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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**



DATE **FEB 12 2013**

OFFICE: MOUNT LAUREL, NJ

FILE: [REDACTED]

IN RE:

APPLICANT: [REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B), and under Section 212(i) of the 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 in accordance with the instructions on 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,

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

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Mount Laurel, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Kenya who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. He was also 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 a visa, other documentation, or admission into the United States or other benefit provided under the Act through fraud or misrepresentation. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his U.S. Citizen spouse.

The Field Office Director concluded that the applicant failed to demonstrate the existence of extreme hardship to a qualifying relative and denied the application accordingly. *See Decision of Field Office Director* dated March 6, 2012.

On appeal, counsel for the applicant submits a brief in support, statements from the applicant's spouse, letters from family, friends, and community members, documentation on country conditions in Kenya, and real estate documents. In the brief, counsel contends that the positive factors outweigh the negative factors in a determination of extreme hardship.

The record includes, but is not limited to, the documents listed above, a psychological evaluation, financial and real estate documents, other statements from the applicant and his spouse, evidence of birth, marriage, residence, and citizenship, documentation of community service, and other applications and petitions. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) of the Act provides, in pertinent part:

(B) ALIENS UNLAWFULLY PRESENT.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in

the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

.....

(iv) Tolling for good cause.-In the case of an alien who-

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application, the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record reflects that the applicant was admitted into the United States as a nonimmigrant on January 19, 1997, with authorization to remain until July 18, 1998. The applicant remained past the date of his authorized stay, and applied for adjustment of status and advance parole on March 8, 2006. He was granted advance parole, left the United States on December 6, 2007, and was paroled back into the United States on December 29, 2007.

In *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), the Board of Immigration Appeals (BIA) held that an applicant for adjustment of status who left the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act did not make a departure from the United States within the meaning of section 212(a)(9)(B)(i)(II) of the Act. Here, the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States pursuant to that grant of advance parole, and was paroled into the United States. In accordance with the BIA's decision in *Matter of Arrabally*, the applicant did not make a departure from the United States for the purposes of section 212(a)(9)(B)(i)(II) of the Act. Accordingly, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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, the record reflects that in an application for his nonimmigrant visa the applicant falsely represented he was married to a Kenyan native when in fact he was not. He admitted in a written statement that he did this to increase his chances for obtaining a visa. Inadmissibility is not contested on appeal. The AAO therefore finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for having procured a visa to the United States through fraud or misrepresentation. The applicant's qualifying relative for a waiver of this inadmissibility is his U.S. Citizen spouse.

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 v. I.N.S.*, 138 F.3d 1292 (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.

Counsel relies on *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), and *Matter of Wadud*, 19 I & N Dec. 182 (BIA 1984) to contend that the Field Office Director did not evaluate the applicant’s positive and negative factors in a determination of whether extreme hardship exists. In making this assertion, counsel fails to recognize that the evaluation of the applicant’s positive and negative factors is part of a discretionary analysis, which occurs after a determination on whether a qualifying relative would extreme hardship given an applicant’s inadmissibility.¹ Extreme

¹ This is supported by the cases counsel referenced. The BIA in *Matter of Marin* states:

In order to provide the framework for an equitable application of discretionary relief, the Board has enunciated factors relevant to the issue of whether section 212(c) relief should be granted as a matter of discretion. Among the factors deemed adverse to a respondent's application have been

hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

The applicant's spouse claims the applicant is a very loving and supportive husband, and that he encourages her to pursue her dreams, such as modeling. She adds that she does not work, and relies on the applicant for financial support. The spouse explains that without the applicant, she could not make her monthly mortgage payments, nor could she pay her credit card bills or other expenses without the applicant's income. She indicates her monthly bills include \$1917 for her mortgage, \$350 for an automobile loan, \$118 for car insurance, and \$300 for electricity. The spouse asserts that with her high school education, she could not earn enough money to meet her financial obligations on her own. The spouse moreover contends that she relies on the applicant emotionally, and thinking about his possible deportation causes her stress, sleepless nights, and panic attacks. A psychologist indicates that the spouse has a turbulent family history, is the only one taking care of her infirm mother, and has only met her father seven times. The psychologist opines in the evaluation that the spouse is depressed, frightened, and highly distraught.

The spouse moreover asserts that she would be unable to relocate to Kenya. She indicates that she does not speak Swahili, she dislikes the food in Kenya, and cannot eat peppers, tomatoes, and onions, and has become ill when she visited the country and drank tap water. The spouse states that she wants the best education for her children, when she and the applicant decide to start a family, which is only available in the United States. The spouse adds that inadequate medical facilities and outbreaks would cause her medical hardship in Kenya, and she would be endangered given the threats to safety and security as well as crime in the country. She contends she would be isolated and lonely without any family or friends, or even the ability to communicate with people in Swahili.

The spouse's assertion that her inability to communicate in Swahili would isolate her in Kenya is not supported by the U.S. Department of State, which indicates although Swahili is the national language of the country, English is the official language. Furthermore, although the spouse asserts she wants the best education for her children, the AAO notes that she does not currently have children who would be negatively impacted by educational facilities in that country. Nor is there evidence to support contentions that the applicant's spouse has a medical condition which would be difficult to treat in Kenya. Although the spouse's assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. See *Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be

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 a respondent's bad character or undesirability as a permanent resident of this country.

Matter of Marin, 16 I & N Dec. at 584 (emphasis added). The BIA in *Matter of Wadud* cited the above-listed factors in *Matter of Marin* to determine whether an alien was eligible for a favorable exercise of discretion, not whether extreme hardship to a qualifying relative had been established. *Matter of Wadud*, 19 I&N Dec. at 186.

disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it.”). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Similarly, without supporting evidence, the assertions of counsel will not satisfy the applicant’s burden of proof. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

However, her concerns on safety, security, and crime in Kenya are supported by the U.S. Department of State’s travel warning, which indicates:

The U.S. Department of State warns U.S. citizens of the risks of travel to Kenya. U.S. citizens in Kenya, and those considering travel to Kenya, should evaluate their personal security situation in light of continuing and recently heightened threats from terrorism and the high rate of violent crime in some areas. The levels of risk vary throughout the country... U.S. government employees, contractors, grantees, and their dependents are prohibited from traveling to the North Eastern Province, including the cities of El Wak, Wajir, Garissa, Dadaab, Mandera, and Liboi. Although the U.S. government travel restriction for Lamu has been lifted, U.S. citizens should consider ongoing security concerns following recent events involving U.S. citizens in Lamu, including a sexual assault and threatened kidnapping. U.S. government personnel are restricted from traveling to the coastal area north of Pate Island, including Kiwayu and north to Kiunga on the Kenya/Somalia border.

Travel Warning: Kenya, U.S. Department of State, January 14, 2013. Furthermore, the record reflects that the applicant’s spouse is a native of the United States, not Kenya, has family ties in this country, and has resided here for her whole life. There is also some indication of record that she takes care of her mother in the United States, which other family members are unwilling or unable to do.

In light of the evidence of record, the AAO finds the applicant has established that his spouse’s difficulties would rise above the hardship commonly created when families relocate as a result of inadmissibility or removal. In that the record demonstrates that the emotional, financial, family-related, or other impacts of relocation on the applicant’s spouse are in the aggregate above and beyond the hardships normally experienced, the AAO concludes that she would experience extreme hardship if the waiver application is denied and the applicant’s spouse relocates to Kenya.

However, the record does not contain sufficient evidence to demonstrate the applicant’s spouse would experience extreme hardship in the event of separation from the applicant. The record does reflect that the applicant earns \$45.67 an hour working as a wireless software engineer. However, there is no evidence of record supporting assertions that the applicant’s spouse could not find

adequate employment given her education, experience, and past employment history as listed on her Form G325A, Biographic Information. Furthermore, the record does not contain documentation of the spouse's monthly expenses in support of her assertions. Without sufficient details and supporting evidence on income and expenses, the AAO is unable to assess the nature and extent of financial hardship, if any, the applicant's spouse will face.

The record reflects that separation from the applicant would cause the spouse some emotional difficulties. While the AAO acknowledges 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 her 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 she would suffer extreme hardship if the waiver application is denied and the applicant returns to Kenya without his spouse.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a 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 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. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

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 his U.S. Citizen spouse as required under sections 212(a)(9)(B)(v) and 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 sections 212(a)(9)(B)(v) and 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.