



(b)(6)

[Redacted]

DATE: MAR 20 2013

Office: PHILADELPHIA, PA

FILE: [Redacted]

IN RE: Applicant: [Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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 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.

Thank you

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of the Dominican Republic 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 having procured admission to the United States through fraud or misrepresentation. She seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her U.S. citizen spouse.

The Field Office Director concluded that the applicant had failed to demonstrate extreme hardship to her qualifying spouse and denied the application accordingly. *See Decision of Field Office Director*, dated April 23, 2012. The Field Office Director also found that the applicant had failed to demonstrate that she merited a favorable exercise of discretion. *Id.*

On appeal, counsel for the applicant asserts that the Field Office Director erred in finding that the qualifying spouse would not suffer extreme hardship if the applicant were removed. Counsel states that the qualifying spouse “is a particularly vulnerable individual” as a result of various health problems. Counsel contends that the qualifying spouse needs the assistance and emotional support of the applicant in the United States in order to continue his medical treatment. Additionally, counsel states that the qualifying spouse would suffer extreme hardship in the Dominican Republic because of the high poverty rate and poor human rights conditions in that country. *Counsel’s Brief.*

The record includes, but is not limited to: a statement from the qualifying spouse; financial records; medical records; a psychological evaluation; and country conditions information. The entire record was reviewed and considered in rendering a decision on the appeal.

The record also shows that the applicant committed retail theft in 2009 in violation of Pennsylvania Crim. Stat. Ann. § 3929(a)(1). Instead of withstanding trial, the applicant completed the Accelerated Rehabilitative Disposition (ARD) program and was placed on probation.¹ The Field Office Director did not address whether or not the applicant’s commission of retail theft is a crime involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Nevertheless, because the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act and demonstrating eligibility for a waiver under section 212(i) also satisfies the requirements for a waiver of criminal grounds of inadmissibility under section

¹ A comment to Rule 312 of the Pennsylvania Rules of Criminal Procedure states that “acceptance into an ARD program is not intended to constitute a conviction . . . [but] it may be statutorily construed as a conviction for purposes of computing sentences on subsequent convictions.” *See also Gilles v. Davis*, 427 F.3d 197, 209 (3d Cir. 2005).

212(h), the AAO will not determine whether the applicant is inadmissible under section 212(a)(2)(A)(i)(I).

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 the applicant entered the United States on June 7, 2008 using a fraudulent passport and B-2 visa. On September 13, 2011, the applicant appeared for an interview regarding her application for adjustment of status and falsely claimed that the passport and visa she had used in 2008 were genuinely issued documents. The applicant is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for having attempted to procure admission to the United States through fraud or misrepresentation. She does not contest this finding of inadmissibility on appeal. She is eligible to apply for a waiver under section 212(i) of the Act as the spouse of a U.S. citizen.

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.

The qualifying spouse indicates that he has serious medical problems and that he depends on the applicant for assistance and emotional support. He states that he is extremely overweight and

has high blood pressure, severe obstructive sleep apnea, asthma, and joint, back, and leg pain. He claims that he must attend frequent doctor's appointments and that he uses an inhaler for his asthma and a breathing mask while he sleeps. He states that without the breathing mask he could asphyxiate and die in his sleep. He indicates that the mask sometimes falls off while he is asleep and that the applicant puts it back on for him. The qualifying spouse also indicates that he is a candidate for bariatric surgery to assist with his weight problem. He states that he needs the applicant's support in order to maintain a healthy lifestyle and stay motivated. He indicates that the applicant takes him to his doctor's appointments, cooks healthy food for him, monitors his breathing at night, and encourages him to maintain a healthy lifestyle. The qualifying spouse claims that he has no family in the United States other than the applicant and his son, who lives with his mother and with whom the qualifying spouse does not have a close relationship.

Medical records confirm that the qualifying spouse is morbidly obese and that he has obstructive sleep apnea, hypertension, back pain, leg pain, knee pain, and asthma and that he has undergone testing in preparation for bariatric surgery, which he was unable to obtain due to loss of his health insurance. Additionally, a psychological evaluation in the record notes that the qualifying spouse is experiencing depression and that he "has developed a psychological dependency on his wife" See *Psychological Assessment*, [REDACTED] dated April 9, 2012.

The AAO finds that the qualifying spouse would suffer extreme hardship if he were separated from the applicant. The record reflects that the qualifying spouse suffers from serious health problems and that the applicant plays an important role in his treatment and maintenance of a healthy lifestyle. The applicant monitors the qualifying spouse's breathing mask at night in order to prevent him from asphyxiating and she has assisted him in establishing habits to improve his health. Additionally, the qualifying spouse will need the emotional and physical assistance of the applicant when he undergoes bariatric surgery. Medical records indicate that in determining the qualifying spouse's eligibility for bariatric surgery, his doctors considered whether he had "the motivation and support to succeed in this endeavor." See *Letter from* [REDACTED], dated January 8, 2010.

Additionally, the AAO finds that the qualifying spouse would suffer extreme hardship if he were to relocate to the Dominican Republic with the applicant. The record indicates that the qualifying spouse has a teenage son who lives with his biological mother. The qualifying spouse states that he visits his son a few times a month and that he has had trouble establishing a close relationship with him. If the qualifying spouse relocated to the Dominican Republic, he would be permanently separated from his son. Additionally, the record reflects that the qualifying spouse is originally from Puerto Rico and that most of his family is there. Therefore, adjusting to life in the Dominican Republic, a country with which he is unfamiliar and in which he has no family ties, would be difficult for the qualifying spouse. Finally, the qualifying spouse requires regular treatment for his health problems and relocation would separate him from his team of doctors, who have coordinated in performing numerous evaluations on the qualifying spouse to prepare him for bariatric surgery. In the aggregate, the AAO finds that these factors would create extreme hardship for the qualifying spouse if the waiver application were denied. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of O-J-O-*, 21 I&N Dec. at 383.

In that the applicant has established that the bars to her 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).

The favorable factor in this case is the extreme hardship the qualifying spouse would suffer if the applicant's waiver application were denied. The unfavorable factor is the applicant's material misrepresentation which resulted in her inadmissibility.

Although the applicant's violation of immigration law is serious and cannot be condoned, the positive factor in this case outweighs the negative factor. 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.