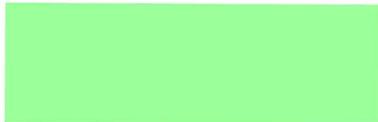




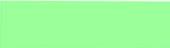
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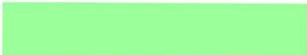
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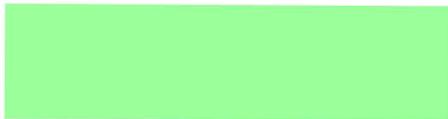
OFFICE: NEWARK

FILE: 

IN RE: 

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 (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,


f.

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Newark, New Jersey denied the waiver application and a subsequent appeal and motion to reopen and reconsider was dismissed by the Administrative Appeals Office (AAO). This matter is now before the AAO on a second motion to reopen and reconsider. The motion will be granted, the prior AAO decisions are withdrawn, and the appeal is sustained.

The applicant is a native and citizen of France 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 entry to the United States by fraud or willful misrepresentation. The record reflects that the applicant entered the United States pursuant to the Visa Waiver Program on June 30, 2006 as an intending immigrant rather than a visitor for pleasure. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

The Field Office Director concluded that the record failed to establish the existence of extreme hardship for a qualifying relative and denied the application accordingly. *See Decision of the Field Office Director*, dated November 22, 2008. On appeal, the AAO also determined that the applicant had failed to demonstrate extreme hardship to a qualifying relative and dismissed the applicant's appeal. *See Decision of the AAO*, dated April 4, 2011. On a motion to reopen and reconsider, based upon newly submitted evidence, the AAO found that the applicant had demonstrated extreme hardship to his spouse upon relocation, but not upon separation. *See Decision of the AAO*, dated November 21, 2012.

The applicant has submitted a second motion to reopen or reconsider. On motion, filed on December 21, 2012 and received by the AAO on May 21, 2013, counsel asserts that the applicant has submitted sufficient evidence demonstrating that the applicant's spouse would also suffer extreme hardship if she separated from the applicant.

In support of the applicant's motion to reopen and reconsider, the applicant submitted affidavits from the applicant and his spouse, financial documentation, a psychological evaluation of the applicant's spouse, and medical documentation concerning the applicant's spouse. 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:

- (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 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 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 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...

The applicant does not dispute the AAO's prior inadmissibility finding pursuant to section 212(a)(6)(C) of the Act.

A section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent. Hardship to the applicant or other relatives are 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.

In the present case, the record reflects that the applicant is a 47 year-old native of Guadeloupe and citizen of France. The applicant’s spouse is a 54 year-old native and citizen of the United States. The applicant is currently residing with his spouse, stepsons, and mother-in-law in [REDACTED] New Jersey.

The AAO previously determined that the applicant has demonstrated that his spouse would suffer extreme hardship if she relocated to France. Based upon the record, the AAO found that the applicant’s spouse acts as a caretaker for her mother in the United States, who suffers from a variety of medical conditions rendering her homebound and requiring 24-hour care. The applicant’s spouse is a native of the United States who resides with her family members and co-owns property in the United States. It is noted that the applicant’s spouse was previously employed as a center director of [REDACTED] but is now seeking other employment. In the aggregate, the AAO determined that the record contained sufficient evidence to find that the applicant’s spouse would suffer hardship beyond the common consequences of inadmissibility or removal if she relocated to France. *See Decision of the AAO*, dated November 21, 2012.

Counsel for the applicant asserts that the applicant’s spouse would suffer extreme financial hardship upon separation from the applicant because she was terminated from her employment in

September 2011 and is receiving unemployment benefits. Counsel further asserts that the applicant's spouse's health insurance lapsed due to unemployment and she cannot afford to continue to monitor her hepatitis C diagnosis. It is noted that the record does not contain a statement from the applicant's spouse's treating physician stating the required treatment and monitoring of a medical diagnosis for the applicant's spouse.

The applicant's spouse contends that she would be homeless without the applicant's income, as she and the other inhabitants of their home do not have savings. The record contains evidence of the applicant's spouse's receipt of unemployment compensation. As noted in the AAO's previous decision, the record does not contain information concerning the extent to which the applicant's spouse's adult children, also residents of the home, could and would assist with payments. It is noted that the applicant's sister is currently contributing 30 paid hours of home healthcare a week for their mother.

The applicant's spouse asserts that it would essentially cause a divorce between the applicant and herself if his waiver application were denied because her role as primary caretaker for her mother prevents her from visiting the applicant in France. The record contains a psychosocial assessment for the applicant's spouse stating that the applicant's spouse reported emotional and physical abuse in her prior marriage, followed by a protracted 16-year custody battle. The assessment further states that the applicant's spouse sought therapy during that time for panic attacks and depression and that the applicant's spouse experienced an anxiety attack in recounting prior incidents. The assessment contains an impression of post-traumatic stress disorder and states that the applicant's spouse could experience trauma upon separation from the applicant. The social worker also indicates that the applicant's spouse reported autoimmune hepatitis, in addition to hepatitis C, and that stress could result in serious consequences to her immunity and physical health. The record indicates that the applicant's spouse has previously sought and received therapy during difficult periods of her life, including a resolved alcohol addiction and dealing with the problems with her ex-husband. There is sufficient evidence in the record, in the aggregate, to find that the applicant's spouse would suffer extreme hardship upon separation from the applicant.

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 her 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.

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 extreme hardship the applicant's spouse would experience whether she remained in the United States, separated from the applicant, or accompanied the

applicant to France; evidence of the applicant's employment and payment of taxes during his residence in the United States; and affidavits of support. The unfavorable factor in this matter includes the applicant's procurement of entry into the United States through willful misrepresentation

Although the applicant's violations of immigration and criminal 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 his burden and the appeal of the applicant's Form I-601 denial will be sustained.

ORDER: The motion is granted, the prior AAO decisions are withdrawn, and the appeal is sustained.