

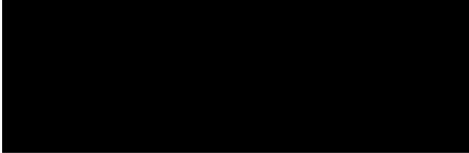
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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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DATE **MAR 08 2012**

Office: NEW YORK, NY

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Ground of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i).

ON BEHALF OF APPLICANT:

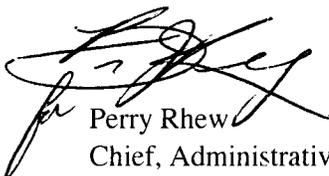


INSTRUCTIONS:

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 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,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York. The matter 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 Dominican Republic 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 having attempted to obtain an immigration benefit through fraud or the willful misrepresentation of a material fact. The applicant is the spouse of a United States citizen and 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 reside in the United States.

The District Director found that the applicant had failed to establish that the bar to her admission would result in extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the District Director*, dated July 24, 2009.

On appeal, counsel questions the finding of inadmissibility and alternately asserts that the District Director abused her discretion in denying the applicant's waiver application. *Form I-290B, Notice of Appeal or Motion*, dated August 24, 2009; *see also addendum to Form I-290B*. Counsel indicates that she will submit a brief and/or additional evidence to the AAO within 30 days. On January 31, 2012, the AAO faxed a request to counsel to submit a brief and/or additional evidence. As of the date of this decision, counsel has not responded to the request and the record does not contain any additional evidence. The AAO will treat the record as complete and will decide the case based on the evidence of record.

The record includes, but is not limited to, a statement from counsel; statements from the applicant's spouse; copies of medical records, billing, and pharmacy receipts, relating to the applicant's spouse; letters from the applicant's and her spouse's employers; a copy of an apartment lease; copies of joint income tax returns, W-2 Wage and Tax Statements, and Earnings Statements for the applicant and her spouse. The entire record was reviewed and all relevant evidence considered in reaching a decision 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.

On appeal, counsel asserts that the applicant did not intentionally misrepresent her marital status on her nonimmigrant visa application in 1989. She claims that the applicant only indicated an inaccurate marital status on the Form OF 156. Counsel also asserts that the misrepresentation was not willful because the Form OF 156 was completed and submitted by an expeditor; that it was not

material as it was innocuous and did not have a bearing on whether the application would be granted or not; and that at the time of her immigrant interview, the applicant gave her correct name and marital status and “disavowed” the erroneous facts contained on the OF 156. The record, however, reflects that the applicant applied for a nonimmigrant visa in 1989 under the name of [REDACTED] claiming to be the wife of [REDACTED]. The record also reflects that the applicant signed the nonimmigrant visa application as [REDACTED] and submitted unidentified false documents in support of the nonimmigrant visa.

In considering whether the misrepresentation on the applicant’s nonimmigrant visa application bars her admission to the United States pursuant to section 212(a)(6)(C)(i) of the Act, the AAO will first consider whether it is a material misrepresentation for immigration purposes.

The Supreme Court in *Kungys v. United States*, 485 U.S. 759 (1988) found that the test of whether concealments or misrepresentations were “material” was whether they could be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, i.e., to have had a natural tendency to affect United States Citizenship and Immigration Services (USCIS) decisions. In addition, *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements of a material misrepresentation are as follows:

A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

- a. the alien is excludable on the true facts, or
- b. 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 (AG 1961).

In this case, the record reflects that the applicant misrepresented her identity in seeking a nonimmigrant visa in 1989, not just her marital status, and that her misrepresentation was material as her true identity was relevant to her eligibility for a nonimmigrant visa. Contrary to counsel’s claim, the applicant’s use of a false identity had a direct bearing on the outcome of her nonimmigrant visa application, resulting in a consular finding of inadmissibility under section 212(a)(6)(C)(i) of the Act.

We note counsel’s assertion that the applicant admitted to having lied about her identity and marital status during her interview, that she “disavowed” the erroneous facts contained on the OF 156 during her interview, and that a timely retraction can cure the misrepresentation for immigration purposes. The AAO notes that a timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for section 212(a)(6)(C)(i) ineligibility. 9 FAM 40.63 N4.6. Whether a retraction is timely depends on the circumstances of the particular case. *Id.* In general, it should be made at the first opportunity. *Id.* If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview. *Id.* In this case, however,

there is nothing in the record that allows us to find that her admission to having misrepresented her identity and marital status was timely and the section 212(a)(6)(C)(i) finding of inadmissibility by the consular officer indicates that no timely retraction occurred. Consequently, the AAO finds that the applicant is barred from admission to the United States under section 212(a)(6)(C)(i) of the Act.

Section 212(i) of the Act provides that:

- (1) 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 a VAWA self-petitioner, 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)(i) of the Act is dependent on a showing that the bar to admission would impose extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant or other family members can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse 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 then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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 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 AAO now turns to the question of whether the applicant in the present case has established that her U.S. citizen spouse would experience extreme hardship as a result of her inadmissibility.

The applicant’s spouse asserts that he would suffer hardship if he relocates to the Dominican Republic with the applicant. In a June 24, 2009 statement, the applicant’s spouse states that he is a citizen of the United States, that he does not have any ties to the Dominican Republic, that he has no family there to assist him and his spouse upon relocation and that he would not be able to find employment there because of the bad economy, high unemployment and the fact that he has no marketable skills. The applicant’s spouse also asserts that he has no financial means to sustain him and his family while they adjust to life in the Dominican Republic. The applicant’s spouse further states that he needs to remain in the United States as he has acute asthma that requires constant monitoring, that he sometimes requires emergency room visits to help keep his asthma in check, that he has medical insurance through his employer, and that his doctors are in the United States. He

contends that if he relocates to the Dominican Republic, he would be forced to give up his medical insurance and his treating physicians and would have to pay out of pocket for any medical care he receives. Finally, the applicant's spouse asserts that his medical condition is exacerbated by hot humid weather, like that in the Dominican Republic.

The AAO acknowledges the preceding claims regarding the impacts of relocation on the applicant's spouse and notes that the record contains copies of prescriptions for asthma medications being taken by the applicant's spouse, Discharge Instructions from Bronx Lebanon Hospital Center that indicates that the applicant's spouse was treated on an emergency basis for viral syndrome on March 24, 2006 and for asthma/seasonal allergies on May 22, 2007, and a medical billing statement that reflects that the applicant's spouse was treated in the emergency room of the same hospital on May 23, 2009 for breathing difficulties. While this documentary evidence establishes that the applicant's spouse suffers from asthma, the record contains no medical evidence or country condition information to establish that relocation to the Dominican Republic would adversely affect his health. Neither does the record provide published country conditions materials on the Dominican Republic's economy and employment situation that supports the applicant's spouse's claim that he would be unable to obtain employment in the Dominican Republic that would allow him to support himself and his family. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the evidence of record, the AAO finds insufficient proof to demonstrate that the applicant's spouse would experience extreme hardship if he relocates to the Dominican Republic. Accordingly, the applicant has not established that a qualifying relative would suffer extreme hardship upon relocation.

On appeal, counsel asserts that the removal of the applicant from the United States would result in the dissolution of her and her spouse's marriage, as well as medical and financial hardship to her spouse. Counsel states that the applicant's spouse has come to rely on the applicant's help with everything, from household chores to providing him with medical care.

In his June 24, 2009 statement, the applicant's spouse states that he has serious medical problems, that the applicant takes care of him, that she cooks, cleans, washes, shops and assists him when his medical condition worsens. He asserts that the applicant accompanies him to his doctors' appointments, picks up his medications from the pharmacy, that she was instrumental in getting him a nebulizer to help control his asthma, and that she is the one who operates and maintains the nebulizer. The applicant's spouse contends that without the applicant, he would have to take care of all the work around the house, that he would no longer be able to use the nebulizer and that his health would suffer a significant setback. The applicant's spouse also states that the applicant works and generates income in order to sustain their household, and that if she is removed from the United States, he would have to cover all the family's expenses in the United States, as well as send money to assist her in the Dominican Republic.

The AAO notes the claims by counsel and the applicant's spouse regarding the impacts of separation from the applicant, but does not find the record to support them. As previously discussed, the record establishes that the applicant's spouse has asthma and is receiving treatment. However, the submitted medical documentation does not establish the impact of the applicant's spouse's asthma on his ability to meet his daily responsibilities, that he requires the applicant's assistance or that his medical conditions will be adversely impacted in her absence. The record also does not contain medical records or reports, to establish the nature or severity of the emotional hardship that the applicant's spouse would experience as a result of his separation from the applicant or how such emotional hardship would affect his ability to meet his daily responsibilities.

The AAO also notes that the record does not contain sufficient evidence to establish that the applicant's removal would result in financial hardship for her spouse. The record does not indicate or document what financial obligations the applicant's spouse would face in the applicant's absence. It also fails to contain country conditions information that establishes the applicant would require her spouse's financial assistance if she is returned to the Dominican Republic. Without additional evidence of the applicant's spouse's financial obligations, the AAO is not in a position to determine the extent of the financial hardship he would experience, if any, as a result of his separation from the applicant. As previously noted, going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Also, without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on our review of the record, the AAO finds there is insufficient evidence, even when that evidence is considered in the aggregate, to establish that the applicant's spouse would experience extreme hardship if the waiver application is denied and he continues to reside in the United States without the applicant.

In that the record does not contain sufficient evidence to establish the applicant's eligibility for a waiver of inadmissibility under section 212(i) of the Act, she is statutorily ineligible for relief. Accordingly, the AAO finds no purpose would be served in discussing whether she 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.