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U.S. Department of Homeland Security  
U.S. 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

[Redacted]

DATE **DEC 13 2013** Office: LAS VEGAS, NV

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,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Las Vegas, Nevada. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of China 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 attempting to procuring an immigration benefit by fraud or willful misrepresentation of a material fact. The applicant's spouse is a U.S. citizen. She seeks a waiver of inadmissibility in order to reside in the United States.

The Field Office Director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the Field Office Director*, dated March 20, 2013.

On appeal, counsel asserts that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act, as she received ineffective assistance from prior counsel, and the applicant's spouse would experience extreme hardship if the applicant's waiver application is denied. *Brief in Support of Appeal*, dated April 18, 2013.

The record includes, but is not limited to, financial records, medical records, affidavits from the applicant and his spouse, an affidavit from the applicant's son, immigration records, 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, 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.

Section 212(i) of the Act provides:

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 immigrant who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The record reflects that the applicant was admitted to the United States as a B-2 visitor on March 27, 2008, her authorized period of stay expired on September 26, 2008, and she filed Form I-589, Application for Asylum and Withholding of Removal, on September 22, 2008. The applicant

submitted a statement in support of her asylum application, dated September 2, 2008, in which she detailed policemen dragging her outside of her home, arresting her, bringing her to the police station and locking her up in a cell for three days. Her asylum claim was denied because she was not found credible, and she was placed into immigration proceedings. Her proceedings were terminated so she could pursue her Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), then pending before U.S. Citizenship and Immigration Services (USCIS). The applicant was interviewed on January 30, 2013 in connection with her Form I-485. She used an interpreter of her choice, was placed under oath and was advised not to answer any questions that she did not understand or know the answer to. The applicant answered in the negative to questions of whether she had ever been arrested or detained by law enforcement anywhere in the world; whether she had ever been to jail or prison anywhere in the world; whether she had ever had any problems with police or law enforcement anywhere in the world; whether the police had ever come to her house anywhere in the world; and whether she had been forced to ride in a police vehicle or had been to a police station anywhere in the world. The applicant was unable to account for her asylum statement until it was read back to her. The record reflects that the applicant misrepresented herself in her asylum case. She is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for attempting to procure an immigration benefit by willful misrepresentation of material facts.

The applicant states that before her Form I-485 interview, she sought legal advice from her previous attorney due to her limited knowledge of English; the attorney prepared the Form I-485 without her approving the content before she signed due to her limited English skills; she mentioned to her former attorney that she was previously taken by the police and persecuted by the Chinese government; her former attorney advised her that her persecution was not a criminal offense or arrest and to respond "no" to the arrest and related questions; she trusted her former attorney; and she did not know she was considered to be giving false or misleading information. The record includes a letter from the applicant's former attorney in which he claims responsibility for the applicant's plight; he told her she did not need to review her Form I-589; and he apologizes for his advice to her. The AAO finds that these representations do not overcome the finding of inadmissibility under section 212(a)(6)(C)(i) of the Act. The applicant's inability to account for her asylum statement until it was read back to her supports concluding that her statement was false, and this inability was not related to the purported advice from former counsel.

Furthermore, the applicant has not established ineffective assistance of counsel. Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

*Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988).

The record indicates that the first two requirements were met. However, the record does not include evidence that the applicant filed a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, an explanation of why not. Accordingly, the applicant did not articulate a proper claim based upon ineffective assistance of counsel.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative, in this case the applicant's spouse. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. See *Matter of Mendez*, 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 will first address hardship to the applicant’s spouse if he relocates to China. The applicant’s spouse states that he is very close to his 96 year-old mother and two children in the United States; he could not survive in China without proper medical treatment and he cannot afford medical benefits in China; people in China do not care about depression, anxiety and insomnia as medical conditions; he will not be able to find a job in China; he has been living in the United States for more than two decades; and he does not have family or friends in China.

The applicant’s spouse’s medical records reflect that he has chronic mental illness and reflux esophagitis; he has a history of anxiety and insomnia; and he currently takes several medications. Additionally, the records reflect that he has been taking anxiety and depression medication since 2001; recent family stress has triggered anxiety, excessive worrying, and insomnia; and he resumed taking his previous medication. His medical records reflect that he is not sleeping well even with medication.

The record reflects that the applicant’s spouse’s two children and mother reside in the United States, and he is close to them. He has resided in the United States for a long period of time. In addition, he lacks family and social ties in China. The applicant’s spouse also has a documented history of mental and physical health issues. His claim that he could not find employment in China is plausible based on his age (62 years old), medical conditions, lack of social ties in China and lengthy period of time residing outside of China. Based on the totality of the hardship factors presented, the AAO finds that the applicant’s spouse would experience extreme hardship if he relocated to China.

The AAO will now address hardship to the applicant’s spouse if he remained in the United States. The applicant’s spouse states that he cannot imagine what he would do if the applicant leaves; his

ex-spouse of 30 years died in his arms; he often had depression and anxiety and his depression has improved since marrying the applicant; he cannot sleep or eat well; the applicant takes care of him, especially by managing his special diet; and the applicant also provides financial support to his mother and children.

The applicant states that her spouse needs her emotionally, mentally and financially; her spouse had been seeing doctors for depression, anxiety and insomnia for ten years, and these conditions have worsened with the recent legal stress related to her immigration status; he has been diagnosed with chronic mental illness, which is causing reflux esophagitis; he is not sleeping or eating and barely can care for himself; he forgets to take his prescribed medication; and he is not focused while driving.

The applicant's stepson states that after his biological mother passed away in 2008 in his father's arms, his father was diagnosed with moderate to severe depression; and his father became much happier after meeting the applicant.

As mentioned, the applicant's spouse has medical issues, including chronic mental illness, reflux esophagitis, a history of anxiety and insomnia. He currently takes several medications. The medical records reflect that he stopped taking medication when he married the applicant and recent family stress has triggered anxiety.

The applicant and her spouse's 2012 federal tax return reflects an income of \$19,631 and that the applicant earned the majority of their income through her reflexology business.

The record reflects that the applicant's spouse has significant mental health issues and the applicant's presence has helped his emotional state. The record also reflects that the applicant is the main source of the couple's income. Based on the totality of the hardship factors presented, the AAO finds that the applicant's spouse would experience extreme hardship if he remained in the United States.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Morales*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

*Matter of Mendez-Moralez* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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).

*Id.* at 301 (citation omitted).

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the applicant's U.S. citizen spouse, extreme hardship to her spouse and the lack of a criminal record. The unfavorable factors include the applicant's misrepresentations and unauthorized period of stay.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

**ORDER:** The appeal is sustained.