



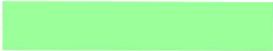
U.S. Citizenship
and Immigration
Services

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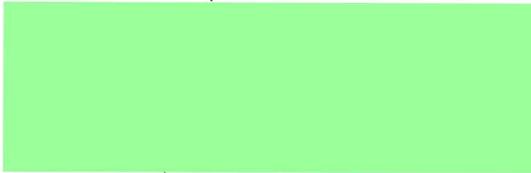
DATE: MAR 08 2013 Office: OAKLAND PARK, FL

FILE: 

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 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 Acting Field Office Director, Oakland Park, Florida. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States pursuant to section 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(C), due to controlled substance trafficking. The applicant's spouse is a U.S. citizen, his son is a lawful permanent resident and he seeks a waiver of inadmissibility in order to reside in the United States.

The acting field office director found that there is no waiver for inadmissibility under section 212(a)(2)(C) of the Act and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting Field Office Director*, dated June 3, 2011.

On appeal, counsel asserts that the applicant is not inadmissible pursuant to section 212(a)(2)(C) of the Act and that the acting field office director erred in not adjudicating his waiver under section 212(i) of the Act due to his misrepresentation. *Form I-290B*, received July 5, 2011.

The record includes, but is not limited to, counsel's brief, a psychological evaluation, criminal records and country conditions information on Jamaica. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(C) of the Act provides, in pertinent part, that:

Any alien who the consular officer or the Attorney General knows or has reason to believe

- (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so...is inadmissible.

The applicant's arrest report states that a package with 10 pounds of marijuana was delivered to the applicant by the mailman, the applicant then went across the street and observed the residence for approximately 45 minutes; and a co-defendant arrived with a car. The applicant and co-defendant entered the apartment and after five minutes the co-defendant exited the apartment carrying two cans containing the marijuana and placed them in the trunk of his car. The applicant and the co-defendant were then stopped in the car, ran away from the police officers and were arrested. The applicant asserts that he signed for the package without knowing the contents and without transporting it, the co-defendant came to pick it up and then the police came to the house and arrested them. Counsel asserts that the applicant is not inadmissible under section 212(a)(2)(C) of the Act and cites to *Garces v. U.S. Atty. Gen.*, 611 F.3d 1337 (11th Cir. 2010), and 9 FAM 40.23 N2(b) in support of his contention.

The court in *Garces* stated, “At issue in this case is whether the combination of a guilty plea leading to a conviction that was later vacated and some hearsay statements in police reports provides enough reason to believe that Garces trafficked in a controlled substance. Our conclusion is that it does not, at least not in the circumstances of this case.” *Id.* at 1339. The AAO notes that the current case arises under the Ninth Circuit, therefore the case cited by counsel is not binding. The AAO also notes that the court was looking at the specific facts of the case before it and we will address the specific facts of the applicant’s case.

9 FAM 40.23 N2(b) states:

“Reason to believe” might be established by a conviction, an admission, a long record of arrests with an unexplained failure to prosecute by the local government, or several reliable and corroborative reports. The essence of the standard is that the consular officer must have more than a mere suspicion—there must exist a probability, supported by evidence, that the alien is or has been engaged in trafficking. You are required to assess independently evidence relating to a finding of inadmissibility.

Counsel asserts that the applicant was not convicted of a crime; the state declined to prosecute him; there has not been an admission; and there is no corroborating evidence. The AAO notes that the type of documents mentioned in 9 FAM 40.23 N2(b) are absent from the record. The AAO notes the discrepancy in the applicant’s version of the events. However, the arrest report does not reflect that the applicant opened the package delivered to him or that he knew the contents of it, and it reflects that the co-defendant transported the marijuana to the car. In reviewing the record and the persuasive law cited by counsel, the AAO finds that there is insufficient evidence to establish a “reason to believe” that the applicant was involved in controlled substance trafficking.

Counsel states that the applicant presented a passport with a false name when entering the United States in 1993. The applicant also checked the box on his Form I-601 which deals with procuring an immigration benefit by fraud or willful misrepresentation. As such, he is inadmissible under section 212(a)(6)(C)(i) of the Act for procuring admission to the United States by willful misrepresentation of a material fact. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Field Office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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 that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [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 Attorney General [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 section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C)(i) of the Act is dependent first upon a showing that the bars imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his child is not considered in section 212(i) waiver proceedings unless it causes hardship to a qualifying relative, in this case the applicant's spouse. 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 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.

Counsel states that the applicant’s spouse has significant ties to the United States; all of her family, including her son, are in the United States; she has been employed by the same company for the past decade; she suffers from asthma and high blood pressure; her medical conditions are complicated as she is morbidly obese; and there is no indication that her medications would be available in Jamaica. The psychologist who evaluated the applicant’s spouse states that she was born in Jamaica; she suffers from asthma and hypertension, and she is morbidly obese; she is completely acculturated as an American with little experience as a Jamaican; and her only son resides close to her.

The applicant’s spouse’s employer states that she started working on June 28, 1999 and she is a billing analyst. The record includes U.S. Department of States human rights information on Jamaica.

The record reflects that the applicant’s spouse would experience difficulty in Jamaica due to separation from her family, lack of ties to Jamaica and loss of her employment in the United States. However, the record does not include supporting documentation of the applicant’s spouse’s claimed medical issues, the severity of the issues or the lack of medical care in Jamaica. The record does not include sufficient evidence to establish that she would experience financial hardship in Jamaica. The AAO finds that the record lacks sufficient documentary evidence of emotional, financial, medical or other types of hardship that, in their totality, establish that the applicant’s spouse would suffer extreme hardship if she relocated to Jamaica.

Counsel states that the applicant's spouse suffers from medical problems, including depression, which have been exacerbated by the imminent threat of the applicant's removal; and she would be forced to remain in the United States without the emotional support of the applicant.

The psychologist states that the applicant's spouse has had three failed marriages which have added to her sorrow; she has headaches and neck pain; her symptoms meet the criteria of Major Depression, Single Episode; her behavior reflects the presence of Dependent Personality Disorder; if the applicant is removed her depression may worsen to the point that she contemplates or commits suicide; and her present marriage, after a life time of failed marriages, is a sole source of pride and accomplishment for her.

The record reflects that the applicant's spouse would experience serious psychological and emotional issues if she were separated from the applicant. The AAO notes the claims related to her marriage history. Considering the hardship factors mentioned, and the normal results of separation, the AAO finds that the applicant's spouse would suffer extreme hardship if she remained in the United States.

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 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 relatives in this case. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he 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. *See* 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.