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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**



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FILE:



Office:



Date:

APR 07 2011

IN RE:

Applicant:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility pursuant to section 212(i) of the Immigration and Nationality Act (the 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, [REDACTED]. 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 [REDACTED] who was found to be inadmissible to the United States pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien previously removed, and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The applicant is married to a U.S. citizen and applied for a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside with his wife and child in the United States.

The field office director found that the applicant was statutorily ineligible for any benefits or relief under the Act pursuant to section 241(a)(5) of the Act. *Decision of the Field Office Director*, dated May 12, 2008.

On appeal, counsel contends that section 241(a)(5) does not bar the applicant from applying for a waiver of inadmissibility as he has already been removed from the United States and is no longer in proceedings to reinstate his prior removal order. Counsel also contends that the applicant has established the requisite hardship, particularly considering that the applicant's wife, [REDACTED] suffers from Multiple Sclerosis. *Letter from [REDACTED]* dated March 8, 2011; *Statement in Support of I-290*, dated June 4, 2008.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and his wife, [REDACTED] showing they were married on June 26, 2000; copies of the applicant's birth certificates showing he was born [REDACTED] but then changed his name to [REDACTED]; a letter from the applicant; two letters from the applicant's wife, [REDACTED]; a copy of the birth certificate of the couple's U.S. citizen son, [REDACTED]; letters from [REDACTED] teachers; a letter from [REDACTED] mother; a letter from [REDACTED] physician and copies of her medical records; invoices from [REDACTED] physical therapy sessions; a letter from [REDACTED] friend; copies of tax and other financial documents; photographs of the applicant and his family; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

Section 241(a)(5) of the Act states:

Reinstatement of removal orders against aliens illegally reentering

If the Attorney General [now Secretary of Homeland Security] finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not

eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The AAO finds counsel's contention persuasive that section 241(a)(5) of the Act does not bar the applicant from applying for a waiver after the applicant has already been removed from the United States. Section 241(a)(5) of the Act pertains only to reinstatement proceedings and bars aliens who have been removed and illegally reentered the United States from applying for any relief from removal. Once an alien has been removed from the country pursuant to the reinstatement of a removal order, section 241(a)(5) no longer applies and the alien is eligible to apply for a waiver of inadmissibility.

In this case, the record shows that the applicant, born [REDACTED] entered the United States on December 1991, as a B-1 visitor for business. The record reflects, and the applicant concedes, that he submitted two applications for a diversity lottery – one in the name of [REDACTED] and another one in the name of [REDACTED] *Q & A for [REDACTED] DV's*, dated August 23, 1996. The applicant concedes that after one of the applications was approved, he submitted his brother's birth certificate with the lottery application. *Id.* The record further shows that the applicant was removed from the United States on December 30, 1997, after having overstayed his visa and applying for a diversity visa using a fraudulent name. The applicant reentered the United States on May 11, 2000, using a K-1 visa under the name [REDACTED] which counsel contends was the applicant's legally changed, new name. *Letter from [REDACTED] supra; see also Declaration from [REDACTED] dated October 17, 2006* (declaration from the applicant's cousin stating that [REDACTED] changed his name to [REDACTED] in approximately 1998). The applicant married a U.S. citizen on June 26, 2000, and submitted an Application to Register Permanent Residence or Adjust Status (Form I-485) on July 11, 2000. The applicant was served with a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) on July 20, 2006, and was removed from the United States pursuant to the reinstatement order on March 28, 2007. On October 18, 2007, the applicant filed an Application for Immigrant Visa and Alien Registration in [REDACTED]. In January 2008, the applicant filed an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), and a waiver application.

Therefore, the record shows, and counsel concedes, that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willful misrepresentation of a material fact in order to procure an immigration benefit. *Letter from Rodrigo Vilar, supra.*

The AAO notes that, as described in the Request for Evidence dated January 18, 2011, the applicant is no longer inadmissible under section 212(a)(9)(B) of the Act. The proper filing of a Form I-485 stops the accrual of unlawful presence. In this case, the applicant filed a Form I-485 on July 11, 2000, which was denied on May 4, 2006. The applicant accrued unlawful presence from May 4, 2006, until his removal on March 28, 2007, a period greater than 180 days, but less than one year. He was inadmissible under section 212(a)(B)(i)(I) of the Act, but it has now been more than three years since his departure, so he is no longer inadmissible under that section.

A waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), 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 child 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 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.

In this case, the applicant’s wife, [REDACTED] states that she was diagnosed with Multiple Sclerosis eleven years ago. She states that her health has deteriorated in the past four years since her husband’s departure from the United States. [REDACTED] contends that after husband’s departure, she had a major exacerbation and was bedridden for five months, losing use of her arms, hands, legs, bladder, and bowels. She states her mother, who is now seventy four years old, had to move in with her to take care of her and her four year old son, [REDACTED]. [REDACTED] states that she had a nurse visit her daily, an aide who bathed her twice a week, and therapists who came to her home because she was bed-bound. She states she completely lost hearing in her left ear, now uses a wheelchair 90% of the time, and gives herself a shot every other day. In addition, [REDACTED] states that her son, who is almost nine years old, suffers regularly from headaches, stomach aches, and depression. She states that she depends on her son for help, including helping her get up when she falls, and that he gets anxious and afraid when he sees her health deteriorating. Furthermore, [REDACTED] states that she has been unable to work since 2001 and that her only income is \$1,200 per month she receives in social security disability benefits. She contends that the only reason she has managed to keep a roof over their heads is because her mortgage company has allowed her to pay interest only, but that this accommodation will end in August 2011. [REDACTED] states she will be unable to pay the \$1,360 per month mortgage payment and has nowhere to go. She contends her electricity, water, and phone have been cut off numerous times due to non-payment. [REDACTED] states she feels totally helpless and cannot continue to rely on

her elderly mother for help. *Letters from* [REDACTED] dated February 10, 2011, and September 26, 2006.

A letter from [REDACTED] mother, [REDACTED] states that her daily duties include going to her daughter's house to prepare meals, assist her daughter with life's basic necessities, shop for her daughter, and drive her grandson back and forth to school. According to [REDACTED] has little or no feeling from her waist down and has limited ability to grasp even the simplest things with her hands. [REDACTED] contends she is seventy-five years old and that she also cares for her ninety-five year old mother. She states she is exhausted and is never able to have a day of rest. She states that she herself suffers from acid reflux, arthritis, anxiety, and depression. In addition, [REDACTED] states that she is on the edge of financial ruin trying to pay for life's basic necessities and help her daughter and grandson. She states that she has taken out a second mortgage on her house, that she is being advised to file for bankruptcy, and that she has even held monthly garage sales to try to keep her family solvent. She states that she, her daughter, and grandson have suffered extreme hardship and ask that the applicant be permitted to return to the United States. *Letter from* [REDACTED] dated February 14, 2011.

A letter from [REDACTED] physician states that [REDACTED] was diagnosed with Multiple Sclerosis (MS) in 1999. According to the physician, [REDACTED] has MS "not only in the brain but in the cervical and thoracic spine." The physician states that the disease has progressed over the last three years and she has "significant disability" with respect to walking. The physician states that [REDACTED] also experiences MS-related fatigue, cognitive deficits, sensory deficits, and bladder dysfunction. In addition, the physician contends that over the past three years, it has been recommended that [REDACTED] undergo physical and occupational therapy, but that she has not been able to afford therapy. According to the physician, having her spouse at home would alleviate much of [REDACTED] emotional stress and would help provide her with care in managing her MS. *Letter from* [REDACTED] dated February 3, 2011; *see also Letter from* [REDACTED] dated July 8, 2009 (indicating [REDACTED] is on medications for her MS that require careful laboratory monitoring).

Upon a complete review of the record evidence, the AAO finds that the applicant's wife will suffer extreme hardship if the applicant's waiver application were denied. The record shows that [REDACTED] was diagnosed with Multiple Sclerosis in 1999 and has been seeing the same physician for her treatment and therapy since her diagnosis. *Letters from* [REDACTED] *supra*. According to her physician, [REDACTED] MS has entered a "more rapid disease progression" in the past few years, possibly as a result of the significant stress of being separated from her spouse. *Id.* According to [REDACTED] and her mother, she relies on her elderly mother and her young son to help her with all aspects of daily life. [REDACTED] states she cannot drive, uses a wheelchair, has permanent hearing loss, and has had problems with her bladder and bowels. In addition, the record shows that [REDACTED] has experienced extreme financial hardship. According to the couple's 2005 tax return, the applicant was the sole income earner, earning \$40,696 in wages, while [REDACTED] received \$10,754 in Social Security benefits. *2005 U.S. Individual Income Tax Return* (listing [REDACTED] occupation as homemaker). [REDACTED] claim that she is behind in her bills is corroborated by her mother's letter as well as a letter from her Homeowners Association which states that it will commence foreclosure

proceedings against [REDACTED] house in the next forty-five days. *Letter from [REDACTED]* dated February 18, 2011; *see also Invoice from Physical Therapy Specialists*, dated January 21, 2011 (showing [REDACTED] paid \$835.95 on November 21, 2010, for physical therapy sessions and currently owes \$241.09). Considering these unique factors cumulatively, the AAO finds that the hardship [REDACTED] has experienced and will continue to experience if her husband's waiver application were denied is extreme, going well beyond those hardships ordinarily associated with a spouse's inadmissibility to the United States.

It would also constitute extreme hardship for [REDACTED] to move to [REDACTED] to avoid the hardship of separation from the applicant. Relocating to [REDACTED] would disrupt the continuity of the health care treatment she has been receiving for the past twelve years. The AAO takes administrative notice that the U.S. Department of State has recognized that "[m]edical facilities in [REDACTED] are limited, particularly outside [REDACTED] the capital, [and that t]ravelers should carry adequate supplies of any needed prescription medicines." *U.S. Department of State, Country Specific Information, [REDACTED]*, dated August 17, 2010. Moreover, the record shows that [REDACTED] is currently fifty-one years old, was born in the United States, and that the couple's son, [REDACTED] was also born in the United States. [REDACTED] would need to adjust to a life in [REDACTED] a difficult situation made even more complicated given her U.S. citizen son and her health condition. In sum, the AAO finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors 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 include the applicant's misrepresentation of a material fact to procure an immigration benefit and periods of unlawful presence. The favorable and mitigating factors in the present case include: the applicant's family ties to the United States, including his U.S. citizen wife and child; the extreme hardship to the applicant's wife if he were refused admission; and the applicant's lack of any arrests or criminal convictions.

The AAO finds that, although the applicant's immigration violations 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. Accordingly, the appeal will be sustained. The AAO further notes that the applicant's Form I-212, Application for Permission to Reapply for Admission (Form I-212), was denied based solely on the denial of the Form I-601. As the AAO has now approved the Form I-601, the Field Office Director shall review the Form I-212 on its merits and render a new decision.

ORDER: The appeal is sustained.