

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave. NW MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**

[REDACTED]

HLS

DATE: DEC 20 2011 OFFICE: ALBANY, NY

FILE: [REDACTED]

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 PETITIONER:

[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.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew, Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Canada who has resided in the United States since November 26, 2007, when she attempted entry at Cannon Corners, New York. The applicant was refused entry at Cannon Corners because she was found to be an intending immigrant. Later that same day she entered the United States at Mooers, New York as a visitor. She was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or misrepresentation. The applicant is the spouse of a U.S. Citizen and is the beneficiary of an approved Form I-130 Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her U.S. Citizen spouse.

The Field Office Director concluded that the applicant failed to establish extreme hardship to her U.S. Citizen spouse and denied the application accordingly. *See Decision of Field Office Director* dated July 29, 2009.

On appeal, counsel for the applicant submits a brief in support of appeal, as well as several notarized affidavits. In the brief, counsel avers that the Field Office Director failed to consider all the individual hardship factors in the aggregate. *Brief in support of appeal*, August 26, 2009. Counsel explains the applicant's spouse would not be allowed to take his child from a previous marriage to Canada, and separation from that child would cause the spouse severe hardship. *Id.* Counsel emphasizes the family ties between the applicant, her spouse, and the children, as well as the financial implications of separation and relocation to Canada. *Id.* Counsel further states the spouse's mother has serious medical conditions, and requires the assistance of the applicant. *Id.*

The record includes, but is not limited to, the documents listed above, other applications and petitions filed on behalf of the applicant, letters from friends, family, and employers, physician's scripts, photographs, and U.S. Federal Income Tax Returns. The entire record was reviewed and considered in rendering a decision on the appeal.

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

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

Section 212(i) of the Act provides:

- (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse,

son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

In the present case, the record reflects that the applicant attempted to enter the United States at [REDACTED]. The immigration official inspected her vehicle, and found some furniture. It was determined the applicant was an intending immigrant, not a visitor. The applicant was refused entry, and was advised that [REDACTED] should file a fiancée petition for the applicant so she could immigrate in a few months. The record further reflects on the same day the applicant entered the United States without incident at Mooers, New York, and on December 23, 2006, within 30 days of her entry, married her U.S. Citizen spouse. The applicant is therefore inadmissible under section 212(a)(6)(C) of the Act as an intending immigrant. She does not contest her inadmissibility.

Section 212(i) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec.

880, 883 (BIA 1994); *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.*

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., *Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record contains references to hardship the applicant’s children and mother-in-law would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien’s children or parents-in-law as factors to be considered in assessing extreme hardship. In the present case, the applicant’s spouse is the only qualifying relative for the waiver under section 212(i) of the Act, and hardship to the applicant’s children or parents-in-law will not be separately considered, except as it may affect the applicant’s spouse.

The applicant’s spouse submits he will suffer financial, psychological and emotional, as well as other hardship upon separation from the applicant. In his affidavit, he explains he and the applicant have recently given birth to their first child together. See *affidavit of applicant’s spouse*, August 24, 2009. The spouse contends his duties towards the newborn, as well as to other children from previous marriages and his own mother are complicated by his work as a trucker who just started his own trucking company. *Id.* The spouse further explains: “As a trucker, I only make money if I am able to travel. Without Jessica to watch the kids and look after my mother, I would not be able to work nearly as much.” *Id.* The spouse’s mother describes her own difficulties: “For the past several years I’ve struggled with chronic back pain as a result of osteoporosis weakening my bones. Recently, it became so debilitating that everything I did was very difficult. Finally I was diagnosed

with spinal stenosis and underwent painful back surgery... I also suffer from bilateral carpal tunnel, which causes me to lose feeling in my hands and makes it difficult for me to grasp objects. On top of this I also have severe emphysema, which makes breathing difficult and painful.” *Affidavit from* [REDACTED] August 17, 2009. The spouse’s mother then describes the applicant’s role: “[REDACTED] comes over regularly to help with my housework. When [REDACTED] is home, he helps with all of the bigger chores I would never be able to do on my own. They monitor my health and make sure I am up-to-date on my prescriptions.” *Id.* The spouse states: “I worry about my mother, who is still recovering from back surgery she underwent in July of this year and has been diagnosed with severe emphysema, GERD, osteoporosis, and depression.” *See affidavit of applicant’s spouse, August 24, 2009.*

The applicant’s spouse also contends he suffers from emotional and psychological issues given the applicant’s inadmissibility. *See affidavit of applicant’s spouse, August 24, 2009.* He states: “I’ve been completely overwhelmed with stress and worry. I find it hard to focus on anything else, including work. I cannot think of any other time in my life when I have felt so unhappy. I am constantly tired and miserable, which is affecting my work and relationships. I am currently prescribed Zoloft to help manage those feelings, but I am still overwhelmed with sadness and worry over [REDACTED]’s immigration issues.” *Id.* His mother confirms: “it’s been hard to watch [REDACTED] go through all of this. Since [REDACTED]’s immigration problems have emerged, he hasn’t been the same. When I talk to [REDACTED] he sounds so unhappy and discouraged. He looks tired all the time, and he’s losing weight from not eating properly. His family means everything to him and I can see the toll of the possibility being taken away from [REDACTED] has taken on him.” *Affidavit from* [REDACTED] August 17, 2009.

The applicant’s spouse further explains another aspect of the emotional toll the applicant’s inadmissibility would take with respect to his son, [REDACTED]. The spouse indicates: “I have two sons from a previous marriage. I currently have custody of my son, [REDACTED], while my ex-wife has custody of [REDACTED]. At 13 years old, [REDACTED] needs me now more than ever. I know if I were to move to Canada my ex-wife would never agree to allow [REDACTED] to move with me and I would lose custody. I would also lose contact with my 8 year old son, [REDACTED]. I would never be able to abandon my children to move to another country and it would absolutely destroy me to be separated from them.” *See affidavit of applicant’s spouse, August 24, 2009.* In a letter, the spouse’s ex-wife confirms: “I would not willingly allow my ex-husband, [REDACTED], to move outside the United States with our son [REDACTED]. This, I fear, would create too much of a distance from me, much added expense to visit and would further separate him from his brother, [REDACTED].” *Affidavit of* [REDACTED] July 11, 2008.

Lastly, the applicant’s spouse describes the financial hardship he would encounter upon separation from the applicant and relocation to Canada. He states, with respect to separation: “[REDACTED] and I started our own trucking business in January... Without [REDACTED]’s support and hard work, I know my business would fail. This would crush me financially and I would not be able to pay bills and child support... [REDACTED] not only helps with the business directly, she also watches the children and takes care of the house and my mother when I am away from my business.” *See affidavit of applicant’s spouse, August 24, 2009.* The spouse also indicates he would be unable to relocate to Canada for financial reasons: “Not only would it kill me to abandon the business we have built, it is not

financially feasible... If I were able to find employment as a truck driver in Canada, I would not be earning nearly as much as I am now. In Canada, the price of fuel is much higher. This would be financially debilitating. In fact, I doubt I would be able to earn enough to support my family. Since I don't have a high school diploma or GED, my choices are even more limited... My parents own the three bedroom doublewide trailer where my family is currently living. I am very grateful to my parents, who only charge us \$350/month for rent... If I were to move to Canada and leave my parent's property, I most definitely would not be able to afford the rent payments while supporting our family." *Id.* The spouse's U.S. federal income tax return filed with his 2007 Form I-864, Affidavit of Support, shows his total income in 2006 was \$10,744.00.

The spouse's trucking job, as well as the duties it entails and the consequences it has on his personal life, contribute significantly to a finding of extreme hardship. Given his long hours away from home, the applicant's role as a caretaker for all the children as well as the spouse's mother signify her absence would create for the spouse difficulties above and beyond those normally experienced by family members of inadmissible aliens. Moreover, these logistical difficulties are complicated by the spouse's emotional and psychological state, as confirmed in affidavits from his mother and maternal aunt. *See affidavit from [REDACTED] August 25, 2009* ("my nephew has become a shell of his former self. I can tell the stress and anxiety of [REDACTED] and her children being separated from him, his sons, and the new baby are taking a toll on [REDACTED]. He's obviously lost weight and just seems very sad and worried"), *affidavit from [REDACTED] August 17, 2009* ("When I talk to [REDACTED] he sounds so unhappy and discouraged. He looks tired all the time, and he's losing weight from not eating properly. His family means everything to him and I can see the toll of being taken away from [REDACTED] has taken on him").

Furthermore, the applicant has submitted evidence of financial hardship. The latest tax return submitted shows her spouse has a yearly income of \$10,744.00. *See 2006 tax transcripts.* This income is insufficient to support a household of two to 100 percent of the poverty guidelines, much less a family with several children and two adults. *See Form I-864P, Poverty Guidelines, U.S. Citizenship and Immigration Services, March 1, 2011.* Although the record lacks evidence of other monthly bills or the applicant's own income, the spouse's mother confirms she charges the household "minimal rent" which allows the applicant's spouse to spend that money on other necessities. *Affidavit from [REDACTED] August 17, 2009.* The AAO therefore finds the spouse experiences some financial hardship given the evidence of record.

When the spouse's emotional and psychological distress, financial hardship, and hardship due to the spouse's job and his family responsibilities are considered in the aggregate, the AAO finds the impacts of separation on the applicant's spouse are cumulatively above and beyond the hardships commonly experienced by relatives of inadmissible aliens. Therefore, the AAO concludes that the applicant's spouse would suffer extreme hardship if the waiver application is denied and the applicant returns to Canada without her spouse.

The AAO also finds the spouse would experience extreme hardship upon relocation to Canada. In addition to the financial hardships, as discussed *supra*, there is sufficient evidence to show the spouse would lose custody of his son [REDACTED] if he moved to Canada. *See affidavit of [REDACTED]*

July 11, 2008. The spouse explains that such a loss, given relocation to Canada, would destroy him. *See affidavit of applicant's spouse*, August 24, 2009. Although the physical distance between the current residence in [REDACTED] and the applicant's previous address in Quebec, Canada, is not significant, the legal ramifications of moving the child [REDACTED] to another country can be substantial. This hardship, when considered cumulatively with the financial hardship the spouse currently experiences and the financial hardship of possibly giving up his trucking business, amounts to hardship above and beyond those normally experienced by relatives of inadmissible aliens upon relocation.

Considered in the aggregate, the applicant has established that the applicant's spouse would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The favorable factors include the extreme hardship to the applicant's spouse, the applicant's lack of a criminal record, family ties in the United States, and the existence of business ties in the United States. The unfavorable factors include the applicant's misrepresentation to immigration officials.

Although the applicant's violation of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

We note that the Field Office Director denied the Form I-485, application to register permanent residence or adjust status, solely on the basis of the applicant's inadmissibility under section 212(a)(6)(C)(i) of the Act and the Field Office Director's denial of the Form I-601 waiver application. *Decision of the Field Office Director*, dated July 29, 2009. The Field Office Director's denial of the Form I-485 was premature, as the applicant timely filed the instant appeal. Because the appeal will be sustained, there remains no basis, in the present record, for the denial of the adjustment application. Accordingly, the Field Office Director should reopen the adjustment application pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(i) and issue a new decision.

ORDER: The appeal is sustained.