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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

[redacted]

H5

DATE: FEB 2 3 2012 OFFICE: SANTA ANA, CA 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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ellen C. Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Santa Ana, California, and the decision was appealed to the Administrative Appeals Office (AAO). The AAO remanded the application to the Field Office Director for adjudication of the underlying Form I-130, Petition for Alien Relative, and for another decision on the waiver application. The Form I-130 Petition has now been approved, and the Field Office Director issued another denial of the waiver application. That denial has been certified for review to the AAO for adjudication of the appeal. The appeal will be dismissed.

The applicant is a native of Vietnam and citizen of France who has resided in the United States since June 26, 2005, when she was admitted pursuant to the visa waiver program. On July 8, 2005, the applicant married a U.S. Citizen. She was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or misrepresentation. The applicant is the spouse of a U.S. Citizen and is the beneficiary of an approved Form I-130 Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her U.S. Citizen spouse and child.

The Field Office Director concluded that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *See Decision of Field Office Director* dated December 10, 2009.

On appeal, counsel for the applicant submits a brief in support, statements from the applicant and her spouse, copies of birth certificates and naturalization certificates, correspondence, and financial and medical documents. In the brief, counsel contends the applicant is not inadmissible for misrepresentation or fraud, as he indicates the applicant told immigration officials she was requesting admission to visit and marry her fiancée. Counsel asserts even if the applicant were found inadmissible for misrepresentation or fraud, the applicant has submitted ample evidence of extreme hardship to a qualifying relative given the applicant's inadmissibility.

The record includes, but is not limited to, the documents listed above, evidence of birth, marriage divorce, residence, and naturalization, statements from family, friends, and employers, other applications and petitions filed on behalf of the applicant, financial and medical documents, a psychological evaluation, educational documents, evidence related to rent payments, and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides:

> (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 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 [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, counsel contends because the applicant was always truthful and forthcoming with immigration officials, she is not inadmissible for fraud or misrepresentation. The record reflects the applicant and her spouse met on the telephone on March 28, 2004, and became engaged the same day. The applicant's spouse explains his attorney suggested the applicant should obtain a visitor's visa, come to the United States, and then get married and file the appropriate immigration paperwork. In her statement, the applicant indicates she obtained her French passport, saw there was no United States visa in it, and was told she had an international optic visa, which was not visible but a machine would be able to read it. She further states that upon arrival in the United States on June 26, 2005, she filled out an application which was in Spanish because there were no more English language applications left. She then states she told an immigration official she was in the United States to visit and to get married, and that the immigration official let her through. The applicant was admitted to the United States that same day under section 217 of the Act, 8 U.S.C. §1187. The applicant married her U.S. Citizen spouse on July 8, 2005.

The Department of State Foreign Affairs Manual states that, "in determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving aliens in the United States who conduct themselves in a manner inconsistent with representations they made to the consular officers concerning their intentions at the time of visa application. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants, either: Apply for adjustment of status to permanent resident..." *DOS Foreign Affairs Manual,* § 40.63 N4.7(a)(1).

The Department of State developed the 30/60-day rule which applies when, "an alien states on his or her application for a B-2 visa, or informs an immigration officer at the port of entry, that the purpose of his or her visit is tourism, or to visit relatives, etc., and then violates such status by ...Marrying and takes [sic] up permanent residence." *Id.* at § 40.63 N4.7-1(3).

Under this rule, "If an alien violates his or her nonimmigrant status in a manner described in 9 FAM 40.63 N4.7-1 within 30 days of entry, you may presume that the applicant misrepresented his or her intention in seeking a visa or entry.." *Id.* at § 40.63 N4.7-2.

Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis in these situations to be persuasive. In the case at hand, the applicant was admitted to the United States

pursuant to the visa waiver program, which only allows for nationals of certain countries to be admitted as a nonimmigrant for a period not exceeding 90 days. INA §217. It is also noted that the applicant was already engaged to be married to a U.S. Citizen when she applied for admission as a nonimmigrant. After demonstrating to an immigration official that she met the requirements to be admitted as a nonimmigrant, including having nonimmigrant intent, the applicant married a U.S. Citizen within 30 days of entry, and has resided in the United States ever since. This conduct violates the 30/60 day rule. Moreover, the applicant contends she told the immigration officer she was coming to marry and visit. Even if this contention were true, the fact that she remained past the 90 days allowed by statute and did not return to France is further evidence of her immigrant intent. The applicant is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for having procured admission to the United States through fraud or misrepresentation. The applicant's qualifying relative for a waiver of this inadmissibility is her U.S. Citizen spouse.

Section 212(i) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (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 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.

The record contains references to hardship the applicant's child would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(i) of the Act, and hardship to the applicant's child will not be separately considered, except as it may affect the applicant's spouse.

The applicant's spouse explains the applicant is a homemaker and takes care of his 11 year old child from a previous marriage as well as their daughter, [redacted] born in 2008. The spouse asserts that the bond between mother and daughter is so strong that separation would cause psychological and physical destruction to the family. Furthermore, without the applicant, the spouse indicates that he would have to pay for childcare, which he cannot afford given his income and expenses. An email from Kindercare is attached, showing that 10 hours of care per day for a toddler would cost $317.00 per week. The spouse states that if he had to pay for childcare in addition to rent and other household expenses, his total expenses would exceed his income by $1,000 to $1,500 a month, and he would lose his home, car, belongings, and perhaps even his job. A paystub shows the applicant's spouse earns $1472.76 in gross income every 2 weeks, and an earlier rental agreement shows monthly rent is $772.00. Moreover, the applicant's spouse asserts

he is the primary caretaker for his parents, who suffer from chronic diseases and depression. Without the applicant, the spouse states his parent's health would be at risk because he would not be able to take care of them. The spouse explains his father had open heart surgery five years ago, and that both parents have diabetes, high blood pressure, asthma, and depression. A physician's note confirms that the parents are taking daily medication for their depression. Medical records are also submitted in support of the spouse's assertions.

A psychological evaluation on the applicant's spouse is also in the record. Therein, a clinical psychologist opines that the spouse experiences a high level of anxiety and stress due to uncertainty over the applicant's immigration status, especially given his divorce from his first wife, and the death of his father at a young age.

Counsel asserts that country conditions in France would subject the applicant's spouse to extreme hardship if he relocated there with the applicant and the children. Counsel explains that the spouse does not know French, has never been to France, and would consequently have a difficult time finding employment there. Counsel further contends that even if the applicant's spouse found employment in France, he would be unable to earn sufficient money to support the family. Counsel adds that the applicant and her spouse are both practicing Muslims, and in Saint-Etienne, where the applicant previously resided, both would not be allowed to practice their religious beliefs in school or at work. Counsel explains women are not allowed to wear their head scarves, and such disobedience of God's will would cause both of them to enter hell. Counsel further indicates that if the family were separated, the applicant's spouse would be unable to support two households given his income. The applicant's spouse corroborates counsel's assertions in another statement.

The applicant's spouse contends that without the applicant to take care of the children, he would be unable to meet his expenses. The spouse's paystub shows that the spouse earns over $38,000.00 in gross income a year, therefore making more than 125% of the minimum income requirement for a family of four. *See Form I-864P, Poverty Guidelines, U.S. Citizenship and Immigration Services,* March 1, 2011. Furthermore, although there is evidence on rent payments, which are $772.00 a month, there is insufficient evidence of other household expenses to support assertions of financial hardship. The record does contain evidence showing childcare for a toddler would cost $317 a week through a childcare company; however, the applicant fails to provide evidence on why other relatives could not help care for the children and alleviate this financial burden, or why the children could not relocate to France with the applicant. The applicant also fails to indicate why she, a citizen of France and educated in French schools, would be unable to find adequate employment to meet household expenses. Without details and supporting evidence of the family's expenses including childcare, the AAO is unable to assess the nature and extent of financial hardship, if any, the applicant's spouse will face upon separation.

The applicant's spouse also asserts that without the applicant's assistance, he is unable to care for his parents, who have medical and psychological conditions, as well as his two children. The applicant's spouse contends his parents have medical problems and depression; however, the

record indicates only that they are taking depression medications.[1] The record does not contain correspondence from a treating physician on what the parent's medical conditions are, what their daily needs are due to these conditions, and why they are unable to assist their son in the event the applicant relocated to France. Without such evidence, the AAO cannot determine what the spouse's duties are with respect to the parents, and the hardship which would be experienced by the spouse due to the applicant's absence and the parents' conditions. The psychological evaluation indicates that although the applicant's spouse experiences some stress and anxiety due to the applicant's immigration situation, he is a fairly healthy person mentally. While the AAO does not minimize the spouse's stress and anxiety, and we acknowledge that the applicant's spouse would face difficulties as a result of the applicant's inadmissibility, we do not find evidence of record to demonstrate that his hardship would rise above the distress normally created when families are separated as a result of inadmissibility or removal. In that the record fails to provide sufficient evidence to establish the financial, emotional, or other impacts of separation on the applicant's spouse are cumulatively above and beyond the hardships commonly experienced, the AAO cannot conclude that he would suffer extreme hardship if the waiver application is denied and the applicant returns to France without her spouse.

Counsel and the applicant make several assertions with respect to living in France. Their assertion that the applicant and her spouse would be unable to fully practice their religion in France and would go to hell as a consequence is not supported by evidence of record. The U.S. Department of State does note that in French public schools, which are secular, employees and students are prohibited from wearing conspicuous religious symbols, including the Islamic headscarf, Jewish skullcap, Sikh turban, and large Christian crosses. *International Religious Freedom Report: France, U.S. Department of State,* September 13, 2011. However, the report also indicates that parents may homeschool children for religious reasons or enroll them in private schools which are associated with religious organizations. *Id.* Furthermore, though the applicant's spouse claims Muslim women are not allowed to wear headscarves at work, the State Department's report does not support this claim, and to the contrary indicates Muslim women wear headscarves in public. *Id.* The State Department also notes that France is home to the largest Muslim community in Europe. *Background note: France, U.S. Department of State,* May 27, 2011. Moreover, although the applicant's spouse asserts he will be unable to find adequate employment in France as he does not speak the language, there is no evidence submitted to support this assertion, or, as discussed above, evidence to show the applicant would be unable to find sufficient employment in France. There is also no evidence of record supporting an assertion that health care would be unavailable to the applicant's spouse in France. The AAO acknowledges the applicant's spouse may experience difficulties upon relocation to France, including separation from other family members. However, because the record fails to establish the emotional, financial, religious, or other impacts of relocation on the applicant's spouse are in the aggregate above and beyond the hardships

[1] The record contains copies of medical records, including hand-written progress notes containing medical terminology and abbreviations that are not easily understood. The documents submitted were prepared for review by medical professionals or are otherwise illegible or indiscernible and do not contain a clear explanation of the current medical condition of the spouse's parents.

commonly experienced by relatives of inadmissible aliens, the AAO cannot conclude that the applicant's spouse would experience extreme hardship upon relocation to France.

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 her U.S. Citizen spouse as required under section 212(i) of the Act. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for a waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. 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.