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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services

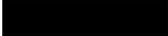
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HS

Date: **MAY 26 2011**

Office: ACCRA, GHANA

FILE: 

IN RE:

Applicant: 

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the
Immigration and Nationality Act (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,

A handwritten signature in black ink that reads "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Accra, Ghana. A subsequent motion to reopen was granted, but the waiver application was again denied on the merits. 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 and citizen of Nigeria 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 obtain 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 and child in the United States.

The field office director found that the applicant failed to establish extreme hardship to her spouse and denied the waiver application accordingly. *Decision of the Field Office Director*, dated July 30, 2008. After the applicant's motion to reopen was granted, the field office director found that the applicant was also inadmissible for unlawful presence for over one year, found that the applicant failed to establish extreme hardship to her spouse, and denied the waiver application accordingly. *Decision of the Field Office Director*, dated January 22, 2009.

On appeal, counsel contends that the applicant is not inadmissible for unlawful presence as she never entered the United States. Counsel further contends that the applicant established the requisite hardship, particularly considering the applicant and her husband have been separated for fourteen years and the applicant's husband has medical and emotional problems.

The record contains, *inter alia*: a letter from the applicant's husband, [REDACTED] letters from [REDACTED]. [REDACTED] physicians and copies of his medical records; an affidavit from a psychologist; a copy of [REDACTED]. [REDACTED] business's tax records; 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)(9)(B) of the Act provides, in pertinent part:

Any alien (other than an alien lawfully admitted for permanent residence) who -

....

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

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case

of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

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, and the applicant concedes, that she attempted to enter the United States using a photo-switched passport on November 27, 1999. *Record of Sworn Statement in Proceedings Under Section 235(b)(1) of the Act*, dated November 27, 1999; *Memorandum Report of Interview of Ineligible Applicant for Immigrant Visa*, dated May 16, 2008. The record shows that the applicant was removed from the United States the same day. 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 fraud or willful misrepresentation of a material fact in order to obtain an immigration benefit.

The AAO finds that counsel's contention that the applicant is not inadmissible for unlawful presence is persuasive. There is no evidence in the record that the applicant was ever unlawfully present in the United States for over a year. Therefore, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

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 child 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 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.

In this case, the applicant’s husband, [REDACTED], states that he is a physical therapist, a student, and a small business owner. He states that he is lonely, misses his wife and their son, that his life is rough and is getting rougher, and that he has spent the past thirteen years seeing his family only one or two times per year. [REDACTED] contends he used to be a happy, healthy man, but that he is now sad and his health is in jeopardy. [REDACTED] contends he was diagnosed with high blood pressure, insomnia, and acute depression and was prescribed medications. In addition, he states he spends approximately \$300 per month on calling cards. According to [REDACTED], every time he returns to Nigeria, his studies in his doctoral program suffer and his business shuts down, causing him to lose a lot of money. *Letter from [REDACTED] dated October 6, 2008.*

A psychological evaluation of [REDACTED] states that [REDACTED] and the applicant married in July of 1987 in Nigeria. The psychologist states that the couple’s son was born in 1993 in Nigeria and that [REDACTED] came to the United States to work as a physical therapist in 1994. [REDACTED] reported feeling anxious and depressed all day, having difficulty sleeping, feeling lethargic, having problems concentrating, having a reduced appetite, and having a “suspicion of having some form of seizure disorder.” The psychologist diagnosed [REDACTED] with Major Depressive Disorder. According to the psychologist, even though [REDACTED] has lived apart from his wife for the past fifteen years, it is not feasible for him to continue being separated from his family because his wife’s prolonged absence is exacerbating his symptoms. *Affidavit of [REDACTED] dated March 23, 2009.*

A letter from [REDACTED] physician states that [REDACTED] has been under his care since October 2001. The physician diagnosed [REDACTED] with hypertension, anxiety/depression, and insomnia. The physician states [REDACTED] also experiences tingling sensations in his extremities. *Letter from [REDACTED], dated August 22, 2008.*

A more recent letter from another physician states that [REDACTED] suffers from seizure disorder, accelerated malignant hypertension, insomnia, pulmonary insufficiency, cephalgia, and depressive/anxiety disorder. The physician states that [REDACTED] seizures are worse at night with a higher frequency of seizures." He further states that [REDACTED] hyperventilates with minimal exertion and should see a pulmonologist for an evaluation of breathing dysfunction and sleep apnea. According to the physician, [REDACTED] has also been seen by a neurologist and a psychiatrist, and despite a recent CT scan and EEG, the etiology of [REDACTED] seizures remains unknown. The physician states that [REDACTED] takes five prescription medications for his medical problems. *Letters from [REDACTED] dated March 25, 2009, and November 4, 2008.*

A letter from a neurologist states that [REDACTED] began having "spells" two years ago and that they occur about twice per week, lasting approximately five minutes long. The neurologist states that [REDACTED] sometimes wakes up with a headache and experiences tightness of the neck and shoulders. The neurologist's assessment is that [REDACTED] has cervicogenic headache, that he suspects panic attacks, and that he doubts a seizure disorder. *Letter from [REDACTED], dated October 27, 2008; see also Letter from [REDACTED], dated October 24, 2008 (stating that [REDACTED] is experiencing depression and anxiety, but has not continued mental health services because they are not covered under his insurance coverage).*

After a careful review of the record, the AAO finds that the applicant's husband has suffered, and will continue to suffer, extreme hardship if the applicant's waiver application were denied. The record shows that [REDACTED] and his wife have been married for over twenty-three years, but have lived apart for almost seventeen years since [REDACTED] came to the United States in 1994. Copies of airline tickets in the record corroborate [REDACTED] claim that he sees his family only one or two times per year for approximately one month per visit. The record further shows that [REDACTED] suffers from, and is receiving treatment for, several physical and mental health conditions, including a seizure disorder that has an unknown cause, possible panic attacks, depression, and anxiety. Considering these unique factors cumulatively, particularly the length of the couple's marriage and [REDACTED] seizure disorder, the AAO finds that the hardship [REDACTED] has experienced, and will continue to experience, if he decides to stay in the United States without his wife is extreme, going well beyond those hardships ordinarily associated with a spouse's inadmissibility to the United States.

It would also constitute extreme hardship for [REDACTED] to move back to Nigeria to avoid the hardship of separation from the applicant. Relocating to Nigeria would disrupt the continuity of his health care and the procedures that are in place to monitor and treat him. Furthermore, the record shows that [REDACTED] has started his own physical therapy business and relocating to Nigeria would mean losing his business. Moreover, the AAO takes administrative notice that the U.S. Department of State has issued a Travel Warning for Nigeria, warning U.S. citizens to avoid all but essential travel to some states in Nigeria due to violent crime, including the risks of kidnapping, robbery, and other armed attacks. *U.S. Department of State, Travel Warning, Nigeria, dated April 15, 2011.* The AAO notes that according to the applicant's Biographic Information form, she is currently living in Edo, one of the states included in the Travel Warning. In sum, the AAO finds that the evidence of

hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that [REDACTED] 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 includes the applicant's misrepresentation of a material fact to procure an immigration benefit. The favorable and mitigating factors in the present case include: the applicant's family ties to the United States, including her U.S. citizen husband; the extreme hardship to the applicant's husband if she were refused admission; and the applicant's lack of any arrests or criminal convictions.

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.¹

ORDER: The appeal is sustained.

¹ The AAO notes that more than five years have passed since the applicant's expedited removal on November 27, 1999. Therefore, the applicant no longer needs to file an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212).