



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JAN 31 2013** OFFICE: NEW YORK

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i)
and 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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of China who was 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 attempting to procure admission into the United States through willful misrepresentation of a material fact. The applicant is the beneficiary of an approved Form I-130, Petition for Alien Relative (Form I-130). He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to live in the United States with his lawful permanent resident spouse and U.S. citizen children.

The director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director*, dated May 10, 2011.

On appeal, counsel contests the section 212(a)(6)(C)(i) inadmissibility finding, and he asserts that the director's decision erred in fact and law and violates the applicant's constitutional rights of due process and equal protection. Counsel argues that the evidence is sufficient to establish that the applicant's lawful permanent resident spouse will suffer extreme hardship if a waiver is not granted. *See Form I-290B, Notice of Appeal or Motion (Form I-290B)*, dated June 6, 2011, and *counsel's brief*.

Counsel also references AAO decisions from other cases to support his assertions. The AAO notes that only published decisions by the AAO that are designated as precedent in accordance with the requirements discussed in 8 C.F.R. § 103.3(c) are binding on U.S. Citizenship and Immigration Services (USCIS) officers.

The record contains, but is not limited to: Form I-290B and counsel's appeal brief; Form I-601 and counsel's brief; Form I-130; Form I-485, Application to Register Permanent Residence or Adjust Status; statements by the applicant's spouse; medical records; naturalization, birth and marriage certificates; the applicant's Social Security statement; an article regarding Chinese traditions; an affidavit from counsel; and minutes of meetings between the USCIS New York District Office and the American Immigration Lawyers Association from 2006 and 2007. 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.

The record reflects that the applicant attempted to enter the United States on August 24, 1991 using a fraudulent U.S. visa. The applicant stated during the time of his inspection that he bought the visa in Bangkok from a man in a hotel restaurant. The applicant stated during his interview to adjust status to that of lawful permanent residence that he did not know the visa was fraudulent.

Counsel contends that the applicant did not willfully or intentionally make a misrepresentation and is therefore not inadmissible under section 212(a)(6)(C)(i) of the Act. Counsel argues that the applicant said he did not know the visa that he presented in 1991 was improper. Counsel asserts that because neither the inspecting officer, the immigration judge nor any charging documents stated that the applicant engaged in fraud or misrepresentation, the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act.

Counsel also asserts that the applicant and his spouse were denied equal protection rights under the Fifth Amendment. Constitutional issues are not within the appellate jurisdiction of the AAO, therefore this assertion will not be addressed in the present decision.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The BIA has held that the term "fraud" in the Act "is used in the commonly accepted legal sense, that is, as consisting of false representations of a material fact made with knowledge of its falsity and with intent to deceive the other party." *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956). The "representations must be believed and acted upon by the party deceived to" the advantage of the deceiver. *Id.* However, intent to deceive is not a required element for a willful misrepresentation of a material fact. See *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975).

The AAO finds that the record does not support counsel's assertions. The applicant did not procure a U.S. visa through official channels by applying through the U.S. government. The record establishes that the applicant testified under oath that he bought a visa from an unknown source and used it to attempt to enter the United States. Stating that he did not know the visa was "improper" is not sufficient to meet his burden of proof that he did not willfully misrepresent a material fact to a U.S. government official. The record lacks other evidence addressing the applicant's willfulness. As such, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

Section 212(i) of the Act states:

- (1) The Attorney General [now Secretary, Department 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.

A waiver of inadmissibility under section 212(i) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member, which includes the U.S. citizen or lawful permanent resident spouse or parent of the applicant. Hardship to the applicant and his child can be considered only insofar as it results in hardship to a qualifying relative. In the present case, the applicant's spouse is the only qualifying relative. 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-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*, 22 I&N Dec. 560, 565 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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).

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.

The applicant’s 59 year-old wife is a native and citizen of China and lawful permanent resident of the United States since 2003. The applicant married her in 1972 in China. She states that she entered the United States ten years after the applicant and endured physical and emotional hardships during their separation. She says that the thought of them separating again is “heartbreaking,” and causes her stress and anxiety. She also states that she has numerous chronic health problems, including diabetes, heart disease, and high blood pressure, that are exacerbated by stress. She indicates that she has been twice hospitalized for ulcers. Medical documents indicate that the applicant’s spouse has hypertension, hypertrophic cardiomyopathy, heart murmur, diabetes and a history of gastric ulcers, and takes medication for these diseases. The applicant’s spouse indicates that the applicant comes with her to her appointments even though he does not speak English, and his presence is very important to her. She also states the applicant takes care of her at their home in New York and is the first to see when she is not feeling well in order to alert their children. She states she is terrified by the idea of a health related emergency without the applicant. She worries about physical effects that the stress of the applicant’s separation would cause her.

Counsel asserts that the applicant and his spouse are both retired. Evidence of the applicant’s Social Security income shows his income between 1998 and 2006, and his maximum earnings were \$7,800. The record does not include any other financial documents.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant’s spouse, including the emotional strain of being separated from her husband of forty years; her health conditions; her financial reliance on the applicant; and the emotional and physical assistance the applicant provides. Considered in the aggregate, the AAO finds that the

evidence is sufficient to demonstrate that the applicant's lawful permanent resident spouse would suffer extreme hardship due to separation from the applicant.

The applicant's spouse indicates that she cannot relocate to China because of the quality of the medical care she receives in the United States and because her family is in the United States. The applicant's spouse states that she cannot receive better medical care in China than what she receives in the United States. Although the applicant's spouse's assertion is relevant and has been taken into consideration, little weight can be afforded it in the absence of supporting evidence. *See Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be 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)).

Counsel asserts that the applicant and his spouse have four children, three of whom are U.S. citizens, and eight U.S. citizen grandchildren. The applicant's spouse states that their life revolves around seeing and caring for their grandchildren. She notes that they divide their time between New York and North Carolina, where their children and grandchildren live.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse, including her length of permanent residence in the United States, her age, medical conditions, and strong family ties in the United States. Furthermore, the record also reflects that the applicant's spouse is a native of China, moved to the United States when she was 47 years old, does not speak English, and is not unfamiliar with Chinese culture and traditions. Considered in the aggregate, the AAO finds that the evidence is not sufficient to demonstrate that the applicant's spouse would suffer extreme hardship were she to relocate to be with the applicant in China.

Although the applicant has demonstrated that his qualifying relative spouse would experience extreme hardship based on separation, we can only 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 remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, see also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative(s) in this case.

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,

(b)(6)

Page 7

8 U.S.C. § 1361. Here, the applicant has not met that burden. 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.