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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
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Washington, DC 20529-2090



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

[REDACTED]

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FILE:

[REDACTED]

Office:

[REDACTED]

Date:

APR 26 2011

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:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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 must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and a citizen of the [REDACTED] 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 sought a benefit under the Act through fraud or willful misrepresentation. He is the spouse of a U.S. citizen and the father of two U.S. citizens. The applicant is seeking a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States.

The District Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *District Director's Decision*, dated July 15, 2008; *District Director's Notice of Intent to Deny*, dated November 24, 2007.

On appeal, counsel asserts that the applicant's spouse and/or children will suffer extreme hardship as a result of the applicant's inadmissibility. *Form I-290B, Notice of Appeal or Motion*, dated July 21, 2008.

The record of proceeding includes, but is not limited to, the following evidence: statements from the applicant and his spouse; tax returns and W-2 forms for the applicant and his spouse; and court records relating to the applicant's criminal convictions. The entire record was reviewed and all relevant evidence considered in reaching 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.

The record reflects that the applicant used the passport and Resident Alien Card belonging to his deceased brother to enter the United States. Accordingly, he is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for having sought admission through fraud or the willful misrepresentation of a material fact and must seek a waiver under section 212(i) of the Act, which states:

- (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.

Although not referenced in the Notice of Intent to Deny issued by the District Director on November 24, 2007, the record also establishes that, on December 12, 1990, the applicant pled guilty to Aggravated Assault, Third Degree under [REDACTED] Statutes [REDACTED] § 2C:12-1.b(2), which at the time of the applicant's conviction stated:

b. Aggravated assault. A person is guilty of aggravated assault if he:

....

(2) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon

In *Matter of O-*, 3 I&N Dec. 193 (BIA 1948) and *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992), the Board of Immigration Appeals (BIA) held that assault with a weapon is a crime involving moral turpitude. While as a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration law, this general rule does not apply where an assault or battery necessarily involved some aggravating dimension, such as the use of a deadly weapon.... See, e.g., *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). The BIA has also held that the knowing use or attempted use of deadly force constitutes a crime involving moral turpitude. *In re Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006). Accordingly, the applicant's conviction for assault with a deadly weapon is a conviction for a crime involving moral turpitude and bars his admission to the United States under section 212(a)(2)(A)(i)(I) of the Act,¹ which states:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Waivers of a section 212(a)(2)(A)(i)(I) inadmissibility may be granted to individuals if:

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3^d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

(1)(A) [I]t is established to the satisfaction of the Attorney General [Secretary] that-

- (i) [T]he activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

In the present case, the applicant is eligible to seek a waiver of his 212(a)(2)(A)(i)(I) inadmissibility under section 212(h)(1)(A) of the Act as the events that led to his conviction took place more than 15 years ago. However, as the applicant is also inadmissible under section 212(a)(6)(C)(i) for willful misrepresentation, the AAO finds no purpose would be served in considering the applicant's waiver eligibility under the more generous waiver requirements of section 212(h)(1)(A). Moreover, the applicant has been convicted of aggravated assault with a deadly weapon, a violent crime, and is subject to the regulation at 8 C.F.R. § 212.7(d), which states:

The Attorney General [Secretary, Department of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO notes that the words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under

that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General did not reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we do not find the statutory terms “violent or dangerous crimes” and “crime of violence” to be synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependant on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, the AAO finds the definition of a crime of violence found in 18 U.S.C. § 16 to offer useful guidance in determining whether the applicant’s conviction for aggravated assault under N.J.S. § 2C:12-1.b(2) is a violent crime under 8 C.F.R. § 212.7(d). The term “dangerous” is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms “violent” and “dangerous” in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual “case-by-case basis.” 67 Fed. Reg. at 78677-78.

Using this definitional framework, the AAO finds aggravated assault with a deadly weapon under N.J.S. § 2C:12-1b(2) to be a violent crime for the purposes of 8 C.F.R. § 212.7(d). As the record does not indicate that the applicant’s case involves national security or foreign policy issues, the applicant is therefore required to establish exceptional or extremely unusual to a qualifying relative in order to be granted a waiver under section 212(h) of the Act.

Prior to addressing the applicant’s eligibility for a waiver under section 212(h), the AAO will consider whether he is eligible for a waiver of his section 212(a)(6)(C)(i) inadmissibility under section 212(i) of the Act. If the applicant is able to meet the extreme hardship requirement of section 212(i), the AAO will consider his hardship claim under the higher hardship standard found at 8 C.F.R. § 212.7(d).

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 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 Board of Immigration Appeals (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 a qualifying relative would experience extreme hardship as a result of his inadmissibility.

The applicant has not asserted that his spouse would experience any hardship if she and their children relocate with him to the [REDACTED]. In the absence of clear assertions from the applicant, the AAO will not speculate as to what hardships the applicant's spouse would encounter if she and her children move to the [REDACTED]. The burden of proof in this proceeding lies with the applicant, and "while an analysis of a given application includes a review of all claims put forth in light of the facts and circumstances of a case, such analysis does not extend to discovery of undisclosed negative impacts." *Matter of Ngai*, 19 I&N Dec. at 247. We therefore find that the applicant has failed to establish that his spouse would experience extreme hardship upon relocation.

The record also fails to demonstrate that the applicant's spouse would suffer extreme hardship if the waiver application is denied and she remains in the United States. While counsel, on appeal, contends that the evidence submitted by the applicant establishes that he is the "foundation" of his family and that they would experience extreme hardship if the waiver application is denied, the AAO finds the evidence submitted to establish extreme hardship to be limited to a statement from the applicant's spouse, submitted with the Form I-601.

In her statement, the applicant's spouse asserts that the effect of the applicant's removal on her and her children would be devastating and tragic. She also asserts that "[her] world from its foundation up would be broken in millions of pieces." The applicant's spouse contends that the applicant is a male role model for her son and is extremely important to her when her son's asthma flares up. She asserts that she is unable to take care of her son on her own. The applicant's spouse also indicates that she has her own house with the applicant and is a key part of his business. Without the applicant, his spouse states, she would have little chance to survive.

Although the AAO recognizes family separation as a factor in determining extreme hardship and acknowledges that the applicant's spouse would suffer emotionally if she is separated from the

applicant, we do not find the record to demonstrate that her emotional hardship would rise above the distress normally created when families are separated as a result of removal or inadmissibility. U.S. courts have repeatedly held that such suffering is insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). The record also fails to document that the applicant's son suffers from asthma or that his condition is severe enough that the applicant's spouse is unable to care for him without the applicant's assistance. Neither does it include evidence that the applicant has a business, that his spouse is part of his business or that she is economically dependent on this employment. Although the record includes the applicant's and his spouse's tax returns for 2005 and 2006, the W-2 forms accompanying these returns indicate that they work for different employers. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See 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 record does document that the applicant had a \$142,065.89 mortgage in 2005, but fails to establish the amount of the family's monthly mortgage payment or their other financial obligations. Moreover, the AAO notes that nothing in the record demonstrates that the applicant would be unable to obtain employment in the [REDACTED] and thereby assist his spouse financially from outside the United States. Based on the record, the AAO does not find the applicant to have established that his spouse would experience extreme hardship if she remains in the United States without him.

The record does not establish that the applicant's spouse would experience extreme hardship as a result of his 212(a)(6)(C)(i) inadmissibility and he is, therefore, not eligible for a section 212(i) waiver. In that the applicant has not demonstrated extreme hardship under section 212(i) of the Act, he has also failed to demonstrate that he warrants a favorable exercise of discretion under the heightened standard of exceptional and extremely unusual hardship imposed by the regulation at 8 C.F.R. § 212.7(d). He is, therefore, also ineligible for a waiver under section 212(h) of the Act.

In proceedings for application for waiver of grounds of inadmissibility, 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal will be dismissed.