U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: AUG 0 6 2013 Office: MILWAUKEE, WI 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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Michael Rumsey

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Administrative Appeals Office (AAO) previously dismissed the applicant's appeal in a decision dated April 2, 2013. The matter is now before the AAO on motion. The motion will be granted and the underlying appeal will be sustained.

The applicant is a native and citizen of China who was found to be inadmissible 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 entering the United States through fraud or misrepresentation. He seeks a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i). The Field Office Director, Milwaukee, Wisconsin, concluded that the applicant had failed to establish that a denial of his waiver application would result in extreme hardship to a qualifying relative and denied the application accordingly. *See Decision of Field Office Director*, dated May 12, 2011.

The applicant appealed to the AAO, asserting that his U.S. citizen spouse would suffer extreme hardship if his waiver application were denied. In our decision on appeal, the AAO found that the applicant had demonstrated that his qualifying spouse would suffer extreme hardship if separated from the applicant, but had not shown that his qualifying spouse would suffer extreme hardship on relocation to China. Therefore, we found that the applicant had failed to meet his burden of proof as required for a waiver under section 212(i) of the Act.

On motion, counsel for the applicant asserts that the qualifying spouse would face extreme hardship if she were to relocate to China. Counsel notes that the qualifying spouse has several health conditions which would worsen in China and for which she would be unable to receive necessary care. Additionally, counsel states that the qualifying spouse would suffer financial hardship in China because she and the applicant would struggle to find work in that country. Counsel also asserts that the applicant would be forcibly sterilized in China if the qualifying spouse returned with him and their children, and that sterilization of the applicant would cause extreme hardship to the qualifying spouse. Finally, counsel declares that the applicant's spouse and children would be forced to renounce their U.S. citizenship in China because China does not recognize dual nationality.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record now includes, but is not limited to: medical records relating to the qualifying spouse and letters from her doctors; country conditions information; statements from the applicant and the qualifying spouse; a psychological evaluation regarding the qualifying spouse; photographs; financial documentation; a letter from the applicant's sister and a medical certificate relating to her; letters of support regarding the applicant and the qualifying spouse; a police clearance document for the applicant; and relationship and identification documents for the applicant, the

qualifying spouse, and their children. The entire record was reviewed and considered in rendering this decision.

The applicant has not contested the AAO's finding that he is inadmissible under section 212(a)(6)(C)(i) of the Act for entering the United States through fraud or willful misrepresentation of a material fact. Additionally, the AAO previously found that the qualifying spouse would experience extreme hardship if separated from the applicant. We will not disturb that finding now. Therefore, the only issues on motion are whether the applicant has demonstrated that his qualifying spouse would face extreme hardship if she were to relocate to China, and whether the applicant merits a waiver in the exercise of discretion.

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.

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 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 U.S. 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 v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (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.

On motion, counsel claims that the qualifying spouse has a chronic cough which would be exacerbated by the poor air quality in China. He states that the qualifying spouse's doctors have been unable to find the cause of her cough and that her doctor recommends against living in a location with high levels of pollution in the air. Counsel notes that air pollution has contributed to high numbers of early deaths in China. Counsel also notes that the qualifying spouse has other medical conditions, including history of an ectopic pregnancy, latent tuberculosis, breast and ovarian cysts, abdominal pain, and a distended bladder. Counsel contends that the qualifying

spouse would be unable to afford necessary medical care in China due to the high cost of services and the expectation that patients pay for treatment in cash.

Additionally, counsel claims that the qualifying spouse would suffer extreme financial hardship in China because she and the applicant would struggle to find gainful employment. Counsel notes that the qualifying spouse has a junior high school education and has worked as a cashier in Chinese restaurants. He states that the applicant has a high school education and has worked as a cook in his own restaurant in the United States, but never learned to cook authentic Chinese food in China. Counsel cites reports regarding the high levels of unemployment in China, particularly for low skilled workers and people with low levels of education.

Counsel also alleges that the applicant and his family would suffer hardships due to the one child policy in China. Counsel states that individuals who have children in violation of birth limits are subject to high fines and face additional fees for sending their children to school. Additionally, counsel asserts that the applicant would likely be sterilized in China pursuant to coercive family planning policies. Finally, counsel declares that the qualifying spouse and her children would not be recognized as Chinese citizens unless they were to renounce their U.S. citizenship. Counsel claims that as non-citizens of China, the qualifying spouse and her children would be required to renew their documents every six months to a year at a cost of approximately $1500 per person.

In a written statement, the qualifying spouse indicates that the applicant "is the backbone of support for [her] family both financially and emotionally." She states that the applicant comforted her when her first pregnancy was terminated and that they now have two children. She fears that they will be unable to have more children if they return to China because the applicant will be sterilized. The qualifying spouse notes that the applicant's sister was sterilized in China after having two children. She also asserts that she has no family in the United States except an uncle and that no one would help her care for her children in the United States. Additionally, she states that the applicant is the manager and cook at their family restaurant and that she lacks the English skills, cooking experience, and time to manage the restaurant on her own while also caring for her two young children. The qualifying spouse contends that she would not be able to afford to support her children or to visit the applicant in China.

The qualifying spouse further states that her cough worsened during her two visits to China in the past ten years. She fears that air pollution in China would exacerbate her cough and that she would be unable to afford quality healthcare for herself and her family. Also, she worries that her children would be unsafe in China and would not receive a good education. She alleges that she and the applicant would "have to pay three or four times more to send [their] children to school in China than normal Chinese because [they] have no household registration" due to the fact that they married and had children in the United States. Finally, she states that she and the applicant would be unable to afford the high fees for regular renewal of their children's documents in China. She fears that her "family situation will be miserable" in China.

The AAO finds that the qualifying spouse would experience extreme hardship upon relocation to China. First, the applicant has submitted documentation to demonstrate that his qualifying spouse's health would likely be negatively affected by the air quality and medical system in China. The record shows that the qualifying spouse has undergone various medical tests related to her respiratory system. *See Statement of Account,* dated February 24, 2013. A medical report indicates that she has been diagnosed with a persistent cough and "post viral cough syndrome." *Progress Note, APNP,* dated January 21, 2013. The record also shows that the qualifying spouse was treated for latent tuberculosis in 2010. *Progress Notes, APNP, Thedacare Physicians – Infectious Diseases*, dated August 17, 2010. The qualifying spouse's doctor also states that the qualifying spouse has "a prolonged cough . . . of unknown etiology" and warns that "if she were to move to a heavily polluted environment her cough would most likely worsen . . . ." *Letter from , MD*, dated May 2, 2013. The U.S. Department of State warns U.S. citizens that "[air] pollution is . . . a significant problem throughout China, and you should consult your doctor prior to travel and consider the impact seasonal smog and heavy particulate pollution may have on you." *U.S. Department of State, Country Specific Information: China*, dated January 28, 2013. The applicant has also submitted an article regarding a study which found that "[o]utdoor air pollution contributed to 1.2 million premature deaths in China in 2010 . . . ." *New York Times, Early Deaths Linked to China's Air Pollution Totaled 1.2 Million in 2010, Data Shows*, dated April 2, 2013. The qualifying spouse's current respiratory condition makes her particularly vulnerable to health problems relating to air quality in China.

A letter from one of the qualifying spouse's doctors indicates that she was treated for a breast cyst in December 2011 and January 2012 and irregular menstrual bleeding in October 2012. *Letter from K MD*, dated April 23, 2013. According to the Department of State, "The standards of medical care in China are not equivalent to those in the United States" and "[m]ost hospitals demand cash payment or a deposit in advance for admission, procedures, or emergencies . . . ." *U.S. Department of State, Country Specific Information: China.* Additionally, the psychological evaluation in the record demonstrates that the qualifying spouse has been diagnosed with "Major Depressive Disorder, Recurrent, Severe Without Psychotic Features" and that she has exhibited "passive suicidal ideations." *Psychological Evaluation, Ph.D.*, dated January 17, 2011. Her depression has affected her ability to sleep, eat, and work and her psychologist has recommended that she receive treatment through therapy as well as medication. The Department of State notes that "[m]ental health facilities or medications are not widely available in China," so the qualifying spouse would likely be unable to receive necessary mental health care if she were to relocate. *U.S. Department of State, Country Specific Information: China.*

Additionally, the applicant has shown that his qualifying spouse would face financial hardship in China. The evidence of record demonstrates that the qualifying spouse has a junior high school education and that her only work experience is as a cashier in her family-owned Chinese-American restaurant. The applicant has a high school education and has worked as a cook in his

restaurant. Reports in the record establish that the average unemployment rate in urban China was approximately eight percent in 2012, but the rate among low skilled workers was nearly twelve percent for those with a middle school education and ten percent for those with a high school education. *Is China's Official Unemployment Rate Totally Off?*, *The Atlantic*, 2012; *Chinese Survey Shows a Higher Jobless Rate*, *Wall Street Journal*, dated December 8, 2012. Therefore, the applicant and his qualifying spouse may struggle to find work in China, resulting in financial hardship for the qualifying spouse.

Furthermore, the penalties relating to violations of China's family planning policies would create additional financial difficulties for the qualifying spouse. According to a report in the record, Chinese "[c]itizens who have unauthorized, or 'out-of-plan,' children are required to pay a fine known as the 'social maintenance fee.' . . . The fine is reported to be up to 10 times the local average income in some localities." *Immigration and Refugee Board of Canada, China: Treatment of "illegal" or "black" children born outside the family planning policy; whether unregistered children are denied access to education, health care and other services*, dated October 1, 2012 (citations omitted). Parents who fail to pay the fine or otherwise violate family planning policies are unable to obtain registration documents for their children, resulting in their children having "no legal status" and an inability to obtain identification documents, health insurance, social benefits, education, and employment. *Id.* The Department of State indicates that "[t]he financial and administrative penalties for unauthorized births were strict." *U.S. Department of State, Country Reports on Human Rights Practices for 2012: China.*

The AAO also notes that the qualifying spouse has been living in the United States for approximately 13 years. Although she is originally from China and still has family there, she has established a life in the United States. She was married and had her children in the United States, she and the applicant own a restaurant where she is employed, and letters of support indicate that she is an important part of her community.

Finally, the qualifying spouse would suffer emotional hardship in China due to the likelihood that she or the applicant would be subjected to coercive abortion or sterilization under the family planning policies because they have two children. The record demonstrates that the applicant's sister was forcibly sterilized after having two children and the qualifying spouse states that she and the applicant hope to have more children. Although forced abortion and sterilization are prohibited by Chinese law, the Department of State notes:

> [I]ntense pressure to meet birth-limitation targets set by government regulations resulted in instances of local family-planning officials' using physical coercion to meet government goals. Such practices included the mandatory use of birth control and the abortion of unauthorized pregnancies. In the case of families that already had two children, one parent was often pressured to undergo sterilization.

Id. The applicant and the qualifying spouse are originally from Fuzhou City, located in China's Fujian province, where laws "require unspecified 'remedial measures' to deal with unauthorized

pregnancies." *Id.* The Department of State reports that in April 2012, government officials forced a woman in Fujian City to undergo an abortion. *Id.*

The AAO finds that, in the aggregate, the qualifying spouse's physical and mental health concerns, low level of education and work experience, ties to the United States, and potential for suffering financial, administrative, and physical penalties for violating China's family planning policies would create extreme hardship for her if she were to relocate. *See Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996); *see also Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 566 (BIA 1999). Having already found that the qualifying spouse would suffer extreme hardship if separated from the applicant, the AAO concludes that the applicant has met his burden of establishing extreme hardship to a qualifying relative as required for a waiver under section 212(i) of the Act.

In that the applicant has established that the bars to his admission would result in extreme hardship to a qualifying relative, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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).

Matter of Mendez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

A favorable factor in this case is the extreme hardship the qualifying spouse would suffer if the applicant were removed. Additionally, the applicant has two young U.S. citizen children who rely on him for financial and emotional support. Furthermore, the applicant has resided in the

United States since 1999 and he owns and operates a restaurant here. Letters of support indicate that he contributes to his community through donations to various churches, non-profit organizations, and police and fire departments; that he is helpful and well-liked; that he always pays the rent for his restaurant space on time; and that his restaurant is an important part of the downtown area of his city. The applicant also pays taxes and has no criminal record. The unfavorable factor is the applicant's use of a fraudulent passport to gain admission to the United States.

Although the applicant's violation of immigration law cannot be condoned, the positive factors in this case outweigh the negative factor. In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met. Therefore, his motion will be granted and the underlying appeal will be sustained.

ORDER: The motion is granted. The underlying appeal is sustained.