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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**

HS

FILE: [REDACTED]

Office: SOUTH PORTLAND, MAINE

Date: FEB 07 2011

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) and section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

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,

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

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of the Dominican Republic who is 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 attempted to procure admission into the United States by fraud or willful misrepresentation and pursuant to 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 and seeking readmission within ten years of his last departure from the United States. The applicant is married to a lawful permanent resident. He seeks a waiver of inadmissibility in order to reside in the United States with his lawful permanent resident spouse and their children.

The Field Office Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the Field Office Director*, dated July 8, 2008.

On appeal, counsel for the applicant contends that the applicant's qualifying relative would suffer extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion; Attorney's brief*.

In support of the waiver, counsel submits a brief. The record also includes, but is not limited to, school records for the applicant's children; statements from the applicant and his spouse; bank statements; tax statements; employment letters for the applicant and his spouse; earnings statements for the applicant's spouse; utility bills; cable bills; apartment leases; telephone bills; W-2 statements; an examination report for the applicant's child; and published country conditions reports. The entire record was reviewed and considered in rendering this decision.

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

- (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(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

- (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

- (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The record reflects that the applicant entered the United States without inspection in February 1995. *Record of Sworn Statement*, dated July 27, 1996; *Statement from the applicant*, dated July 17, 2007. In the summer of 1996, he obtained a fraudulent passport with a lawful permanent resident stamp. *Statement from the applicant*, dated July 17, 2007. He subsequently flew to the Dominican Republic. *Id.* On July 27, 1996 the applicant attempted to gain admission to the United States at the JFK airport in New York with the fraudulent documents. *Form I-275, Notice of Visa Cancellation/Border Crossing Card Voidance*, dated July 27, 1996; *Record of Sworn Statement*, dated July 27, 1996. The applicant was questioned by immigration authorities and subsequently withdrew his application for admission. *Form ER-583, Withdrawal of Application for Admission*. On July 28, 1996 the applicant was returned to the Dominican Republic. *Id.*; *Form I-259, Notice to Detain, Deport, Remove or Present Aliens*, dated July 27, 1996. In the fall of 1996, the applicant entered the United States without inspection. *Statement from the applicant*, dated July 17, 2007. On March 14, 2002 the applicant departed the United States under an authorization of advance parole, returning to the United States on April 3, 2002. *Attorney's brief*. On December 28, 2003 the applicant departed the United States under an authorization of advance parole, returning to the United States on January 23, 2004. *Id.* On July 19, 2006 the applicant departed the United States under an authorization of advance parole, returning to the United States on August 1, 2006. *Id.* The applicant has remained in the United States since that time. The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until he departed the United States on March 14, 2002, from April 3, 2002 until his departure on December 28, 2003, and from January 23, 2004 until his departure on July 19, 2006. The applicant is therefore inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year. As the applicant attempted to gain admission to the United States with false documents, he is also inadmissible under section 212(a)(6)(C) of the Act.

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.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) 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 children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*,

10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or

removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). 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.

If the applicant’s spouse joins the applicant in the Dominican Republic, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant’s spouse was born in the Dominican Republic. *Permanent Resident Card*. The applicant’s spouse has two sisters in Rhode Island and a father in New York. *Statement from the applicant’s spouse*, dated July 17, 2007. The mother of the applicant’s spouse resides in the Dominican Republic. *Form G-325A, Biographic Information sheet, for the applicant’s spouse*. The applicant’s spouse has four children, one of whom is a child with special needs. *Birth certificates; School records*. The applicant notes that he and his spouse are afraid to leave their oldest child alone because she is unable to care for herself and is very emotionally volatile. *Statement from the applicant*, dated August 28, 2008. An examination report from the Massachusetts Rehabilitation Commission Disability Determination Services notes that the applicant’s child has been diagnosed as having a Learning Disorder NOS; Selective Mutism, provisional; Mixed Receptive-Expressive Language Disorder, deferred; and Borderline Intellectual Functioning, provisional. *Consultative*

Examination Report, Massachusetts Rehabilitation Commission, Disability Determination Services, dated May 31, 2007. School records for the applicant's eldest child note that she is obese and needs a small, structured class program where she can receive the individualized attention and instruction she needs to address her cognitive, language and social needs. *New York City Board of Education, Individualized Education Program*, dated May 28, 2004. Cognitive and academic delays do not permit the applicant's child to benefit from a general education environment. *Id.* Country conditions reports included in the record note that there is no officially recognized disability policy within Dominican society nor is there a clear expectation for full participation of individuals with disabilities in the larger society. *An Introduction to the Culture of The Dominican Republic for Rehabilitation Service Providers, CIRRIE, Center for International Rehabilitation Research Information and Exchange*, 2002. While legislation exists protecting the rights of individuals with disabilities through a combination of special laws that allow for due process through the courts, these laws are not universally applied in the Dominican Republic due to limited fiscal resources, shortages of trained personnel, accessibility barriers, costs associated with assistive devices and prescriptions and the lack of rehabilitation facilities outside of large urban centers. *Id.* While the AAO notes that the applicant's children are not qualifying relatives for the purposes of this case, it acknowledges the difficulties of caring for four children, particularly when one child has documented learning disabilities. The AAO also acknowledges the documented lack of resources for disabled individuals in the Dominican Republic. When looking at the aforementioned factors, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in the Dominican Republic.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse was born in the Dominican Republic. *Permanent Resident Card*. The applicant's spouse has two sisters in Rhode Island and a father in New York. *Statement from the applicant's spouse*, dated July 17, 2007. The mother of the applicant's spouse resides in the Dominican Republic. *Form G-325A, Biographic Information sheet, for the applicant's spouse*. The applicant's spouse has four children, one of whom is a child with special needs. The applicant's spouse notes that there is no practical way for her to take care of her eldest child's emotional and psychological needs and be a good parent to her without the applicant. *Statement from the applicant's spouse*, dated August 28, 2008. While the applicant's child is not a qualifying relative for purposes of this case, the AAO acknowledges the difficulties in being a single-parent to four children, one of whom has documented special needs. The applicant's spouse states that she would be unable to support her family on an economic level. *Id.* The record includes documentation of the various expenses of the applicant's spouse which include car insurance statements, utility bills, cable bills, an apartment lease, and telephone bills. The record also includes an employment letter for the applicant's spouse noting her rate of pay to be \$7.50 per hour and that she works 40 hours a week. *Statement from [REDACTED] Trinity Staffing & Design*, dated October 10, 2007; *See also earnings statements for the applicant's spouse*. The AAO acknowledges the documented financial difficulties of the applicant's spouse. When looking at the aforementioned factors, particularly the difficulties of being a single parent to four children, one of whom has documented special needs, and the documented financial difficulties of the applicant's spouse,

the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to remain in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which 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 are the applicant's misrepresentation for which he now seeks a waiver, his prior unlawful presence for which he now seeks a waiver, and periods of unauthorized employment. The favorable and mitigating factors are his United States citizen spouse and children, the extreme hardship to his spouse if he were refused admission, and his supportive relationship with his spouse as documented in the record.

The AAO finds that, although the immigration violations committed by the applicant 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.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(6)(C)(i) and 212(a)(9)(B)(v) of the Act, 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.