

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

PUBLIC COPY



U.S. Citizenship
and Immigration
Services

tt5

FILE: [REDACTED] Office: PHILADELPHIA DISTRICT OFFICE

Date: MAR 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 PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Perry Rhew

Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Philadelphia, Pennsylvania, and 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 citizen of Niger, who was admitted to the United States on April 22, 2004 as a B1 visitor. He was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or misrepresentation. The applicant is the beneficiary of an approved Immigrant Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with his wife.

The Acting District Director concluded the applicant failed to establish that his qualifying relative would endure “extreme hardship,” and denied the application accordingly. *See Decision of the Acting District Director* dated November 27, 2008.

On appeal, the applicant’s attorney asserted that that the United States Citizenship and Immigration Services (USCIS) failed to provide any evidence to demonstrate that the applicant misrepresented any information and that, even if he did, such misrepresentations were not material. In the alternative, the applicant’s attorney contends that the qualifying spouse would suffer extreme hardship as a result of her separation from the applicant. The applicant’s attorney contends that the qualifying spouse will encounter mental, physical and financial hardships as a result of the applicant’s inadmissibility. In addition, the applicant’s attorney asserts that the applicant’s spouse has family ties to the United States, and also has safety and financial concerns with regard to relocating to Niger.

The record contains the following documents, including, but not limited to: an Application for Waiver of Grounds of Inadmissibility (Form I-601), a Notice of Appeal (Form I-290B), an appeal brief on behalf of the applicant, the qualifying spouse’s birth certificate, a marriage certificate, affidavits from the qualifying spouse and the applicant, a letter from their church’s pastor, letters from friends and family members, handwritten medical notes, financial documentation, country condition materials, Form I-130, and evidence submitted in conjunction with the Application to Adjust Status (Form I-485). 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.

In the present case, the applicant’s attorney asserts that that USCIS failed to provide any evidence to demonstrate that the applicant misrepresented any information and that, even if he did, such misrepresentations were not material. The burden of establishing admissibility rests with the

applicant. INA § 291, 8 U.S.C. § 1361. While counsel contends that the applicant did not make any fraudulent statements to the embassy in order to obtain a visa, the record contains evidence that the applicant did in fact make a material misrepresentation by misstating that he was married. In the applicant's visa application, dated on March 22, 2004, the applicant indicated in two separate sections that he was married, and even provided a name, [REDACTED] and date of birth for his wife. However, the qualifying spouse indicated in Form I-130 and on other documents on the record that the applicant had never been married before. With regard to the materiality of the applicant's misrepresentations, the applicant's attorney states that the applicant "would not have been denied if the application form indicated that he was single at the time," and relies on a provision of the U.S. Department of State Foreign Affairs Manual, 9 FAM 41.31 N.3.5, to support a claim that "marriage is not a consideration for nonimmigrant visa issuance." See *Brief in Support of Appeal* at 7. However, the provision of the Foreign Affairs Manual cited by the applicant's attorney, entitled "Doubtful Cases not Resolved by Offer to Leave Dependent Abroad," does not state that marriage is not a consideration in nonimmigrant visa issuance. Rather, the note at 9 FAM 41.31 N.3.5 states, "If you doubt an alien's intent to return abroad, the alien cannot satisfy your doubts by offering to leave a child, spouse, or other dependent abroad."

The applicant's attorney contends that a misrepresentation that the applicant was unmarried would not render him inadmissible because his marital status was not material. Section 214(b) of the Act provides, however, that every alien other than certain nonimmigrants shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer at the time of application for a visa that he is entitled to a nonimmigrant status. Although the applicant was not rendered ineligible for a visa on the true fact that he was unmarried, this fact was relevant to determining whether he intended to immigrate to the United States.¹ By stating that he had a wife in Niger, the applicant sought to "cut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." See *Matter of S- and B-C-*, *supra*. The AAO therefore concludes that the applicant's misrepresentation had a natural tendency to influence the decision of the consular officer to grant him a visa and the applicant has failed to meet his burden of establishing that he is not inadmissible under section 212(a)(6)(C)(i) of the Act for making material misrepresentations on his application for a nonimmigrant visa.

Section 212(i) of the Act provides:

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]

¹ The Foreign Affairs Manual states that an applicant for a nonimmigrant visa must demonstrate permanent employment, meaningful business or financial connections, close family ties, or social or cultural associations, which will indicate a strong inducement to return to the country of origin. 9 FAM 41.31 N3.4 --Ties Abroad.

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 or, in the case of an alien granted classification under clause (iii) or (iv) of section 204 (a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B), the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

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 wife 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 the Philippines, 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.

The applicant’s qualifying relative is his spouse, who is a United States citizen. The documentation provided that specifically relates to the qualifying spouse’s hardship includes affidavits from the qualifying spouse and the applicant, a letter from their church’s pastor, letters from friends and family, handwritten medical notes, financial documentation, country condition materials, and evidence submitted in conjunction with Form I-485. The entire record was reviewed and considered in rendering a decision on the appeal.

As mentioned above, the applicant’s attorney contends that the qualifying spouse would suffer extreme hardship as a result of her separation from the applicant and will encounter mental, physical and financial hardships as a result of the applicant’s inadmissibility. In addition, the applicant’s attorney asserts that the applicant’s spouse has family ties to the United States, and also has safety and financial concerns with regard to relocating to Niger.

The AAO finds that the applicant has established that his wife will suffer extreme hardship as a consequence of being separated from the applicant. The record contains an affidavit from the qualifying spouse and letters from friends and family, as well as handwritten medical notes, which demonstrate the potential mental and physical hardships that the qualifying spouse will experience if she remains in the United States without the applicant. The letters from friends and family explain how the applicant’s spouse has suffered greatly with the loss of her brother after taking care of him for many years, and states that another loss of the applicant would be extremely difficult to her. Further, the documentation also indicates that the applicant’s spouse is currently

her mother's primary care giver, as her mother has various medical issues. The qualifying spouse also faces her own medical issues, including obesity. The letters on the record further state that the applicant has assisted his spouse in the care of her mother, and has also made financial contributions to the family. The record contains documentation of the applicant and qualifying spouse's income and expenses, demonstrating that the applicant would face financial hardships without the applicant's financial contributions. As such, the record reflects that the cumulative effect of the mental, physical and financial hardships the applicant's spouse would experience in the United States without the applicant rises to the level of extreme.

The applicant also demonstrated that his qualifying relative would suffer extreme hardship in the event that she relocated to Niger with the applicant. In the qualifying spouse's affidavit, she asserted that she has lived in the United States for her entire life. She also explains that she plays an active role in caring for her parents and a family friend, assertions which are supported by letters from family and friends. The record also contains financial documentation and country condition information to support the attorney's assertions regarding financial and safety concerns that the qualifying spouse could face were she to relocate to Niger. The record confirms that the applicant's spouse may suffer financially there due to a lack of employment opportunities. Further, the record reflects that it would be financially difficult for the applicant's spouse, considering her current income and expenses, to relocate to another country. As such, the record reflects that the cumulative effect of severing the qualifying spouse's family ties to the United States, adjusting to conditions in Niger after residing her entire life in the United States, and the loss of her employment, were she to relocate, rises to the level of extreme. The AAO thus concludes that were the applicant unable to reside in the United States due to his inadmissibility, his qualifying spouse would suffer extreme hardship if she returned to Niger with him.

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

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

The 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-Morales at 300.

In *Matter of Mendez-Morales*, 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. *Id.* at 301.

The favorable factors in this matter are the extreme hardship the applicant's United States citizen spouse would face if the applicant is not granted this waiver, regardless of whether she accompanied the applicant or remained in the United States; his character, as evidenced by letters of support from the qualifying spouse's family and friends; and his apparent lack of a criminal record. The unfavorable factors in this matter are the misrepresentations made by the applicant 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 his burden and the appeal will be sustained.

ORDER: The appeal is sustained.