

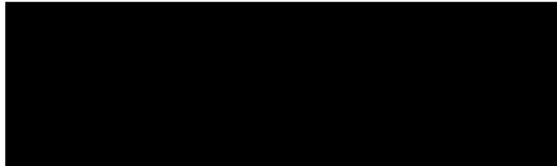
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



#5

FILE: [REDACTED] Office: NEWARK, NJ Date: **APR 04 2011**

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), Section 212(g) of the Immigration and Nationality Act, 8 U.S.C. § 1182(g).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and a citizen of France who entered the United States under the Visa Waiver Program when he was in fact an intending immigrant and 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). The applicant was also found to be inadmissible to the United States under section 212(a)(1)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(1)(A)(i), as an alien who is determined to have a communicable disease of public health significance. He is the spouse of a U.S. citizen. The applicant is seeking a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i), and section 212(g) of the Act, 8 U.S.C. § 1182(g), in order to remain in the United States with his U.S. citizen spouse.

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on November 22, 2008.

On appeal, the applicant's spouse asserts that she has new evidence which illustrates the Field Office Director's decision was in error. *Form I-290B*, received December 24, 2008.

In 2008, Congress amended section 212(a)(1)(A)(i) of the Act to no longer require the Secretary of Health and Human Services (HHS) to designate HIV infection as a "Communicable disease of public health significance." Pub. Law No. 110-293, § 305, 122 Stat. 2918, 2963 (2008). On November 2, 2009, HHS published a final rule amending its regulation at 42 C.F.R. § 34.2(b) removing HIV infection from the definition of "communicable disease of public health significance." 74 Fed. Reg. 56547 (November 2, 2009), effective January 4, 2010. Effective January 4, 2010, HIV infection will no longer make an alien inadmissible under section 212(a)(1)(A)(i) of the Act. *Public Law 110-293, 42 CFR 34.2(b), and Inadmissibility Due to Human Immunodeficiency Virus (HIV) Infection*, Pearl Chang, Acting Chief, USCIS Office of Policy and Strategy, September 15, 2009. Admissibility is determined based on the law in effect at the time of a final decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992).

The Field Office Director's decision was issued on November 22, 2008. However, as HIV is no longer a communicable disease of public health significance, the applicant is no longer inadmissible under section 212(a)(1)(A)(i). *See Matter of Alarcon, supra*.

The applicant has asserted that he is not inadmissible because he did not willfully misrepresent any material fact when entering the United States.

The Department of State developed the 30/60-day rule which applies when an alien enters for the purpose of tourism or other temporary business and then violates such status by marrying and taking

up permanent residence. 9 FAM 40.63 N4.7-1(3). The AAO finds this rule useful in evaluating whether or not an applicant has misrepresented his intent when entering the United States.

In this case the record establishes that the applicant entered the United States on June 30, 2006, as a visitor for pleasure under the Visa Waiver Program. The record contains a copy of the applicant's Form I-94W clearly indicating the authorized period of stay under the program, as well as numerous other entry and departure stamps indicating he previously utilized the Visa Waiver Program. After entering on June 30, 2006, the applicant then married his current spouse on August 26, 2006, less than 60 days later.

If conduct occurs within 30 days of entry to the United States a presumption of misrepresentation arises. 9 FAM 40.63 N4.7-2. If conduct occurs within 60 days of entry a presumption of misrepresentation does not arise, but may be established based on facts that lead to a reasonable belief the applicant misrepresented his or her intent. 9 FAM 40.63 N4.7-3.

An examination of the record indicates that the petitioner in this case filed a Form I-129F on behalf of the applicant as a Fiancé and was aware of the procedures necessary to emigrate to the United States lawfully. Although the applicant's spouse asserts she never received any correspondence, the AAO notes that the fact that the applicant's spouse completed a Form I-129F petition on his behalf supports that they were aware that additional steps were required beyond utilization of the Visa Waiver Program in order for him to enter for the purpose of marrying and remaining for an indefinite period. The record also contains correspondence from the petitioner asking USCIS to expedite their interview so the applicant could come to the United States. *Statement of the petitioner*, dated March 16, 2006. In this case the record establishes that the applicant was engaged to his current spouse and that he intended to get married when he arrived in the United States. *Statement of the Applicant*, dated February 20, 2007. The record reflects that the applicant had already sold his business and his belongings in France and was residing with his mother in anticipation of coming to the United States. The applicant then entered the United States on June 30, 2006, married the petitioner on August 26, 2006, and failed to depart the United States within the 90 day authorized period of stay under the Visa Waiver Program. These facts clearly indicate the applicant was aware that he had to wait for an interview in order to process his Form I-129F, that he was aware of the temporary nature of a Visa Waiver Entry, and that he entered the United States in advance of his petition being approved in order to circumvent the waiting period. The applicant has not submitted any evidence to establish otherwise, and simply stating that he was not aware of the procedures for emigrating to the United States is not sufficient. In light of this evidence the AAO finds that the applicant's assertions are not persuasive, and as such, he is inadmissible under § 212(a)(6)(C) of the Act.

The record contains, but is not limited to, the following evidence: statements from the applicant's spouse; statements from the applicant; statements from the applicant's spouse's mother and sister; and an employment letter for the applicant's spouse.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

Section 212(a)(6)(C) Misrepresentation, states in pertinent part:

- (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 chapter is inadmissible.

Section 212(i) of the Act provides, in pertinent part:

- (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.

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 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 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 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.”). [REDACTED] 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 will first consider hardship upon relocation. The applicant’s spouse has submitted several statements. She asserts that she returned to the United States in 2005 to care for her aging mother, and explains that she needs both her and the applicant’s salary in order to provide for her mother

because her mother's social security income would not be sufficient to care for her. *Statement of the Applicant's Spouse*, dated October 18, 2008. She also asserts that she and the applicant provide physical support for her mother, and that if she and the applicant had to return to France her mother would have to enter a nursing home. *Statement of the Applicant's Spouse*, December 19, 2008. She states that she was unable to find desired employment in France and that she earns three times what she made there by being employed here in the United States. She also states that she has two teenage boys who are United States citizens who would not get to benefit from the educational opportunities in the United States.

The applicant's spouse's mother has submitted a statement attesting to the fact that she is aging and needs the physical support of the applicant and his spouse. *Statement of Applicant's Spouse's Mother*, December 10, 2008. She states that they assist her with physical chores such as grocery shopping and doctor's visits, and that if they relocated to France she would have to enter a nursing home.

The applicant's spouse's sister has submitted a letter stating the applicant and his spouse are the primary care givers for her mother and that she is unable to care for her mother because she has to care for her own aging husband. *Statement of Applicant's Spouse's Sister*, December 19, 2008.

An examination reveals that there is insufficient evidence to support the assertions of the applicant's spouse. There is no documentation establishing that she has two U.S. citizen children and no documentation that, as they are now adults, they would be unable to care and provide for themselves. Even in a light most favorable to the applicant, if there was evidence to establish that she had two U.S. citizen children, children are not qualifying relatives in this proceeding and the applicant has not clearly shown how his spouse would be impacted by any challenges her children would face.

The AAO also notes that the applicant's spouse's mother is not a qualifying relative in this proceeding. Any hardship to her is only relevant as it would indirectly impact the qualifying relative, in this case the applicant's spouse. The record does not contain any documentary evidence that the applicant's spouse's mother suffers from any terminal medical conditions, or requires daily physical caretaking. The applicant's spouse's mother states in her letter that both the applicant and his spouse work full time, so it is not clear from the record of proceeding what level of physical support the applicant and his spouse actually provide. The record does not contain any documentation establishing the financial needs of the applicant's spouse's mother, showing what is her income, or establishing that her income is insufficient to provide for her financial obligations. Nor has the applicant shown that his spouse's mother would be unable to hire professional assistance to help care for her physically in her home. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). The AAO would also note an inconsistency in the testimony of the applicant's spouse and her mother. The applicant's spouse asserted in her October 18, 2008, letter that she and the applicant "live in my mother's home and pay bills and repairs." Her mother states in her letter, dated December 10, 2008, that the applicant and her spouse "do not pay all of the

bills here.” Although the applicant’s spouse claims there is no inconsistency, the AAO observes that, even after being noted by the Field Office Director, the applicant failed to provide any evidence that they pay for any bills or repairs on her mother’s house, or establishing that they provide any financial support for the applicant’s spouse’s mother.

There is no documentation establishing that the applicant or her spouse would be unable to find employment in France, or support her mother financially from abroad.

It appears from the record that the applicant and his spouse have resided in France for a significant period of their lives. This fact would mitigate any impact of relocating there, as the applicant’s spouse clearly speaks the language and is familiar with the culture. In addition, the applicant’s spouse has asserted that the applicant’s family resides in France, further mitigating any impact from having to relocate.

Even when the hardships asserted in this case are examined in the aggregate, they fail to rise above the common hardships associated with relocating with an inadmissible spouse, and as such do not establish extreme hardship.

With regard to hardship upon separation, the applicant’s spouse has asserted that she would suffer emotional hardship if the applicant were removed. She also explains that she pays bills and repairs on her mother’s house, and that she could not do it without the applicant’s salary.

As with the assertions above there is no evidence to support these assertions. There is no documentation corroborating that the applicant or his spouse have paid any bills for the applicant’s spouse’s mother, or any documentation that the applicant’s spouse’s mother would be unable to meet her own financial obligations with her income. The record contains a letter from [REDACTED] a District Director for the applicant’s employer, stating that she earns \$54,060 annually. The applicant’s spouse has stated that the applicant is employed, but has failed to submit any evidence of his earnings. The record does not contain sufficient documentary evidence to establish that the applicant’s spouse would experience any significant financial hardship upon separation.

Nor does the record contain any documentation that any emotional impact on the applicant’s spouse would rise above the common hardships associated with separation from an inadmissible family member.

Even when these hardships are examined in the aggregate, they fail to rise to a level of extreme hardship.

U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. Having found the applicant

statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.