



**U.S. Citizenship
and Immigration
Services**

(b)(6)

DATE: OFFICE: MILWAUKEE, WISCONSIN

APR 30 2013

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 with the field office or service center that originally decided your case by filing a 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Milwaukee, Wisconsin, denied the waiver application. The applicant, through counsel, appealed the Field Office Director's decision, and the Administrative Appeals Office (AAO) dismissed the appeal. On September 26, 2012, the applicant filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted. The previous decision of the AAO will be affirmed.

The record reflects the applicant is a native of Togo and citizen of Togo and Nigeria 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 procured admission to the United States through misrepresentation. The Field Office Director concluded the applicant failed to establish extreme hardship would be imposed upon a qualifying relative, and denied his Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The AAO dismissed the applicant's appeal and affirmed the Field Office Director's decision.

On motion, counsel contends: the AAO "has run afoul" of controlling caselaw concerning expert testimony in the Seventh Circuit, citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004); the AAO also erred by using denial "boilerplate" language that does not consider the hardship the AAO has found on the record; and the AAO committed reversible error by failing to properly weigh all hardship factors and concluding the record contains insufficient evidence of hardship in the aggregate. Counsel also submits additional documentary evidence to support the claim of extreme hardship to the applicant's qualifying relative. *Brief in Support of Motion*, notarized September 25, 2012.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be proved and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). As the applicant has submitted new documentary evidence to support his claim and asserted reasons for reconsideration, the motion to reopen and reconsider will be granted.

The record includes, but is not limited to: briefs and a motion from counsel; letters of support; identity, psychological, medical, employment, financial, and academic documents; correspondence; Internet articles; and documents on conditions in Togo and Nigeria.¹ The entire record, with the

¹ The record contains some documents in the French language. 8 C.F.R. § 103.2(b)(3) states:

Translations. Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

exception of the French-language documents, was reviewed and considered in rendering a decision on the appeal.

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

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

...

(iii) Waiver Authorized.-For provision authorizing waiver of clause (i), see subsection (i).

The Field Office Director found the applicant inadmissible under section 212(a)(6)(C) of the Act for having obtained a nonimmigrant student visa by changing his name and date of birth and failing to disclose he was denied a student visa on two previous occasions. On motion, the applicant does not contest the finding of inadmissibility. Accordingly, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, and he requires a waiver under section 212(i) of the Act.

Section 212(i) of the Act provides, in relevant part:

(1) The Attorney General [now Secretary of Homeland Security (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.

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. Hardship to the applicant or his son can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse is the only demonstrated qualifying relative in this case. 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*,

As certified translations have not been provided for all foreign-language documents, as required by 8 C.F.R. § 103.2(b)(3), the AAO will not consider these untranslated documents in support of the motion.

10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) 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 BIA 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 BIA 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 Id.* at 568; *In re 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 BIA 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., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *In Re 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 v. I.N.S.*, 138 F.3d 1292, 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 support of the applicant's motion, counsel contends: "In a blatant legal lapse, the AAO has substituted its fiat in the place of [REDACTED] expert opinion" and that "the spirit of *Daubert* requires that where, as here, a party seeks to exclude the opponent's expert from testifying, the party seeking exclusion must adduce evidence into the record that sufficiently undermines the expertise of the expert whose testimony is sought to be excluded."

The AAO notes that in *Niam*, the U.S. Court of Appeals for the Seventh Circuit stated:

The ground rules for qualifying expert witnesses in federal trials are given by the *Daubert* decision. But *Daubert* interprets Fed.R.Evid. 702, and the federal rules of evidence do not apply to the federal administrative agencies; so, strictly speaking, neither does *Daubert*. *Consolidation Coal Co. v. Director, Office of Workers' Compensation Programs*, 294 F.3d 885, 893 (7th Cir.2002); *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir.2002). But the spirit of *Daubert* . . . does apply to administrative proceedings.

354 F.3d at 660 (citations omitted). Also, the circuit court concluded the immigration judge's summary exclusion of expert testimony was arbitrary, as the expert's "affidavit was critical evidence and nothing in it or in her *curriculum vitae* showed that she was unqualified to give expert evidence in this case." *Id.*

In its previous decision, the AAO acknowledged [REDACTED] credentials as a licensed clinical psychologist with certification involving substance abuse but found that the record did not demonstrate that she has "the expertise to determine whether the applicant and his spouse's circumstances meet the legal standards of extreme hardship as contemplated by section 212(i) of the Act." Accordingly, the AAO did not challenge [REDACTED] professional credentials or expertise to conduct mental health evaluations or make a diagnosis concerning the applicant's spouse's mental health. Rather, the AAO determined the record does not demonstrate [REDACTED] expertise as a licensed clinical psychologist qualifies her to determine whether the applicant and his spouse's circumstances meet the legal standards of extreme hardship contemplated by section 212(i) of the Act. Moreover, the AAO did not exclude the expert testimony concerning the applicant's spouse's mental health in making its decision. Rather, the AAO indicated the record lacked evidence of the applicant's spouse's current mental health, as the evaluation was conducted almost two years prior to the applicant's submission of his appeal, and [REDACTED] report based on that evaluation was dated over one year after the evaluation. Accordingly, the AAO concludes that the "spirit of *Daubert*" concerning expert testimony in the Seventh Circuit has been properly applied in the instant case.²

² On motion, counsel submits a statement from [REDACTED] indicating an error was made concerning the date of the applicant's spouse's psychological evaluation and the report of that evaluation.

In support of the applicant's motion, counsel further contends: new evidence shows hardship to the applicant's spouse concerning her psychological condition and her ability to support her family in the applicant's absence; their child has an "ongoing reflux choking problem" resulting in "tremendous stress" to her and the applicant; she would become a single mother dealing with their child's medical condition alone if the applicant were removed; and the AAO's own findings contradict its conclusion that the record does not include sufficient evidence to show the applicant's spouse's hardship, in the aggregate, is extreme.

Although the applicant's spouse may experience some psychological and economic hardship in the applicant's absence, the AAO finds the record does not establish the hardship goes beyond what is normally experienced by qualifying relatives of inadmissible individuals. The record is sufficient to establish the applicant and his spouse's younger son has been assessed with "gagging episodes" and is currently undergoing observation and treatment. Also, the record includes a report by licensed mental health counselor, [REDACTED] indicating the applicant's spouse is currently receiving psychotherapy treatment for anxiety, depression, post-traumatic stress disorder (PTSD), and postpartum depression. Additionally, [REDACTED] indicates the applicant's spouse was referred to her by [REDACTED] who has prescribed antidepressant and anti-anxiety medications, and the applicant's spouse is suffering from anxiety, depression, and PTSD, in part, because of undergoing female genital mutilation (FGM) at a young age. The AAO notes [REDACTED] does not specifically discuss when the psychotherapeutic relationship with the applicant's spouse began or the frequency of their therapy sessions. The AAO also notes the record does not include evidence of the applicant's spouse's medical evaluations or treatment by [REDACTED] other than what has been self-reported to [REDACTED]. Moreover, in its previous decision, the AAO indicated the record lacked evidence that the applicant's spouse is a member of an ethnic group or tribe that practices FGM. The AAO notes the motion does not address this concern.

Additionally, the record is sufficient to establish the applicant's spouse's position as a paralegal for the [REDACTED] was scheduled to be eliminated on January 1, 2013, and the applicant's spouse was offered the opportunity to apply for a part-time legal secretary position with [REDACTED]. Also, as previously noted, the record establishes the applicant is the primary breadwinner. However, the AAO previously noted that the record does not include sufficient evidence of the applicant and his spouse's current financial obligations, or of labor or employment opportunities in Nigeria or Togo, to demonstrate the applicant's inability to support his and his spouse's households. The AAO notes the motion does not include additional evidence to address these concerns. The AAO is thus unable to conclude the record establishes the applicant's spouse's psychological and financial hardship would go beyond that which is commonly expected.

The AAO notes the concerns regarding the hardship the applicant's spouse may experience in the applicant's absence, but finds that even when this hardship is considered in the aggregate, the record fails to establish the applicant's spouse would suffer extreme hardship as a result of separation from the applicant.

In its previous decision, the AAO found three instances of hardship that, in the aggregate, amount to extreme hardship if the applicant's spouse were to relocate to Nigeria or Togo. The AAO notes the spouse's circumstances have not improved since the AAO's previous decision. Accordingly, the record continues to reflect the cumulative effect of the hardship the applicant's spouse would experience upon relocation due to the applicant's inadmissibility rises to the level of extreme.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining in the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, also *cf. In Re Pilch*, 21 I&N Dec. at 632-33. As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to his spouse in this case.

In this case, the record does not contain sufficient evidence to show that the hardship faced by the qualifying relative, considered in the aggregate, rises beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds the applicant has failed to establish extreme hardship to his 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 application for 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 motion will be granted and the previous decision of the AAO will be affirmed.

ORDER: The motion is granted. The previous decision of the AAO is affirmed. The application remains denied.