

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave. NW MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**

#5

DATE: OCT 25 2011 OFFICE: PHILADELPHIA, PA

File: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act; 8 U.S.C. §§ 1182(a)(9)(B)(v) and 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, appearing to read "Perry Rhew".

Perry Rhew

Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Indonesia who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of her last departure from the United States. The applicant was also found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for failing to disclose on a B1/B2 visa application that she violated the terms of a prior B1/B2 visa by overstaying the period of authorized stay, and for falsely asserting an intent to vacation when her actual intention was to marry her husband and immigrate to the United States. The applicant seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act; 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i), in order to live in the United States with her U.S. citizen husband.

The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. See *Decision of the Field Office Director*, dated March 19, 2009.

On appeal, counsel asserts that the Service erred by failing to consider the advanced age of the applicant's husband together with other factors that would render the removal of his wife an extreme hardship. See *Form I-290B, Notice of Appeal or Motion*, received April 20, 2009.

The record contains the following evidence submitted on appeal: the applicant's husband's hardship letter, social security income information, medical records related to his October 2007 surgery; 2008 joint tax returns and the applicant's W-2; and internet print-outs pertaining to flights from New York to Jakarta and country conditions information. The record also contains evidence previously submitted, including but not limited to: the applicant's husband's earlier hardship statement; the applicant's sworn statement related to fraud/misrepresentation; Forms I-601, I-485, and I-130, along with documents submitted in support of these. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) of the Act provides:

(B) ALIENS UNLAWFULLY PRESENT.-

(i) In general.- 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 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record reflects that the applicant entered the United States on December 31, 2000 with a valid B1/B2 visa authorizing a stay not to exceed March 6, 2001. The applicant overstayed her visa, not departing the U.S. until April 24, 2003. The applicant accrued unlawful presence from March 7, 2001 to April 24, 2003. On March 9, 2005, the applicant applied for and was granted another B1/B2 visa after failing to disclose her previous unauthorized overstay. In addition, when applying for the visa in 2005 the applicant asserted an intention to visit the U.S. on vacation when her actual intent was to marry her husband and immigrate. The applicant was readmitted to the U.S. on April 25, 2005 with a B1/B2 visa obtained by misrepresentation. As the applicant was unlawfully present in the United States for more than one year and now seeks readmission within 10 years of her April 2003 departure, she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 USC § 1182(a)(9)(B)(i)(II). Further, the applicant procured a visa through misrepresentation of material facts, i.e., her prior overstay and intent to reside permanently in the U.S. She is, thus, inadmissible pursuant to section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C). The applicant does not contest these findings on appeal.

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

- (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.

Section 212(i) of the Act provides that:

The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General

[Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien 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(a)(9)(B)(v) or 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. 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). The only qualifying relative in the present case is the applicant's husband.

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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In this case, the record reflects that the applicant’s husband is a 68-year-old native of Puerto Rico and citizen of the United States. With regard to separation from the applicant, he asserts hardship of a physical, economic, and emotional nature. The applicant’s husband states that he and the applicant are very much in love. She takes him to his doctor’s appointments, makes sure that he takes his medication, dotes over him, makes sure he does not drink too much coffee or eat too many sweets, does not allow him to lift heavy objects, and takes him walking for exercise. *See Hardship Letter*, dated April 15, 2009.

With regard to medical hardship, the applicant submits an *Assignment of Insurance Benefits* form, dated October 24, 2007, showing that her husband was to undergo “TRANS URETHERAL NEEDLE ABLATION US W/O BX.” No evidence was submitted to define or explain this procedure. A *Post-Operative/Anesthesia Instructions* form, dated October 24, 2007 was submitted but the handwritten list of medications thereon is illegible. A *CVS Pharmacy Receipt*, dated September 5, 2008 for Avodart 0.5mg/daily was submitted, but with no evidence describing the condition for which the medication was prescribed. Counsel asserts on appeal that the applicant’s husband underwent surgery for an enlarged prostate. No evidence was submitted to describe the effects and/or limitations this surgery has had on the applicant’s husband, and/or whether he continues to see a physician on a regular basis. With regard to other medical conditions, the applicant’s husband states that his health is generally good, but that he is getting older and needs more medicine and medical care as he ages. *See Hardship Statement*, dated July

17, 2007. No evidence was submitted that shows that the applicant's husband takes any medication(s) other than Avodart, and no evidence was submitted that shows any increased need for medical care. The applicant's husband states that he previously underwent surgery to remove kidney stones and is supposed to see his doctor regularly and take medicine to prevent more stones and for his prostate health, *id.*, but no evidence was submitted in this regard. Without evidence detailing the applicant's husband's medical conditions, special needs, and expenses, the AAO is unable to make a finding of medical hardship. Therefore, the AAO finds that the evidence in the record is insufficient to establish that the applicant's husband will suffer significant medical hardship related to separation from the applicant.

With regard to economic hardship, the applicant's husband states that he is retired and receiving social security. See *Hardship Letter*, dated April 15, 2009. A 2008 joint tax return shows a total of \$9,665 in social security income in addition to the applicant's income of \$25,000 from Sasha's Hideaway, Inc. See *2008 Tax Return* and *Applicant's 2008 W-2*. The applicant's husband asserts that separation from his wife would result in his being unable to make ends meet. See *Hardship Letter*, dated April 15, 2009. While no evidence was submitted showing the applicant's husband's financial expenses and obligations, the AAO acknowledges that his household income would be significantly reduced without the applicant's financial contribution. The applicant's husband states that the cost of traveling to and from Indonesia is high, and an internet print-out was submitted that shows roundtrip fares in excess of \$1,200. See *Hardship Affidavit*, dated July 11, 2007 and *Yahoo Travel Print-Out for flights departing on Sunday May 10, 2009*. Counsel asserts that travel to Indonesia is "not to a contiguous country but is literally half way around the world," a roundtrip ticket would cost nearly twice the applicant's husband monthly social security, and this poses a hardship more than the average qualifying relative of a deportee would suffer. See *Counsel's Appeal Letter*, dated April 15, 2009. The AAO recognizes that given the age of the applicant's spouse, his fixed income, and the distance between the United States and Indonesia, the frequency with which he would be able to visit his wife could be minimal and cause significant hardship to the applicant's qualifying family member.

With regard to emotional hardship, the applicant's husband expresses his great love for the applicant and the way she cares for him, watches out for his health, and makes his life happy. See *Hardship Affidavit*, dated April 15, 2009. *Id.* He states that he would be totally lost and distraught without his wife. *Id.* Evidence was not submitted that shows emotional difficulties going beyond those ordinarily associated with the removal of a family member. The applicant's husband asserts that his own family loves and adores his wife and that they too would suffer hardship if separated from her. See *Hardship Letter* and *Hardship Affidavit*. Congress did not include hardship to the applicant's extended family members as a factor to be considered in assessing extreme hardship under section 212(a)(9)(B)(v) or section 212(i) of the Act, except as it may affect the qualifying relative – here the applicant's spouse. The record contains no evidence showing hardship to extended family members that demonstrates extreme hardship to the applicant's qualifying relative spouse.

The AAO has considered cumulatively all assertions of separation-related hardship including emotional and medical implications, the significant reduction in household income upon the applicant's husband given his fixed income, the significant burden on the applicant's spouse of traveling between the United States and Indonesia in light of his age, the high cost of airfare, and the applicant's wife's permanent ineligibility. Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship if separated from the applicant by her removal to Indonesia.

With regard to relocation, the AAO recognizes, as asserted by counsel, that: "Indonesia does not share common heritage in law, customs, religion, or language with the United States," and that it "is literally half way around the world." *Counsel's Appeal Letter*, dated April 15, 2009. The applicant's spouse states that he has never traveled outside the United States and Puerto Rico, speaks only a little Indonesian as taught by his wife, and does not believe that, in his sixties, he will be able to learn a new language. See *Hardship Statement*, dated July 11, 2007. He states that he would not know how to perform simple tasks in Indonesia like getting around, shopping, going to a doctor, banking and otherwise taking care of himself and his wife. *Id.* The applicant's husband is a Mennonite Christian and states that church is an important part of his life and that separation from his religious community would make him feel alone and isolated. See *Hardship Statement*, dated July 11, 2007. Country conditions reports for Indonesia list among its human rights problems: "...societal abuse against religious groups and interference with freedom of religion sometimes with the complicity of local officials." See *U.S. Department of State, "2008 Human Rights Report-Indonesia*, dated February 25, 2009. The AAO notes that the current (2011) report repeats this concern. See *U.S. Department of State, "2010 Human Rights Report-Indonesia*," dated April 8, 2011. <http://www.state.gov/g/drl/rls/hrrpt/2010/eap/154385.htm>.

The applicant's husband further asserts that he is too old to begin working in Indonesia and that because his wife is ethnically Chinese, she faces significant employment discrimination likely to result in financial hardship. See *Hardship Statement*, dated July 11, 2007. Country conditions reports confirm that: "A number of articles of law, regulation, or decree discriminated against ethnic Chinese citizens." *2008 Human Rights Report* at page 11. As previously noted, the applicant's husband asserts a large and close-knit familial support system in the United States which includes two adult children, two sisters, two brothers, and numerous grandchildren, nieces, and nephews, all of whom he will miss terribly were he to relocate to Indonesia. See *Hardship Statement*, dated July 11, 2007. And while he did not establish that he suffers any serious or life-threatening medical conditions, the AAO acknowledges that he could face difficulty communicating his health concerns in Indonesia on account of the cultural and language barriers.

The AAO has considered cumulatively all assertions of hardship including adjusting to a country, culture, and language so different from his own, separation from his family in the U.S., separation from community ties in the U.S. including his religious community, and medical concerns. Considered in the aggregate, the AAO finds that the evidence is sufficient to

demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship if he were to relocate to Indonesia to be with the applicant.

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-Moralez at 300.

In *Matter of Mendez-Moralez*, 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(h)(1)(B) relief must bring forward to establish that he 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 include extreme hardship to the applicant's U.S. citizen spouse as a result of the applicant's inadmissibility, the applicant's family ties including her devotion to her husband and her service to her husband's family and the community, her history of stable employment, lack of criminal history, and attestations by others to her good moral character. The unfavorable factors include the applicant's unauthorized overstay, failure to disclose that overstay, misrepresentation of her intent to marry her husband and immigrate to the United States, and her period of unlawful presence.

Although the applicant's violations of immigration law are significant and cannot be condoned, the positive factors in this case outweigh the negative factors. Therefore, the AAO finds that a favorable exercise of discretion is warranted.

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. The application is approved.