citizen.¹ He 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 his family.

The Acting Field Office Director found that the applicant had failed to establish that the bar to his admission would result in extreme hardship for his spouse and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Acting Field Office Director's Decision*, dated September 15, 2008.

On appeal, counsel contends that the Field Office Director's denial of the waiver application is an error of fact and law, and that the most prominent aspects of the hardship claim were not discussed. *Form I-290B, Notice of Appeal or Motion*, dated September 24, 2008.²

In support of the waiver application, the record includes, but is not limited to, a statement from the applicant's spouse; medical documentation relating to the applicant's spouse; employment letters for the applicant and his spouse; tax returns and W-2 forms for the applicant and his spouse; and

¹ Counsel asserts that documentation has been submitted to establish that a second child has been born to the applicant and his spouse. While the AAO notes that evidence in the record indicates that the applicant's spouse was pregnant in November 2007, there is no birth certificate that establishes the birth of a second child.

² Counsel also appeals the Acting Field Office Director's denial of the Form I-485, Application to Register Permanent Residence or Adjust Status. The AAO does not, however, have jurisdiction over an appeal from the denial of a Form I-485 adjustment application filed under section 245 of the Act. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner. As a "statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy," the creation of appeal rights for adjustment application denials meets the definition of an agency "rule" under section 551 of the Administrative Procedure Act. The granting of appeal rights has a "substantive legal effect" because it is creating a new administrative "right," and it involves an economic interest (the fee). "If a rule creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself, then it is substantive." *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992) All substantive or legislative rule making requires notice and comment in the Federal Register.

documentation submitted by the applicant in support of a prior waiver application. The entire record was reviewed and considered in reaching a decision on the application.

Section 212(i) of the Act provides 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.

As the AAO noted in our dismissal³ of the applicant's appeal of the denial of his prior waiver application, the record reflects that the applicant filed a fraudulent application for adjustment under the provisions of the Haitian Refugee Immigration Fairness Act of 1998. Accordingly, he is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for having attempted to obtain an immigration benefit through fraud or the willful misrepresentation of a material fact. The applicant does not contest this finding.⁴

³ *Decision of the Chief Administrative Appeals Office*, dated February 28, 2008

⁴ The record also indicates that in 2002 the applicant was convicted of shoplifting under the Rhode Island General Laws (RIGL) § 11-41-20 and sentenced to one year of probation. The AAO does not, however, find it necessary to address whether shoplifting in Rhode Island is a crime involving moral turpitude (CIMT). Even assuming it is a CIMT, the crime falls under the petty offense exception of section 212(a)(2)(ii)(II) of the Act as the maximum sentence for a violation of RIGL § 11-41-20 does not exceed one year and the applicant was not sentenced to more than six months incarceration.

The AAO notes that the applicant has submitted a court order showing that his shoplifting conviction has been expunged. However, under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan* 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes). In the present case, the record indicates that the applicant's conviction was expunged under RIGL § 12-1.3-3(c), based on the applicant's rehabilitation. Accordingly, the submitted expungement order would not have removed the applicant's conviction from consideration had the AAO found the crime of shoplifting to bar his admission to the United States.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission would impose 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 or his U.S. citizen child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez*, 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 (BIA) 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 BIA 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 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 exclusive. *Id.* at 566.

The BIA 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 BIA 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 BIA 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 AAO now turns to the question of whether the applicant in the present case has established that his U.S. citizen spouse would experience extreme hardship as a result of his inadmissibility.

On appeal, the applicant’s spouse states that if she relocated to St. Martin with the applicant, they would have to live with his parents in a three bedroom house that is already housing six other family members. She also asserts that if she moves to St. Martin prior to receiving her nursing degree, it will be much more difficult to find a good job as most of the employment on the island is in the low-paying tourist industry. Without a good job, the applicant’s spouse states, she and the applicant would not be able to pay for the care their daughter requires as a result of her severe asthma. The applicant’s spouse contends that being unable to provide her daughter with the prescriptions she needs would result in extreme hardship for her daughter and, therefore, for her.

The record includes the section on The Netherlands from the Department of State publication, *Country Reports on Human Rights Practices – 2005*. While the Netherlands Antilles, including St. Martin, is part of The Netherlands, the AAO does not find the report to specifically address conditions there, except to note that respect for human rights in the islands is generally the same as in the European Netherlands. We further observe that general overviews of country conditions do not establish extreme hardship in the absence of evidence that the conditions would specifically affect the qualifying relative. *See Kuciemba v. INS*, 92 F.3d 496 (7th Cir. 1996) (citing *Marquez-Medina v. INS*, 765 F.2d 673, 676 (7th Cir. 1985)). No other country conditions materials have been submitted as evidence. Accordingly, the AAO does not find the record to support the applicant’s

spouse's assertion that it would be difficult for her to find a good job if she moved to St. Martin prior to completing her nursing degree.

The record also fails to document that the applicant's daughter has any serious medical needs. Although the applicant's spouse states that her daughter has asthma and takes Albuterol and Singulair every day and Flovent as needed, there is no documentary evidence (e.g., medical reports or statements from healthcare personnel treating the applicant's daughter) in the record that establishes she suffers from asthma or requires any medication. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See *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)).

Based on the limited evidence in the record, the AAO is unable to find that the applicant's spouse would experience extreme hardship if she relocated with the applicant to St. Martin. The AAO also notes that the applicant holds a Dutch passport and the record does not establish that he and his spouse could not relocate to The Netherlands if his waiver application is denied.

If she remains in the United States, the applicant's spouse contends that she will lose the applicant's positive and reassuring influence on her life. She states that she has had two nervous breakdowns, the first in July 2007 and the second in November 2007, and that without the applicant she would not be able to continue to live a normal productive life and properly care for herself and her children. In this same statement, the applicant's spouse asserts that she and the applicant, along with the applicant's mother, own the home in which they live and that she and the applicant pay the mortgage, which is \$1,200 a month and that they rent the second floor of the property. The applicant's spouse also indicates that she owes \$10,000 on a student loan that she is slowly paying off.

The record includes a January 20, 2006 Quit-Claim Deed that establishes the applicant, his spouse and his mother are joint tenants of the property in which the applicant and his spouse reside. The record also includes a Monthly Home Loan Statement that establishes the monthly mortgage for this property at approximately \$1,200 a month. The AAO notes that the applicant's and his spouse's unsigned 2006 and 2007 federal tax returns indicate they paid mortgage interest in the amount of \$4,400-4,500 in each of these years, as well as an additional \$4,700 and \$4,400 in mortgage interest relating to the rented portion of their property during these same years. However, there is no documentation in the record that establishes that the applicant and his spouse directly or indirectly paid the mortgage on the house in which they live during these years. The loan statement in the record indicates that the only individual responsible for the payment of the mortgage is the applicant's mother. Further, the 2006 Form 1098, Mortgage Interest Statement, in the record indicates that the applicant's mother paid \$9,024.66 in mortgage interest during the 2006 tax year. Accordingly, the record does not establish the applicant's and his spouse's financial responsibility with regard to the mortgage on their home. It also fails to document any other financial obligations, including the educational loan claimed by the applicant's spouse, although it does include 2005 and 2006 Form 1098-Ts, Tuition Statements, in her name.

The record includes medical records and a discharge summary from the Landmark Medical Center that proves the applicant's spouse was admitted on June 1, 2007, when she was unable to stop crying at work. The applicant's spouse was released on June 6, 2007 with a diagnosis of Adjustment Disorder with Depressed Mood, and prescribed Zoloft and Ambien. A second discharge report, this one issued by the Women and Infants' Hospital, indicates that the applicant's spouse was hospitalized a second time for emotional problems on November 16, 2007, diagnosed with Major Depressive Disorder-Recurrent, Severe without Psychotic Features, and Anxiety Disorder, and treated with individual and group psychotherapy. Released on November 30, 2007, her diagnosis was amended to Major Depressive Disorder-Recurrent, Moderate. The November 30 report indicates that at the time of her discharge, the applicant's spouse was prescribed medication and given follow-up appointments for treatment. The AAO also notes that a psychological evaluation of the applicant's spouse conducted in 2006 and submitted in support of the prior waiver application filed by the applicant, concluded that, based on her symptoms, the applicant's spouse was suffering from Major Depressive Disorder, Severe, without Psychotic Features.

Although the AAO does not find the record to establish that the applicant's spouse would experience financial hardship if he is removed from the United States, we acknowledge the multiple evaluations of the applicant's spouse's emotional problems, as documented in the hospital discharge summaries and the psychological evaluation found in the record. When the applicant's spouse's fragile emotional health and the normal difficulties and disruptions created by the separation of a family are considered in the aggregate, the AAO finds that she would experience extreme hardship if the applicant is removed and she remains in the United States. However, as he has not also proved that she would suffer extreme hardship upon relocation to St. Martin, enduring the hardship of separation would be a matter of choice and not the result of the denial of the waiver application. Consequently, the applicant has failed to establish statutory eligibility for a waiver under section 212(i) of the Act. As the applicant is statutorily ineligible for relief, the AAO finds 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(a)(6)(C) 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.