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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: MOSCOW

Date: OCT 06 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 PETITIONER:



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,

Perry Rhew

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Russia who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (The Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured a visa or admission to the United States through fraud or misrepresentation of a material fact. The applicant is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to return to the United States and reside with his wife.

The field office director concluded that the applicant had failed to establish extreme hardship would be imposed on a qualifying relative. The application was denied accordingly. *See Decision of the Field Office Director* dated March 27, 2008.

On appeal, counsel for the applicant asserts that his wife is suffering extreme hardship since he departed the United States, including emotional hardship due to separation from the applicant and her two children and financial hardship from supporting two households and traveling to Russia. *Counsel's Brief in Support of Appeal* at 4-5. Counsel states that the applicant's wife would have no choice but to move to Russia if the waiver application is denied, and she would have to abandon her home and career in the United States and would be separated from her mother. *Brief* at 9-12. Counsel further claims that the applicant's wife would suffer financial hardship if she relocated to Russia because she would be unable to sell her home in Florida or continue paying the mortgage and would be unable to find a job as a nurse with an adequate salary in Russia. *Brief* at 9-10. In support of the appeal counsel submitted affidavits from the applicant and his wife, birth certificates for the applicant's daughters, a copy of the applicant's wife's passport and other evidence concerning her travel to Russia, copies of family photographs, letters from the applicant's wife's current and previous employers and from co-workers, diplomas and licenses for the applicant and his wife, letters of recommendation from friends and neighbors, copies of income tax returns, documentation related to a house in Florida purchased by the applicant's wife, ownership certificate for the applicant's apartment in Russia, documentation related to the applicant's nonimmigrant visa application and related criminal charges, and a letter from the applicant's mother-in-law. The entire record was reviewed and considered in arriving at decision on the appeal.

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

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

Section 212(i) of the Act provides:

- (1) The [Secretary] may, in the discretion of the [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 [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.

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 his 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 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 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 the 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) ([REDACTED] 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.

In the present case, the record reflects that the applicant is a forty-one year-old native and citizen of Russia who resided in the United States from May 5, 2000, when he entered as a visitor for business, to March 2001, when he returned to Russia. The applicant was found to be inadmissible under section 212(a)(6)(C)(i) of the Act for having procured a visa through a visa fraud ring by making false statements that he owned a company and was traveling to Chicago for a trade show. He was arrested and charged with fraud and misuse or forgery of a visa on September 14, 2000, but the charges were dismissed by the U.S. District Court for the Northern District of Illinois after he cooperated with authorities in the prosecution of the fraud ring leaders. The applicant's wife is a forty year-old native of Russia and citizen of the United States. The applicant currently resides in [REDACTED]

The applicant's wife states that she is suffering emotional hardship because she has lived apart from her husband and older daughter for over six years and further states that because of the economic situation in Russia they decided that she would remain in the United States and support the family and he would keep the children with him in Russia because she must work long hours as a nurse in order to support the family. *Affidavit of [REDACTED]* dated November 20, 2007. She states that she has visited Russia more than thirty times in the past six years and further states,

I cannot begin to describe in a letter how incredibly difficult, stressful, and exhausting maintaining close transatlantic ties and working fulltime has been After a

nightmarish 6 years of separation from my family, though, I feel that I will have no other choice but to return to Russia to live with my family if my husband's application . . . is denied. . . . The consequences of such a move are grave, but I cannot go on living half a world away from my children and Anatoly. *Affidavit of*

In support of these assertions counsel submitted documentation concerning the applicant's wife's travel to Russia and letters from friends and coworkers. Records from Finnair and a copy of her passport indicate the applicant's wife has traveled to Russia numerous times since 2002, and several visits were for a week or less. A letter from a coworker states that the applicant's wife works a lot of overtime she can take time off and visit her family in Russia. The letter states,

She is back and forth to Russia every few weeks. She misses them dearly and is always planning her next trip back to see them. She misses them very much and is constantly talking about them. It's very hard for her each and every time she has to leave them. *Letter from* [REDACTED] dated October 19, 2007.

A letter from another co worker states that the applicant's wife loves and misses her family and the applicant's wife gets tears in her eyes when she speaks to her about her own husband and son. *Letter from* [REDACTED] dated October 30, 2007. The applicant's wife states that she must work twenty-four hours of overtime in addition to her three twelve-hour shifts per week in order to pay for her travel to Russia and generally works the day after her return trip, which last about fourteen hours. *Affidavit of* [REDACTED] dated May 20, 2008. She states, "I feel sick for at least 10 days after coming back to the U.S. I don't think that I can commute like this for much longer." *Affidavit of* [REDACTED] dated May 20, 2008.

The applicant's wife states that she is experiencing emotional, physical, and financial hardship due to separation from her husband and children and the cost of travel back and forth to Russia, which costs [REDACTED] per trip. Letters from friends and coworkers state that she misses her family terribly, and the record indicates that she travels to Russia several times a year and also works long hours as an operating room nurse at a hospital in [REDACTED]. The applicant's wife has lived apart from her husband and two daughters for several years and travels frequently to Russia to visit them, sometimes for visits lasting less than a week. When combined with the financial and physical hardship resulting from her frequent travel between [REDACTED] the emotional hardship of continued separation from the applicant and their daughters amounts to hardship beyond the common results of inadmissibility or removal for the applicant's wife. As noted above, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido, supra.* at 1293.

The record further indicates that the applicant's wife has resided in the United States since 1999 and works as a registered nurse in New York, where she is regarded by coworkers as dedicated and responsible and serves as a role model for new staff. *See Letter from* [REDACTED], dated September 10, 2007. She earned [REDACTED] in 2007 and purchased a house in Florida in 2006 where she planned to move with her family. The applicant's wife states that if she relocates to Russia she will be forced to sell her house at a loss of over [REDACTED] because the

housing market has crashed, and she will have no way to pay for the shortfall. See *Affidavit of* [REDACTED] dated May 20, 2008. She states that with low wages in Russia she will never be able to pay off this debt, and further states that she would be separated from her mother, who lives in New York and also works as a nurse, and would not be able to afford to visit her. *Affidavit of* [REDACTED] dated May 20, 2008. As noted above, separation from close family members is a primary concern in assessing extreme hardship. *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998). The emotional and financial hardship that would result from separation from her mother, abandoning her home and career in the United States, and the significant financial loss she would experience due to the crash in the housing market and loss of value of her home would, when considered in the aggregate, amount to extreme hardship for the applicant's wife if she were to leave the United States and relocate to Russia with the applicant.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(i) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives). See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's immigration violations, procuring a nonimmigrant visa through fraud. The favorable factors are the hardship to the applicant's wife and to their children if they remain separated from their mother, the applicant's lack of a criminal record aside from his arrest for visa fraud, and his lack of additional immigration violations.

The AAO finds that applicant's violation of the immigration laws cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh

the adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.