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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

H5

[redacted]

FILE: [redacted] Office: NEW ORLEANS, LA Date: FEB 18 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
Chief, Administrative Appeals Office

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

The applicant is a native and a citizen of China who used false documents in an attempt to enter the United States. The applicant 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). She is the wife of a U.S. citizen. 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 Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her U.S. citizen husband, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on September 16, 2010.

On appeal, counsel for the applicant asserts that the Field Office Director's decision fails to provide a reasoned explanation for the denial and fails to examine all of the evidence submitted to establish that the applicant's spouse will suffer extreme hardship if the applicant is removed from the United States. *Form I-290B*, received October 20, 2010.

The record contains documents filed in relation to the applicant's previous removal proceedings, her Form I-130 and previous Form I-485 proceedings. With regard to the applicant's Form I-601, the record also contains, but is not limited to, the following evidence: a brief from counsel; statements from the applicant, the applicant's spouse and the applicant's children; a Psychosocial Diagnostic Evaluation of the applicant's spouse by [redacted], dated October 19, 2010; a statement from the applicant's spouse's employer; documents from [redacted] dated March 25, 2010; and a copy of the 2009 Human Rights Report: China, published by the U.S. State Department's Bureau of Democracy, Human Rights and Labor.

The entire record was reviewed and all relevant evidence considered in rendering 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 indicates that the applicant presented false documents when entering the United States in 1992, and thus entered the United States by materially misrepresenting her identity. Therefore the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) 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.

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 her 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-Moralez,* 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.

With regard to hardship upon relocation, counsel has asserted that the applicant's spouse has lived and worked in the United States for over 20 years, has no family ties in China and suffers from medical issues which would complicate his relocation and ability to find employment. *Brief in Support of Appeal*, December 10, 2010.

The record contains documentation that the applicant's spouse's grown sons reside in the United States. The applicant's spouse has asserted that he feels obligated to assist his son attend college, and that both of his parents have passed away. *Statement of the Applicant's Spouse on appeal*, received December 10, 2010.

The AAO notes that the applicant's spouse is now 53 years old and has resided in the United States for over 20 years, significant considerations in any evaluation of impacts upon relocation. The

record contains country conditions materials on the human rights violations in China and the AAO acknowledges that the conditions in China present concerns for the applicant's spouse.

When the AAO considers the age of the applicant's spouse, his medical condition, his length of residence, the presence of his immediate family, the lack of family ties in China and the conditions in China, it concludes that in the aggregate these factors establish that the applicant's spouse will experience extreme hardship upon relocation.

With regard to hardship upon separation, counsel asserts that the applicant's spouse will experience physical, emotional and financial hardship if the applicant is removed. *Brief in Support of Appeal*, December 10, 2010. Counsel states that the applicant and her spouse have been officially married for 22 years, that the applicant's spouse has resided in the United States for 20 years and that the applicant's spouse been a U.S. citizen for nearly 18 years. He states that the applicant's spouse has severe back pain and that the applicant is the one who cares for him physically.

The applicant's spouse explains that he suffered a back injury in 1976 and that he depends on the applicant to massage and treat him because he cannot afford health insurance. *Statement of the applicant's spouse*, dated October 18, 2010. The applicant's spouse asserts that the applicant is the one who primarily performed the household labor and chores for himself and their children during her residence. He states that he would not be able to afford their home without the applicant's income.

With regard to financial hardship, an examination of their joint 2009 income statement indicates that the applicant and her spouse earned $37,031 in 2009 and did not list any dependents. Tax forms submitted with the record indicate that the applicant's spouse was the primary income earner, but the applicant's social security income statement from 2009 indicates that she earned between $4000 and $11,000 over the previous four years. The record contains a copy of a deed for a residential property, which the applicant's spouse asserted requires a monthly mortgage payment of $1,300, $15,600 annually. However, there is no documentation which supports the assertion that the applicant and her spouse have been financially supporting their sons and it has not been explained why the applicant's sons would not be able to assist her spouse if she were removed. Nonetheless, based on these documents it is evident that the applicant's spouse would experience some loss of income upon the applicant's removal, and that his annual mortgage might comprise over half of his current projected income.

With regard to the applicant's medical condition, the record contains a single statement from a Radiological examination. The x-rays are indecipherable, and the AAO is not qualified to interpret raw medical data. The statement from [redacted] states that the X-rays demonstrate the presence of a slight deformity in the T9 vertabrae and that her diagnostic impression was that it was a healed compress fracture. The record does not contain any documentation supporting the assertion that the applicant and her spouse cannot afford health insurance. Weighing this evidence does not yeild a conclusive picture of the applicant's spouse's medical issues. However, in light of the fact that all four members of the applicant's family attest to her spouse's back problems, and the fact that it is

referenced in his psychosocial examination leads the AAO to conclude that, more likely than not, the applicant's spouse suffers from serious back pain and depends on the applicant for physical support.

The applicant's spouse has asserted that he will experience emotional harship due to the applicant's inadmissibility. He explains that he and his wife have loved each other and lived together for decades, that during this time his spouse has supported him physically and emotionally and that he has mood swings and insomnia and feels depressed at the thought of her removal. A psychosocial evaluation by diagnoses the applicant's spouse with Adjustment Disorder with Mixed Anxiety and Depressed Mood. *Psychosocial Diagnostic Evaluation*, , dated October 19, 2010.

The record contains sufficient evidence to establish that the applicant's spouse is 53 years old, has resided in the United States for a lengthy period of time, has significant family ties in the United States and would experience significant emotional and physical hardship upon removal of the applicant. The AAO also notes the length of the marriage between the applicant and her spouse and the integration of their past family lives. When the hardship factors in this case are considered in the aggregate they rise to the level of extreme hardship. The AAO concludes that the evidence in the record is sufficient to establish that the applicant's spouse would experience extreme hardship upon separation.

The AAO may now move to consider whether the applicant deserves a waiver as a matter of discretion.

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).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300 (citations omitted).

The AAO finds that the unfavorable factors in this case include the applicant's use of false documents to enter the United States and her unauthorized employment. The favorable factors in this case include the presence of the applicant's spouse, the presence of her U.S. citizen children, the physical and emotional hardship that would be experienced by her spouse upon removal and her lack of any criminal record while residing in the United States. The favorable factors in this case outweigh the negative factors, therefore favorable discretion will be exercised. The Field Office Director's be decision will withdrawn and the appeal will be sustained.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.