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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



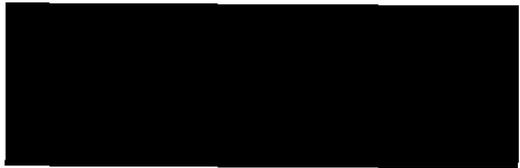
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Date **AUG 22 2012** Office: LONDON, UNITED KINGDOM FILE:

IN RE: Applicant:

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:



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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, London, United Kingdom, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of the United Kingdom 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 record indicates that the applicant is married to a U.S. citizen and 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.

The District Director found that the applicant 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 April 20, 2010.

On appeal, the applicant, through counsel, claims that the applicant's wife will suffer extreme hardship should he be denied admission to the United States. *Appeal Brief attached to Form I-290B, Notice of Appeal or Motion*, dated May 17, 2010. Counsel also asserts that the applicant's misrepresentation was minor; since being HIV positive is no longer a ground of inadmissibility, his misrepresentation is not material; and he relied on bad legal advice after 2007, when he responded "no" to the question on the Form I-94W about having any communicable disease during his last two visits to the United States. *Id.* Counsel submits new evidence of hardship on appeal.

The record includes, but is not limited to, counsel's appeal brief and brief in support of the Form I-601; statements from the applicant and his wife; letters of support; a psychological evaluation for the applicant's wife; medical documents for the applicant, his wife, and his mother-in-law; financial documents; school and employment documents for the applicant and his wife; household and utility bills; photographs; articles on the economy in the United Kingdom; articles on wages and employment opportunities for occupational therapists in the United States; and articles on Japanese-Americans in San Francisco. 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) 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(i) of the Act provides, in pertinent part, that:

- (1) The [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.

A waiver of inadmissibility under section 212(i) of the Act is dependent first on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's 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 United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. See *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (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 of Immigration Appeals (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 the present case, the record indicates that on six separate entries into the United States between December 27, 2002 and July 10, 2008, on his Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure records, the applicant responded “no” to the question “Do you have a communicable disease; physical or mental disorder; or are you a drug abuser or addict,” even though he was diagnosed with HIV in 1998. Counsel claims that the applicant did not willfully misrepresent his HIV status on these Forms I-94W, because he was not aware that the question applied to him until 2007. The AAO notes that even though the applicant claims that he did not know HIV was considered a communicable disease until after 2007, he concedes that he willfully misrepresented his status when he entered the United States after 2007. Counsel also claims that the applicant relied on bad advice from a legal-resource center when he responded “no” on the Forms I-94W on two trips to the United States, after learning that HIV was considered a communicable disease. The AAO notes that the applicant may have relied on bad advice; however, he signed the Forms I-94W, and it is his responsibility to understand the documents that he is signing. Additionally, the applicant states that he takes full responsibility for misrepresenting his status. *See declaration from the applicant*, dated December 15, 2009.

Counsel asserts that the applicant’s misrepresentation was minor, and since being HIV positive is no longer a ground of inadmissibility, his misrepresentation is not material. A misrepresentation is generally material only if by making it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, which is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys*, 495 U.S. at 771-

72. The Board has held that a misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

"It is not necessary that an 'intent to deceive' be established by proof, or that the officer believes and acts upon the false representation," but the principal elements of the willfulness and materiality of the stated misrepresentations must be established. 9 FAM 40.63 N3 (citing *Matter of S and B-C*, 9 I&N Dec. 436, 448-449 (A.G. 1961) and *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975)).

In regards to the willfulness of the applicant's stated misrepresentations, 9 FAM 40.63 N5, in pertinent part, states that:

The term "willfully" as used in INA 212(a)(6)(C)(i) is interpreted to mean knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately made an untrue statement.

In order for the applicant to be inadmissible under INA § 212(a)(6), the applicant's misrepresentations not only must be willful, but they must be material. According to the U.S. Supreme Court, a misrepresentation must have been "predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material." *Kungys*, 485 U.S. at 771-72. Additionally, "materiality" is defined in 9 FAM 40.63 N6.1, which states, in pertinent part, that:

Materiality does not rest on the simple moral premise that an alien has lied, but must be measured pragmatically in the context of the individual case as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa. The Attorney General has declared the definition of "materiality" with respect to INA 212(a)(6)(C)(i) to be as follows: "A misrepresentation made in connection with an application for a visa or other documents, or with entry into the United States, is material if either:(1) The alien is inadmissible on the true facts; or(2) The misrepresentation tends to shut 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 or she be inadmissible." (*Matter of S- and B-C*, 9 I & N 436, at 447.)

An individual's identity and the existence of a prior application for a nonimmigrant visa are not facts in and of themselves that are material. See 9 FAM 40.63 N6.3-3. "They can be material for purposes of

212(a)(6)(C)(i), but only if the alien is inadmissible on the true facts or the misrepresentation tends to cut off a relevant line of inquiry which might have led to a proper finding of ineligibility.” *Id.*

The AAO notes that on January 4, 2010, the Centers for Disease Control and Prevention (CDC), within the U.S. Department of Health and Human Services (HHS), amended its regulations to remove HIV infection from the definition of communicable disease of public health significance. However, even though HIV is no longer considered a communicable disease, at the time that the applicant made his entries into the United States, HIV was considered a communicable disease, and the applicant misrepresented his medical condition in order to enter the United States. Therefore, the applicant’s misrepresentations were willful and material, and based on these misrepresentations, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

In a declaration dated December 15, 2009, the applicant’s wife, who has lived with the applicant in the United Kingdom since 2003, states being separated from her mother and other family members is causing her extreme emotional hardship. In a declaration dated May 14, 2010, the applicant’s wife states she feels “numb and sad all the time,” she has “little interest in things around [her],” and she is withdrawn. In a declaration dated May 14, 2010, the applicant states his wife is “extremely distressed, tense, fearful and anxious,” and she “cries often.” The applicant’s wife claims that many of her “close family members’ health is deteriorating” and she is suffering anxiety and pain by being separated from them. She also states that the majority of her family lives in the San Francisco bay area and she has strong emotional ties to them. The applicant states that if there is a family emergency, his wife will not be able to travel to the United States, because she can only take limited time off from work. In a letter dated May 14, 2010, the applicant’s mother-in-law states the applicant and his wife could be additional support for their family members who are suffering from medical issues, given how close her daughter is to all of them. In a letter dated August 7, 2009, the applicant’s father-in-law and stepmother-in-law state the applicant’s wife’s expertise in occupational therapy would be useful in helping care for grandmother, who had a stroke in 2009. The applicant’s wife states her aunt is in chemotherapy, her grandfather is in the hospital after a fall, and her mother’s health and state of mind is being affected by their medical conditions. She claims that her mother needs her help. In a psychological evaluation dated May 11, 2010, Dr. [REDACTED] states that the applicant’s wife is not suffering from a depressive disorder. However, she states that she could develop a depressive disorder should she be separated from the applicant or continue to live apart from her family members.

Dr. [REDACTED] indicates that if the applicant becomes unwell, his wife “would benefit from being surrounded by her family for their support.” Medical documents in the record indicate, however, that the applicant is in good health and likely will not require antiretroviral therapy in the foreseeable future. Additionally, the applicant’s wife states they would like to start a family, but it will be difficult in the United Kingdom. She states that in the United States, her family would help her with childcare. Further, the applicant’s wife states that remaining in the United Kingdom affects her career prospects and isolates her from the Japanese-American community in San Francisco. She states that she is employed as an occupational therapist and she would be an asset to her community. The applicant states that not being allowed into the United States is a financial hardship because his wife has significant student loans.

The AAO acknowledges that the applicant's wife is a U.S. citizen and that relocation abroad has involved some hardship. The applicant's wife, however, attended university in the United Kingdom, she is currently employed in the United Kingdom, and it has not been established that she has had difficulty adjusting to the culture there. Though the applicant refers to financial difficulties, the record does not contain evidence corroborating the applicant's statement that they are suffering a financial hardship and unable to support themselves in the United Kingdom. Further, though the record shows that the applicant's wife is experiencing emotional hardship as a result of being separated from her family and the Japanese-American community in the San Francisco area, there is no evidence in the record of any other hardships the applicant's spouse has experienced in the United Kingdom. Therefore, based on the record before it, the AAO finds that, considering the potential hardships in the aggregate, the applicant has failed to establish that his wife is suffering extreme hardship in the United Kingdom.

In addition, the record fails to establish extreme hardship to the applicant's wife if she returns to the United States. The applicant's wife states she and the applicant were separated for a few months, and they realized they did not want to be apart. As noted above, Dr. [REDACTED] indicates that the applicant's wife could develop a depressive disorder should she be separated from the applicant. The applicant states that if they were separated, his wife would be devastated, as they rely on each other and they value their time together, knowing that he is HIV positive. Additionally, the applicant's wife states they would like to start a family, which they cannot do if they are separated.

The AAO acknowledges that the applicant's wife may suffer emotional difficulties in being separated from the applicant. While it is understood that the separation of spouses often results in significant psychological challenges, the applicant has not distinguished his wife's emotional hardship upon separation from that which is typically faced by the spouses of those deemed inadmissible. Based on the record before it, the AAO finds that the applicant has failed to establish that his wife would suffer extreme hardship if his waiver application is denied and she returns to the United States.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(i) of the Act. Having found the applicant statutorily ineligible for relief, the AAO finds no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.