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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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[REDACTED]

FILE: [REDACTED]

Office: PHILADELPHIA, PENNSYLVANIA

Date: **NOV 29 2010**

IN RE: Applicant: [REDACTED]

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:

[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,

Tariq Syed
for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania, 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 Costa Rica 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 procuring admission to the United States through fraud or the willful misrepresentation of a material fact. The applicant is married to a United States citizen and the father of three United States citizen children. He 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 his United States citizen spouse 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 Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated September 6, 2008.¹

On appeal, the applicant, through counsel, asserts that the applicant's spouse "has psychological reports, medical illnesses and records of herself, child and other family members and other documentation in support of the extreme hardship they would endure." *Form I-290B*, received October 31, 2008.

The record includes, but is not limited to, counsel's appeal brief, statements and an affidavit from the applicant and his wife, letters of support for the applicant and his wife, medical documents for the applicant's wife and children, medical documents for the applicant's wife's father and uncle, a psychological evaluation for the applicant's wife, tax documents, household bills, utility bills, and mortgage documents. 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:

¹ The AAO notes that even though the Field Office Director's decision was dated September 6, 2008, it was not mailed to the applicant until September 30, 2008.

- (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 reflects that the applicant entered the United States on October 7, 1997 by presenting a Costa Rican passport in another individual's name. Based on the applicant's use of a Costa Rican passport in another name to procure admission to the United States, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The AAO notes that counsel does not dispute this finding.

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

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

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

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

Extreme hardship is “not a definable term of fixed and inflexible content or meaning,” but “necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

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

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

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

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. See *Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be

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

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

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

The first prong of the analysis addresses hardship to the applicant’s wife if she relocates to Costa Rica. In a statement dated October 27, 2008, the applicant’s wife states moving to Costa Rica “could prove permanently damaging to [her] psychological and financial well being [sic]. Leaving a country and culture that [she] adore[s] would be dramatic and stressful adjustment to [her]. It would be a real hardship to start in a new country. The language barrier would be very difficult for [her] since [she] [does] not speak Spanish.” She also claims that she is “unfamiliar with the customs.” The AAO notes that the applicant is a native of Sudan. In a letter dated June 13, 2007, chiropractor John Pandolf states the applicant’s wife has “a serious spinal injury” and she may “require surgery.” In an affidavit dated October 27, 2008, the applicant states he wants “to raise [his] kids here in the United States.”

In counsel’s undated appeal brief, counsel states the applicant’s son, [REDACTED] “has pulmonary condition, asthma and bronchitis and uses a nebulizer.” The applicant’s wife states her son “has been suffering

from a pulmonary condition...that may be asthma related.” The AAO notes that the record establishes that the applicant’s son, [REDACTED] suffers from asthma and uses a nebulizer. *See progress note from [REDACTED]*, dated October 29, 2007; *see also receipt from [REDACTED]* dated October 30, 2007. In a letter dated August 6, 2010, counsel states the applicant’s son, [REDACTED] and daughter, [REDACTED] were both born “with congenital cataracts.” The AAO notes that the record establishes that the applicant’s son, [REDACTED] and daughter, [REDACTED] were both born with congenital cataracts. *See letter from [REDACTED]* dated July 30, 2010; *see also letter from [REDACTED]* dated November 25, 2009. In a letter dated February 5, 2010, [REDACTED] states the applicant’s daughter had her cataract removed in January 2009 and she “was fitted with special baby contact lens.” [REDACTED] claims the applicant’s daughter will need “these special lenses until intraocular lens is implanted in future” and she will need “a new lens about every 1-3 months due to change of prescription.” Counsel claims that “[i]t is a good possibility one or more of [the applicant’s] children could go blind.” Counsel also claims that “[h]ealthcare facilities in Costa Rica is [sic] insufficient to handle their illnesses and the [applicant’s family] have no health insurance there.” The applicant’s wife states the United States would be best for their children “in regards to education, safety, and excellent healthcare.” The AAO notes the applicant’s and his wife’s concerns for their children’s medical conditions and lack of health insurance in Costa Rica.

Counsel states the applicant’s father-in-law “has lost [sic] of vision due to diabetes and depends on both [the applicant’s wife] and [the applicant] for his care.” The applicant’s wife states her father has “type II diabetes mellitus and hyperlipidemia” and “diabetic retinopathy which complicates impaired vision.” The AAO notes that medical documentation in the record establishes that the applicant’s father-in-law suffers from hyperlipidemia, diabetes, anxiety, diabetic retinopathy, and cataracts. *See letter from [REDACTED]*, dated December 12, 2006; *see also letter from [REDACTED]* dated March 20, 2007. The applicant’s wife states that after her uncle was severely beaten and mugged in 1999, he suffered a moderate to severe brain injury. The AAO notes that the record establishes that the applicant’s wife’s uncle suffers from dementia, mood disorder, and psychotic disorder, all due to a traumatic brain injury. *See Form N-648*, dated September 10, 2004. Additionally, medical documentation establishes that her uncle “functions at an impaired cognitive level, with intellectual performance in the retarded range.” *Id.* The applicant’s wife claims that “[b]oth [her] father and [her] uncle require regular family care and [her] mother needs [her] help to take care of them.” She states “[her] parents are the only family left” and she is “very close to them. [She] live[s] in close proximity and they have been a big source of moral support to [her] and [the applicant].” The AAO notes the applicant’s wife’s concerns regarding her father and uncle.

Counsel states the applicant’s employer “relies on [the applicant] in his business.” In an undated letter, [REDACTED] states the applicant has taken over his business as a manager and he “is an essential part of the [company].” [REDACTED] also states that the applicant is his friend, and he “has taken over [his] personal accounts and has been assisting [him] in going to various doctor appointments.” The applicant’s wife states the applicant “would have extreme difficulty finding employment in Costa Rica.” Counsel states “Costa Rica’s unemployment rate is estimated to be extremely high.” The applicant states he “won’t be able to support [his family] if [he] had to go back to Costa Rica.” The AAO acknowledges that the applicant and his wife might suffer some level of financial hardship in relocating to Costa Rica.

The AAO notes that other than counsel's statement regarding the lack of medical facilities and the high unemployment rate in Costa Rica, there is no documentation in the record establishing her claims. 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).

Based on the applicant's wife's unfamiliarity with Costa Rican culture, her lack of family and employment ties to Costa Rica, her lack of Spanish language skills which will affect her ability to work and settle into Costa Rican society, her medical issues, the assistance provided by the applicant's spouse to her family, her children's medical issues, and the emotional hardship of being separated from her family including her father and uncle who have health issues, the AAO finds that the applicant's wife would suffer extreme hardship if she were to relocate to Costa Rica to be with the applicant.

Regarding the hardship the applicant's wife would suffer if she were to remain in the United States without the applicant, counsel states the applicant's wife "depends on [the applicant] emotionally, physically and financially." The applicant's wife states she suffers from both anxiety and depression. In a psychological evaluation dated October 12, 2008, [REDACTED] diagnosed the applicant's wife with anxiety reaction. [REDACTED] states the applicant's wife's symptoms include constant worry, extreme fear, trembling, difficulty sleeping, feeling hopeless and helpless, excessive guilt, withdrawal and pervasive sadness, and episodes of crying. [REDACTED] claims that if the applicant's wife "is forced to either lose [the applicant] or relocate in Costa Rica she is at high risk for developing a Major Depressive Disorder and/or a Generalized Anxiety Disorder."

Counsel states "[t]he entire family depends on [the applicant's] income to survive." The applicant's wife claims that she cannot make it on her own. The applicant's wife states that "[w]ith both of [them] working [they] are just barely making it with [the applicant] making \$700 a week and [herself] earning roughly \$500 a week." Counsel states the applicant's wife's employer claims that the applicant's wife's "attitude to work has changed since [the applicant's] problems with immigration." The applicant's wife states that "[d]ue to [her] anxiety and lack of concentration [sic], [she] [is] in jeopardy [sic] of losing [her] job. Without [her] job, [she] will not be able to support [their] family" and she will lose her "health care benefits." In an undated letter, [REDACTED] states the applicant's wife, who works as one of his accounts payable specialists, "has become very withdrawn." [REDACTED] states he has noticed "a lack of eagerness and attention to detail in [the applicant's wife's] work obligations." He claims that he had to put the applicant's wife "on a six month probation period." Counsel states that now with the applicant's children's additional medical issues, the applicant's wife "spends most of her time taking the children to the doctor or hospital." Counsel claims that the applicant "is the main bread winner in the family and the medical conditions of his children has placed additional emotional, financial and physical stress on the family." The AAO finds the record to include some documentation of the applicant's and his wife's expenses in the United States.

Counsel claims that the applicant's wife "has neuromuscular injuries which limits her ability to do everyday household chores for the family." The applicant's wife states that she is "being treated by a chiropractor." She claims that her "chronic back pain has stopped [her] at times from doing daily tasks around the house, food shopping, and watching [their] son." As noted above, chiropractor [REDACTED] states the applicant's wife has "a serious spinal injury" and she may "require surgery." In an undated follow-up letter, [REDACTED] states the applicant's wife "requires the assistance of [the applicant] to perform all activities of daily living. [The applicant's wife] has difficulty with child care and home and personal maintenance."

Based on the applicant's spouse's financial issues, mental health issues, raising three children with health issues, medical issues, and the normal effects of a permanent separation, the AAO finds that the applicant's wife would experience extreme hardship if the applicant's waiver request were to be denied and she remained in the United States.

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 misrepresentation, his unauthorized employment, and his period of unlawful presence. The favorable and mitigating factors are the applicant's United States citizen wife and children, the extreme hardship to his wife if he were refused admission, and the absence of a criminal record.

The AAO finds that, although the immigration violations committed by the applicant are 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.