

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

PUBLIC COPY

H5

FILE: [REDACTED] Office: MEMPHIS, TN

Date: JAN 12 2011

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:

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, Memphis, Tennessee. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native of Sudan and citizen of Australia who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for fraud or willful misrepresentation of a material fact in order to procure an immigration benefit. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside with her husband in the United States.

The field office director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the waiver application accordingly. *Decision of the Field Office Director*, dated August 9, 2008.

On appeal, counsel contends the applicant is not inadmissible. Specifically, counsel states that the applicant has used different names given her life circumstances. According to counsel, in 1991, when the applicant was nine years old, she fled from Sudan to Kenya during the war. Counsel states that the applicant was cared for by a family in Kenya and used that family's name as an "adopted name" from 1991 until 2004 when she turned twenty-one years old. Counsel contends that in 2004, the applicant's biological father found her and they were reunited in Kenya. Counsel states that the applicant's father gave her a copy of her birth certificate and that the applicant changed her name back to her birth name, or "maiden name." In addition, counsel states that the applicant did not misrepresent her intention to enter the United States. According to counsel, the applicant "intended to come to the United States to visit her cousin . . . who was then supposed to take her to see [her now husband, Mr. ██████████]" Alternatively, counsel argues that even if the applicant is inadmissible, she established the requisite hardship. *I-290B, Notice of Appeal Addendum*, undated.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and her husband, Mr. ██████████, indicating they were married on December 4, 2006; an affidavit from the applicant; a letter and an affidavit from Mr. ██████████ a psychological evaluation of Mr. ██████████; copies of Mr. ██████████ medical records; copies of tax and financial documents; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

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

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 Act is inadmissible.

Section 212(i) provides, in pertinent part:

(1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 permanent resident spouse or parent of such an alien

In this case, the record shows that the applicant entered the United States on November 29, 2006, under the Visa Waiver Program. The record also shows, and the applicant does not contest, that prior to entering the United States, on two occasions, she unsuccessfully applied for a visa to enter the United States using the name "[REDACTED]," her purported adopted name. *Affidavit of [REDACTED]*, dated August 21, 2008 (explaining she used an adopted name even though she never had any official adoption documents); *Affidavit of [REDACTED]*, dated August 21, 2008 (same). In addition, the record shows, and the applicant and her husband concede, that she "definitely intended to come to the United States to visit and marry [REDACTED] . . ." *Affidavit of [REDACTED] supra*; *Affidavit of [REDACTED] supra* ("her intent to come into the United States was to eventually marry me The fact remains that both of us intended when she came to visit for her to marry me"). The marriage certificate in the record indicates the applicant and Mr. [REDACTED] married on December 4, 2006, the week after the applicant's entry into the country.

The Act clearly places the burden of proving eligibility for entry or admission to the United States on the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361 ("Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document"). Furthermore, it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willful misrepresentation of a material fact in order to procure an immigration benefit. Even if the AAO were persuaded by counsel's contention that the applicant did not willfully misrepresent her name in her attempts to enter the United States, nonetheless, the applicant and her husband concede that the purpose of her November 2006 entry was to marry Mr. [REDACTED]. The Department of State Foreign Affairs Manual states that, "[i]n determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving aliens in the United States who conduct themselves in a manner inconsistent with representations they made to the consular officers concerning their intentions at the time of visa application or to an

immigration officer when applying for admission. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants, . . . [a]pply for adjustment of status to permanent resident. . . .” *DOS Foreign Affairs Manual*, § 40.63 N4.7(a)(1). The Department of State developed the 30/60-day rule, which applies when “an alien states on his or her application for a B-2 visa, or informs an immigration officer at the port of entry (POE), that the purpose of his or her visit is tourism, or to visit relatives, etc., and then violates such status by . . . [m]arrying and taking up permanent residence. . . .” *Id.* at § 40.63 N4.7-1(3). Under this rule, “[i]f an alien violates his or her nonimmigrant status in a manner described in 9 FAM 40.63 N4.7-1 within 30 days of entry, you may presume that the applicant misrepresented his or her intention in seeking a visa or entry.” *Id.* at § 40.63 N4.7-2.

Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis in these situations to be persuasive. In the case at hand, the applicant entered the United States under the Visa Waiver Program, applying for admission as a nonimmigrant visitor for a maximum of 90 days. *See* section 217(a)(1) of the Act, 8 U.S.C. § 1187(a)(1). Within a week of entering the United States, the applicant married Mr. [REDACTED] who filed a Petition for Alien Relative (Form I-130) on the applicant’s behalf on January 17, 2007. Because the applicant married and her husband filed a Form I-130 within thirty days after the applicant entered the United States under the Visa Waiver Program, there is a presumption she misrepresented her intention to merely visit the United States. Therefore, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willful misrepresentation of a material fact in order to procure an immigration benefit.

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 can be considered only insofar as it results in hardship to a qualifying relative. 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) (“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.

In this case, the applicant's husband, Mr. [REDACTED], states that he was born in Sudan and that when he was six years old, he was separated from his parents due to the war. He states that his home was destroyed and that many people were killed or died of famine. According to Mr. [REDACTED], he walked for twenty days before reaching Ethiopia, where he lived for four years in a refugee camp. Mr. [REDACTED] states that when he was ten years old, in 1991, war broke out in Ethiopia and he ran back to Sudan. During this journey, he states that soldiers chased them and shot at them. He stated he had to swim across the Gilo River and that only one-quarter of the people who fled survived. Mr. [REDACTED] states that he fled to safety and spent four months without food, eating only tree leaves and some fruit. He states that he made it to Kenya where he again lived in a refugee camp. According to Mr. [REDACTED] he stayed in Kenya and eventually was certified as a nurse's aide, pharmacy assistant, and medical assistant. He contends he was permitted to enter the United States as a refugee in September 2001. He states he is very happy with his new life and currently goes to school full-time as well as works full-time as a medical technician. Mr. [REDACTED] states that moving to Australia with his wife would mean dropping out of school, leaving his job, and losing his house. He states he has no relatives in Australia and fears not being able to find a job there. [REDACTED] dated August 21, 2008, and October 6, 2006.

A psychological evaluation of Mr. [REDACTED] states that due to the numerous traumatic events he has experienced in his life, Mr. [REDACTED] suffers from Posttraumatic Stress Disorder and depression. According to the psychologist, Mr. [REDACTED] experiences suicidal ideations and reported that he will likely commit suicide if separated from his wife. The psychologist states that the applicant is invaluable to Mr. [REDACTED] life as they are able to talk about his memories, many of which the couple share. Mr. [REDACTED] reported that the only way he can manage his daily emotional suffering is by thinking about a better life with his wife, and that losing hope of such a life would make the temptation of suicide difficult to resist. The psychologist states that Mr. [REDACTED] would be at risk of severe psychosocial deterioration without his wife, that his anxiety and depression symptoms would likely worsen to extremely debilitating levels, and that he would be at high risk for suicide. In addition, Mr. [REDACTED] reported that if he had to move to Australia to be with his wife, he would have to start his life all over again and that all of his efforts to make a place for himself in the United States would be destroyed, including losing his house, car, job, and college credits. The psychologist states that such a move would psychologically overwhelm Mr. [REDACTED] and be severely debilitating considering his fragile and vulnerable psychological state. *Affidavit of [REDACTED]* dated October 3, 2008.

Upon a complete review of the record evidence, the AAO finds that the applicant has established her husband will suffer extreme hardship if her waiver application is denied. The AAO recognizes the traumatic experiences Mr. [REDACTED] experienced as a child escaping the war in Sudan. According to the psychological evaluation in the record, Mr. [REDACTED] suffers from posttraumatic stress disorder and severe anxiety and depression. The psychologist contends that "complete symptom remission is unlikely even with the aid of intensive treatment." Significantly, the psychologist found that given Mr. [REDACTED] fragility and vulnerability, he would likely commit suicide if separated from his wife. In addition, according to the psychologist, moving to Australia to be with his wife would represent starting his life all over again from nothing and would be psychologically overwhelming for Mr. [REDACTED]. The psychologist concludes that if Mr. [REDACTED] moved to Australia, his psychological

functioning would likely deteriorate to dangerous levels. Mr. ██████ would need to readjust to a life in Australia, where he has no relatives and no job prospects, a difficult situation made even more complicated given his traumatic past. Considering these unique factors cumulatively, the AAO finds that the effect of separation from the applicant on Mr. ██████ goes above and beyond the experience that is typical to individuals separated as a result of inadmissibility and rises to the level of extreme hardship. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that Mr. ██████ faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factor in the present case is the applicant's misrepresentation of a material fact in order to procure an immigration benefit. The favorable and mitigating factors in the present case include: the extreme hardship to the applicant's husband if she were refused admission; a letter of support describing the applicant as kind, enthusiastic, and responsible; and the fact that the applicant has not had any arrests or convictions in the United States.

The AAO finds that, although the applicant's immigration violation is 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. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.