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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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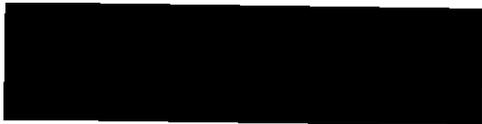


FILE: [REDACTED] Office: ORLANDO, FL Date: **SEP 09 2010**

IN RE: [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:



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,

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Orlando, Florida. The matter 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 Guyana 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 enter the United States through fraud or the willful misrepresentation of a material fact. The record indicates that the applicant is married to a U.S. citizen. She 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 family.

The Field Office Director found that the applicant had failed to establish that the bar to her admission would result in extreme hardship for her spouse and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated August 26, 2009.

On appeal, prior counsel for the applicant contends that the Field Office Director erred in failing to take into account all the contributing factors and evidence presented to establish that the applicant's spouse would experience extreme hardship if her waiver application is denied. *Form I-290B, Notice of Appeal or Motion*, dated September 14, 2009.

In support of the appeal, the record includes, but is not limited to, current counsel's letters; prior counsel's briefs; statements from the applicant's spouse; medical documentation relating to the applicant and her spouse; telephone and utility bills; bank and credit card statements; mortgage documentation; tax returns, earnings statements and W-2 forms for the applicant and her spouse; and country conditions information on Guyana. The entire record was reviewed and considered in arriving at a decision in this matter.

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

- (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 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.

The record reflects that, on September 9, 2001, the applicant arrived in the United States aboard an American Airlines flight as a Transit Without Visa (TWOV) alien destined for Panama. The record contains Form I-94T arrival and departure records for the applicant, a TWOV envelope for the applicant and a copy of her airline ticket showing her destination as Panama City, Panama via Miami International Airport. To travel to the United States, the applicant used a photo-substituted Guyanian passport, which she presented to immigration officers at the port of entry. In a sworn statement taken on the date of her arrival, the applicant stated that, despite her arrival as a TWOV alien, her intention was to come to the United States to seek asylum. At the time of her sworn statement, the applicant continued to claim the identity listed in the passport she had presented to immigration authorities.

In *Matter of Shirdel*, the Board of Immigration Appeals (BIA) held that two Afghani citizens who posed as Turkish nationals were excludable under the second clause of section 212(a)(19) of the former Act, for seeking to enter the United States by fraud or material misrepresentation. The decision specifically states that, “[t]he fraud was their flying to the United States posing as TRWOV [TWOV] aliens in order to submit applications for asylum.” *Matter of Shirdel, supra* at 36.

The AAO also notes that the U.S. First Circuit Court of Appeals held in *Ymeri v. Ashcroft*, 387 F.3d 12, FN 4 (1st Cir. 2004) that:

The transit without visa privilege is a benefit provided under the Immigration laws. An alien who transits through this country as a transit without visa participant has attained one of the benefits listed in section 1182 [212] (a)(6)(C)(i) [of the Act], regardless of whether the alien effects an “entry.”

U.S. v. Kavazanjian, 623 F.2d 730, 732 (1st Cir. 1980) held that:

[T]he actions of an alien who adopts TWOV status solely for the purpose of reaching this country’s border, without any intention of pursuing his journey, constitute a circumvention of the TWOV program and a fraud on the United States.

....

[W]e think an alien’s assumption of TWOV status by itself constitutes an implicit representation that he intends merely to transit through the United States before again departing. *See Reyes v. Neely*, 228 F.2d 609, 611 (5th Cir. 1956), (“A misrepresentation may be made as effectively by conduct as by words”) *Id.* at FN15.

In the present matter, the applicant traveled to the United States under the TWOV program, although it was her intention to remain in the United States and apply for asylum. Further, the applicant used

a fraudulent document, a photo-substituted passport, in her attempt to enter the United States. Based on these misrepresentations, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act and must seek a section 212(i) waiver of inadmissibility. The applicant does not contest 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 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 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 her spouse would experience extreme hardship if he relocates with her to Guyana. On appeal, the applicant’s prior counsel contends that the applicant’s spouse would suffer hardship if the applicant’s waiver request is denied as he suffers from diabetes, low back pain and high cholesterol. She further notes that the applicant’s spouse’s U.S. citizen parents are dependent on him and that both have medical conditions that require his financial support. She also contends that the applicant’s spouse has no strong family, social, political or economic ties to Guyana. Prior counsel states that the applicant’s spouse owns a construction business that provides employment and resources to his community. She asserts that he has contractual obligations and that, if he relocates to Guyana, he will face lawsuits and other damages. Counsel also states that the applicant’s return to Guyana will result in financial hardship as he will not be able to find comparable employment.

In statements dated November 18, 2008, November 5, 2009 and July 16, 2010, the applicant’s spouse, a native of Guyana, asserts that he has diabetes for which he takes medication and that Guyana is a country where medical care is limited. He states that, if he relocates, it could affect his health and that, if he is not properly treated, he could lose his limbs. The applicant’s spouse also contends that Guyana is now considered a third world country and that the average person works for little money and cannot feed his or her family. He notes that he has worked hard since

his arrival in the United States and was able to start his own business in February 2006. The applicant's spouse also states that upon return to Guyana, he would be targeted by thieves, as the country is poor and people will do anything to get their hands on American currency. He asserts that Guyana has a high rate of violence and is increasingly terrorized by opposition political groups, which neither the police nor the government can control. The applicant's spouse contends that, if he and the applicant return to Guyana, they will have to give up their dream of having children as there are no fertility clinics in the country.

While the record does not support all of the preceding hardship claims, the AAO finds it to contain a September 15, 2009 statement from [REDACTED] that establishes the applicant's spouse is suffering from diabetes, low back pain and high cholesterol. The record also includes documentation that demonstrates the applicant and her spouse have been pursuing fertility treatment since August 2007. A July 14, 2010 statement from [REDACTED] at Rochester Fertility Care in Rochester, New York indicates that their efforts to conceive are continuing and that he conducted preliminary tests on the applicant on June 21, 2010 prior to scheduling the start-up of fertility treatment on July 9, 2010. The record further includes a copy of the U.S. Department of State's Country Specific Information – Guyana, dated June 9, 2008, which reports that medical care in Guyana is available for minor medical conditions, but that emergency care and hospitalization for major medical illnesses or surgery is limited because of a lack of trained specialists, below standard medical care and poor sanitation. It also indicates that prescription medicine may not be readily available in Guyana. Articles of organization for [REDACTED] tax records and other documentation contained in the record establish that the applicant's spouse owns a construction business in Orlando, Florida.

Although [REDACTED] does not indicate the severity of the applicant's diabetes or how it affects his ability to function, the AAO acknowledges that relocating to Guyana with a chronic, potentially debilitating health condition would be a significant hardship for the applicant's spouse. We also find that in Guyana, where specialized medical care is not available, the applicant and her spouse would be unable to obtain the fertility treatment that appears necessary to allow them to have a child. The AAO also observes that, if he returns to Guyana, the applicant will lose his investment in the business he started in 2006. When these factors and the normal difficulties and disruptions created by relocation are considered in the aggregate, the AAO finds the record to establish that relocation to Guyana would result in extreme hardship for the applicant's spouse.

The AAO also finds the record to establish that the applicant's spouse would experience extreme hardship if her waiver request is denied and he remains in the United States. On appeal, prior counsel asserts that the separation of the applicant and her spouse could have an adverse psychological impact on all involved, causing the applicant's spouse suffering and emotional distress. Prior counsel also contends that the applicant's spouse requires the applicant's assistance in dealing with his diabetes, low back pain and high cholesterol. She states that the applicant's emotional state has declined and is negatively affecting his health. Prior counsel further asserts that the applicant's removal will bring her and her spouse's attempts to have children to an end. She

contends that their separation and the applicant's inability to obtain fertility treatment in Guyana will ensure that they will not have any children.

The record includes letters from the applicant's current counsel, in which she states that the applicant's spouse's education is much more limited than the applicant's and that he depends on her to run his business and their household. Counsel indicates that the applicant supports her spouse's business by paying the taxes, obtaining permits, ordering building materials and paying invoices. She asserts that, as a result of the applicant's spouse's current detention, her spouse is struggling to keep his business going. Counsel also notes that the applicant and her spouse jointly own rental properties in the Orlando area that are managed by the applicant. She states that the applicant's spouse depends on the applicant to manage his diet and give him his prescriptions, and that he has no other family in Florida on whom he can rely for assistance. Current counsel also states that, if applicant is removed, her spouse will not be able to enjoy fatherhood as Guyana lacks the sophisticated fertility clinics that the applicant needs in order to conceive.

In his statements, the applicant's spouse asserts that if he remains in the United States, he is not sure he can keep up with everything the applicant does at home while he is working. He states that she takes care of the household chores and bills. He also states that he has only a primary school education and relies on the applicant for everything, including business advice. The applicant's spouse notes that he and the applicant own two homes, one of which they rent and that both are managed by the applicant. He states that the applicant is undergoing fertility treatment and that if she is removed, they will have to give up their dream of having children. The applicant's spouse further states that he started his own construction business in February 2006 and that he charges less for his services than other firms to help those who are struggling.

As previously discussed, the record contains a September 15, 2009 statement from [REDACTED] that establishes the applicant's spouse has been diagnosed with diabetes, low back pain and high cholesterol. [REDACTED] also states that the applicant's spouse is feeling depressed as a result of the applicant's immigration problems, that he is not sleeping well and, as a result, his diabetes is out of control. He also reports that the applicant has informed him that her spouse is drinking and smoking excessively, which [REDACTED] notes is not good for the applicant's spouse's health. [REDACTED] states that the applicant's spouse is worried about who will take care of him in the applicant's absence and that he depends on her for preparing his food, checking the glucose levels in his blood, monitoring his medication and providing him with psychosocial support and comfort.

As previously discussed, the record also establishes that the applicant's spouse owns a construction business and that he and the applicant own at least two properties. There is no evidence, however, that supports current counsel's assertions that the applicant's spouse is dependent on the applicant for the running of his business or that she manages their jointly owned properties.

Based on Dr. Sheikh's statement, the AAO is unable to reach any conclusions regarding the impact of the applicant's removal on her spouse's emotional/mental health. We do, however, find this

document to offer sufficient evidence of the impact that removal would be likely to have on the applicant's spouse's physical health and the extent to which he is dependent on the applicant to manage his diabetes. The record also demonstrates that the applicant's removal to Guyana would likely destroy any chance of the applicant's spouse having a child with the applicant. When these additional hardships are added to those normally created by the separation of spouses, the AAO finds that the applicant has demonstrated that her spouse would suffer extreme hardship if her waiver request is denied and he remains in the United States.

In that the applicant has established that the bars to her admission would result in extreme hardship to a qualifying relative, as required by section 212(i) of the Act, the AAO now turns to a consideration of whether she merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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 . . . 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, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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 misrepresentations for which the applicant now seeks a waiver, her failure to comply with a 2003 order of removal and her periods of unauthorized employment. The positive or mitigating factors are the applicant's U.S. citizen spouse, the extreme hardship he would suffer if her waiver application is denied, and her payment of taxes.

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.

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.