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



U.S. Citizenship
and Immigration
Services

[REDACTED]

HS

FILE: [REDACTED] Office: BALTIMORE, MARYLAND

Date: FEB 03 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.

Thank you,

Perry Rhew

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application will be approved.

The applicant is a native and [REDACTED] who conceded that she sought admission to the United States by presenting an altered visa on February 10, 2006 at Los Angeles, California. 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 the use of such visa in 2006. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130), and her husband, a United States citizen, is her petitioner. 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.

The District Director concluded that the applicant failed to establish that a bar to her admission to the United States would result in an "extreme hardship" to the qualifying relative and denied the application accordingly. *See Decision of the District Director* dated October 28, 2009.

On appeal, the applicant's attorney provided a brief in support of the applicant's appeal. In the appeal brief, the applicant's attorney asserted that the qualifying spouse has lived in the United States his entire life, has his own business in the United States and has close family ties to the United States. The applicant's attorney also contends that if the qualifying spouse were to relocate he would face difficult country conditions and be affected by safety concerns and financial issues. Moreover, the appeal brief states that the applicant's spouse would suffer emotionally and psychologically should he remain in the United States without the applicant.

The record contains the original Application for Waiver of Grounds of Inadmissibility (Form I-601), the Notice of Appeal (Form I-290B), an appeal brief, a letter from the qualifying spouse, country condition materials [REDACTED], a psychological evaluation, 2008 tax returns, a lease for the qualifying spouse's business, birth certificates for the qualifying spouse's children, a residential lease, a marriage certificate, banking information, the qualifying spouse's birth certificate and an Application to Register Permanent Residence or Adjust Status (Form I-485), as well as the accompanying materials submitted in conjunction with the application. 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, 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. The applicant's husband 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) [REDACTED] 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 the Phillipines, 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. [REDACTED], 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); [REDACTED], 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 the present case, the record reflects that the applicant conceded that she used an altered visa on February 10, 2006 to seek admission to the United States at Los Angeles, California. It is unclear from the appeal brief whether the issue of inadmissibility is being contested because it indicates that the applicant “readily admitted” that the visa she used had been altered, and this might imply she made an immediate retraction. However, the record indicates that the applicant did not admit to her use of an altered visa until she was asked at secondary inspection, and thus did not make an immediate retraction. The applicant is therefore inadmissible under section 212(a)(6)(C)(i) of the Act to the United States for her use of an altered visa.

The applicant’s qualifying relative is her husband, and as aforementioned, her Form I-130 has already been approved.

The evidence provided which specifically relates to the applicant’s hardship includes a letter from the qualifying spouse, country condition materials for Sri Lanka, a psychological evaluation, 2008 tax returns, a lease for the qualifying spouse’s business, birth certificates for the qualifying spouse’s children, a residential lease, banking information and the accompanying materials submitted in conjunction with the Form I-485 application. The entire record was reviewed and considered in rendering a decision on the appeal.

As aforementioned, the applicant’s attorney provided a brief in support of the applicant’s appeal detailing the hardships that the qualifying spouse would encounter if he were to relocate to Sri

Lanka. The applicant's attorney asserted that the qualifying spouse has lived in the United States his entire life, is self-employed in the United States and has close family ties to the United States. The applicant's attorney also contends that, if the qualifying spouse were to relocate, he would face difficult country conditions and be affected by safety concerns and financial issues. Moreover, the appeal brief indicates that the applicant's spouse would suffer emotionally and psychologically if he were to remain in the United States without the applicant.

The AAO finds that the applicant's husband would suffer extreme hardship as a consequence of being separated from the applicant. The qualifying spouse's stated in his letter that he would face "emotional devastation" if he had to live without the applicant, and that he needs the applicant to "be at [his] side." The psychological report confirms that the qualifying spouse would be "devastated and ill equipped to manage further guilt, distress, and shame." The report further finds that the qualifying spouse is "at risk for a more overt, paranoid reaction which would psychologically disable him." Moreover, the report indicates that the loss of the applicant could result in the qualifying spouse being a "suicide risk" based on his prior psychological history. With regard to the qualifying spouse's potential financial hardships in the event the applicant returns to Sri Lanka, he indicates in his letter that he will lose approximately \$37,000 net income from the applicant's employment at the French Embassy and that his business will lose the applicant's free help. To support these assertions the applicant submitted one bank statement with a payroll deposit from the applicant's employment, however it is unclear whether the qualifying relative relies on these contributions. Moreover, there is no evidence to support the claim that the applicant works for the qualifying spouse's business. Although the evidence presented regarding potential financial hardship is minimal, the applicant provided sufficient evidence to demonstrate that her qualifying spouse would suffer extreme hardship when his emotional and psychological hardships and potential financial hardships are considered in the aggregate.

The applicant has also demonstrated that her qualifying relative would suffer an extreme hardship in the event that he relocated to Sri Lanka. The qualifying spouse, in his letter, indicated that he has lived in the United States for his entire life, has close family ties and owns his own business in the United States. The applicant's spouse also indicates that, as a United States citizen, it is unsafe for him to live in [REDACTED]. The record contains country condition information to support his assertions regarding his safety concerns over living in [REDACTED]. The applicant's attorney also provided country condition information discussing the general problems with the applicant's home country and its economic issues. Moreover, the record indicates that the applicant's spouse would suffer financially if he relocated. The record reflects that the applicant's spouse is self-employed in the United States and could encounter the loss of his business by his relocation to [REDACTED]. As such, the AAO concludes that were the applicant unable to reside in the United States due to her inadmissibility, her qualifying spouse would suffer extreme hardship if he returned to Sri Lanka with her.

Considered in the aggregate, the applicant has established that her husband 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. [REDACTED] 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 AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of* [REDACTED], in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(i) relief must bring forward to establish that she merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. [REDACTED]

The favorable factors in this matter are the extreme hardships the applicant's United States citizen spouse would face if the applicant is not granted this waiver, regardless of whether he accompanied the applicant or remained in the United States, her support from the qualifying spouse and her apparent lack of a criminal record. The unfavorable factors in this matter are the applicant's use of a fraudulent document in order to obtain admission to the United States.

Although the applicant's violations 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.

ORDER: The appeal is sustained.