

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

HS

[Redacted]

Date: **MAY 12 2011** Office: PORTLAND, OREGON FILE: [Redacted]

IN RE: Applicant: [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 District Director, Portland, Oregon, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of New Zealand who 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), for procuring admission to the United States through fraud or the willful misrepresentation of a material fact. The applicant is married to a United States citizen and the father of a United States citizen. He is the beneficiary of an approved 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 reside in the United States with his spouse and child.

The District Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated October 24, 2008.

On appeal, the applicant, through counsel, contends that United States Citizenship and Immigration Services (USCIS) "failed to give full consideration to the evidence in the record which established extreme hardship to the qualifying relative spouse." *Form I-290B*, filed November 25, 2008. Additionally, counsel claims that the applicant's spouse suffers from major depressive disorder. *Id.*

The record includes, but is not limited to, counsel's appeal brief; counsel's motion to supplement record; statements from the applicant's wife; a copy of the applicant's daughter's birth certificate; letters of support for the applicant and his wife; psychological evaluations for the applicant and his spouse; medical documents for the applicant's wife and sister-in-law; tax documents, employment verification documents, a lease agreement, bank statements, household bills, and insurance documents; and articles on healthcare in New Zealand and depression. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

- (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 Act is inadmissible.
- (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212 of the Act provides, in pertinent part, that:

- (i) (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the [Secretary], 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 resident spouse or parent of such an alien...

In the present case, the record indicates that on February 19, 2003 and January 31, 2004, the applicant misrepresented his intention to depart the United States to a U.S. border inspector. Based on these misrepresentations, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The AAO notes that counsel does not dispute this finding.

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 his child can be considered only insofar as it results in hardship to a qualifying relative. 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-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 (Board) 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 a qualifying relative, 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 first prong of the analysis addresses hardship to the applicant’s wife if she relocates to New Zealand. In counsel’s motion to supplement record dated September 16, 2010, counsel states if the applicant’s wife “chooses to accompany [the applicant] to New Zealand, she will permanently separate herself from the birth family on which she is so dependent, and she will lose the life she has known here in Oregon.” In a statement dated November 23, 2008, the applicant’s wife states she “cannot imagine life without” her family as she is “emotionally dependent on” them. She states being in New Zealand, “will [affect] [her] physical and emotional well-being.” In a statement dated July 25, 2007, the applicant’s mother-in-law states a permanent separation from her daughter “would be a great hardship for all of [her] family.” In counsel’s appeal brief dated November 25, 2008, counsel claims that because the applicant’s wife suffers from major depressive disorder, a “separation from [her family] impacts her more than might normally be expected due to her mental health condition.” The AAO notes that the record establishes

that [REDACTED] diagnosed the applicant's wife with major depressive disorder. *See psychological evaluation, undated.*

Counsel states the applicant and his wife have had a child. The AAO notes that the record establishes that the applicant and his wife had a daughter on May 14, 2010. Counsel claims that if the applicant's wife "were to accompany [the applicant] to New Zealand, she would not only be losing the daily support of her close-knit family in Oregon and the extended Pacific Northwest, but she would be depriving her daughter of the opportunity to grow up in the company of her maternal grandparents, aunts, and greater extended family." Counsel also states the applicant's wife is "very involved with [her sister] in coping with" her type 1 diabetes. The applicant's wife states her parents "rely on [the applicant] and [her] to help with [her] sister," and her sister "is emotionally dependant [sic] on [her]." The AAO notes that the record establishes that the applicant's sister was diagnosed with type 1 diabetes mellitus in May 1996. *See letter from [REDACTED] dated November 20, 2008.* Counsel claims that if the applicant's wife joins the applicant in New Zealand, she would "worry and stress because they are so close and because [her sister] may not stay on top of her diabetes without [the applicant's wife's] continuing presence and support." The applicant's wife also states her grandmother, who resides in Montana, suffers from dementia, and when her grandfather was ill, she traveled to Montana to care for him. The AAO notes the concerns of the applicant's wife regarding being separated from her family.

Counsel states the applicant's wife has no ties to New Zealand except the applicant. Counsel claims that if the applicant's wife joins the applicant in New Zealand, she "will suffer the [loss] of her career in which she has invested considerable time and finances.... She has integrated herself in the school where she teaches second grade. She has debt from her education and relocation to New Zealand would likely result in her being unable to pay her debt in a timely fashion." The applicant's wife states she is "in a leadership position in [her] job after only five years of teaching." [REDACTED] reports that the applicant claims "it would be difficult for his wife to get a job in New Zealand," as his mother has been looking for a teaching position for five years. Counsel states the applicant's wife's employment provides the applicant and his wife health benefits including dental and vision care. Counsel states in New Zealand, even though the medical care is comparable, the applicant's wife "would have to purchase health insurance to approach the availability of dental and vision insurance that she and the [applicant] presently have." The applicant's wife states it would be expensive to move to New Zealand. Counsel states that with the cost of airfare, the applicant's wife would be "very isolated from her family." The AAO notes the applicant's wife's employment, health insurance, and financial concerns.

The AAO acknowledges that the applicant's wife is a native and citizen of the United States and that she may experience some hardship in relocating to New Zealand. Based on the applicant's spouse's lack of ties to New Zealand, her emotional issues, her separation from her family including her sister and grandmother who suffer from medical conditions, having to raise her daughter in New Zealand, her lack of medical insurance in New Zealand, and the loss of her employment in the United States, the AAO finds that the applicant's wife would suffer extreme hardship if she were to relocate to New Zealand to be with the applicant.

Regarding the hardship the applicant's wife would suffer if she remains in the United States, she states that she and the applicant "depend on each other emotionally, physically, and financially." Counsel states the "addition of a child to the [applicant's] family adds to the extreme hardship which would result to [the applicant's wife] if [the applicant] were not allowed to immigrate." Counsel claims that without the applicant, "raising her daughter alone as well as working full-time as a school teacher would be a tremendous burden and extremely stressful for [the applicant's wife]." The applicant's wife states the applicant "has been [her] emotional support system" and she depends "on him on a daily basis." The AAO notes the applicant's wife's concerns.

As noted above, [REDACTED] diagnosed the applicant's wife with major depressive disorder. [REDACTED] reports that the applicant's wife symptoms include increased alcohol and sugar consumption, weight gain, "changes in her work performance," "stomach problems," and "recent changes in her capacity for sexual intimacy." [REDACTED] also reports that the applicant claims his wife is unstable and has mood swings. Counsel claims that now that the applicant's wife has had a child, she is "more vulnerable to a worsening of the Major Depressive Disorder with which she has been diagnosed." [REDACTED] states the applicant's wife's "health, her performance as a school teacher and as a wife are noticeably impaired," and her diagnosis is deteriorating. The applicant's wife states she experiences "anxiety that can be debilitating," but "[m]edication has begun to help relieve some of the anxiety." The AAO notes the applicant's wife's emotional health concerns.

The AAO finds the record to include some documentation of the applicant's wife's income and expenses; however, this material offers insufficient proof that the applicant's wife will be unable to support herself in the applicant's absence. The financial documentation in the record reflects that the applicant's wife is the primary wage earner in the household, and there is no evidence that she will encounter economic challenges upon the applicant's departure. Even though the applicant's wife states she and the applicant depend on each other financially, the AAO notes that the applicant has not distinguished his wife's financial challenges from those commonly experienced when a spouse remains in the United States alone. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Additionally, the AAO notes that there is no documentary evidence in the record establishing that the applicant would be unable to obtain employment in New Zealand and, thereby, financially assist his wife from outside the United States. However, considering the applicant's spouse's mental health issues, raising a daughter without her father, assisting her sister and grandmother without the applicant's support, the expense of traveling to New Zealand to visit the applicant on a teacher's salary, and the normal hardships that result from the permanent separation of a loved one, the AAO finds the record to establish that the applicant's wife would face extreme hardship if she remained in the United States in his absence.

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 misrepresentations to a U.S. border inspector. The favorable and mitigating factors are the applicant's United States citizen wife and daughter, the extreme hardship to his wife if he were refused admission, the absence of a criminal record, and the letters of support.

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. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) 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. The waiver application is approved.