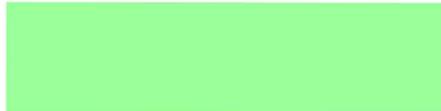




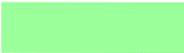
U.S. Citizenship
and Immigration
Services

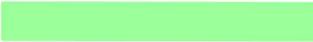
(b)(6)



Date: **OCT 03 2013**

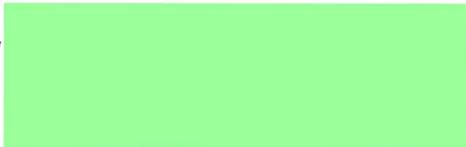
Office: NEWARK

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 (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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the prior decision of the AAO will be affirmed.

The applicant is a native and citizen of Brazil who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for procuring admission to the United States through fraud or misrepresentation. The applicant entered the United States on June 5, 2003 using a fraudulent visa. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act in order to reside in the United States with his U.S. Citizen spouse.

The field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the Field Office Director*, dated January 17, 2012.

The AAO, reviewing the applicant's Form I-601 on appeal, concurred with the Field Office Director that extreme hardship to a qualifying relative had not been established, as required by the Act. *Decision of the AAO*, dated January 14, 2013. Consequently, the appeal was dismissed. *Id.*

On motion, applicant's counsel presents additional documentation regarding emotional hardship to the applicant's spouse if the waiver application is not approved, and additional documentation regarding emotional hardship to the applicant's son by his first wife. According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts to be proved and be supported by affidavits or other documentary evidence. As the applicant has submitted new documentary evidence to support his claim, the motion to reopen will be granted.

The record contains the following documentation: briefs filed by the applicant's attorney in support of the Forms I-290B, Notice of Appeal or Motion; statements by the applicant, the applicant's current spouse, and the applicant's former spouse; financial documentation; a psychiatric evaluation for the applicant, the applicant's spouse, and the applicant's son and step-children; and documentation on country conditions in Brazil. 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.

The Field Office Director and the AAO determined that that the applicant is inadmissible under section 212(a)(6)(C) of the Act for using a fraudulent visa to enter the United States on June 5, 2003.

On motion, counsel contends that the AAO improperly shifted the burden of proof to the applicant to establish that the applicant did not obtain admission by fraud and/or misrepresentation. Counsel cites the EOIR Bench Book and *Woodby v. INS*, 385 U.S. 276 (1966), which held that in deportation proceedings, the government bears the burden of establishing deportability. The applicant is not, however, in removal proceedings and the current appeal does not concern any finding that he is deportable. Rather, he is applying for adjustment of status and a waiver of inadmissibility, and it is his burden to establish that he is admissible and otherwise eligible for the relief sought. Section 291 of the Act, 8 U.S.C. § 1361.

As noted above, the evidence in the record establishes that the applicant entered the United States with a fraudulent visa. The applicant has not presented any evidence to show he believed he was employing a legitimate travel agency to facilitate a genuine B-2 nonimmigrant visa application. Further, the record contains conflicting statements from the applicant concerning his application for the visa. In a notarized affidavit dated July 8, 2011, the applicant stated that he and his brother were transported to a travel agency in Sao Paulo named [REDACTED], and at that agency a woman took his documents and gave him a form to fill out, and after two hours she returned with the visa in his passport. In a sworn statement given on June 3, 2011 to a USCIS officer, the applicant had stated that he was scheduled for an interview in Sao Paulo and he appeared at a building he believed to be the U.S. Consulate, where a woman in a uniform took his documentation and provided him with the visa two hours later. He stated that he and his brother filled out the visa application form, he did not pay any fee except for the visa application fee, and he did not know the amount paid because his brother took care of it. In a notarized affidavit dated October 27, 2011, the applicant stated that he filled out only part of the visa application, and the travel agency where he lived in Governador Valadares filled out the rest of the application and charged him 3,600 reais, which included transportation to Sao Paulo to apply for the visa. Based on the evidence on the record, including the applicant's inconsistent statements concerning the manner in which he obtained the visa, the AAO finds that the applicant has not established that he was unaware that the visa he obtained was not a legitimate visa. Thus, the applicant has failed to meet his burden of demonstrating that he did not know the visa he presented was fraudulent.

Section 212(i) of the Act provides that:

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 or, in the case of an alien granted classification under clause (iii) or (iv) of section 204(a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B), the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. The applicant's U.S. citizen wife is the only qualifying relative in this case. Under this provision of the law, children are not deemed to be "qualifying relatives." However, although children are not qualifying relatives under this statute, USCIS does consider that a child's hardship can be a factor in the determination whether a qualifying relative experiences extreme hardship. 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*, 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, 1293 (9th Cir. 1993), (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.

As noted in the previous decision of the AAO, the record establishes that if the waiver application were denied, the hardships that the applicant's spouse would face were she to relocate to Brazil, when considered in the aggregate, rise to the level of extreme.

With respect to whether the applicant's qualifying relative will experience extreme hardship she is separated from the applicant, counsel contends that the applicant's spouse will suffer emotional hardship if the applicant's waiver is not approved. As noted in the previous decision of the AAO, the applicant submitted a psychological evaluation for the applicant, the applicant's spouse, and the applicant's son and two step-children. The evaluation concludes that the applicant's spouse has a diagnosis of Adjustment Disorder with Mixed Anxiety and Depressed Mood. The previous AAO decision noted, however, that the record contained no further detail about the psychological condition of the applicant's spouse, and any treatment that may be required.

On motion, counsel submits a second psychiatric evaluation of the applicant's spouse. The diagnostic impression of the evaluation states that the applicant's spouse is suffering from Posttraumatic Stress Disorder (PTSD), Acute Form, and Major Depressive Disorder, First Episode, Moderate. However, the psychological evaluations lack details concerning treatment recommendations and her response to any counseling or medical treatments she may have received.

Although the AAO is sympathetic to the family's circumstances and recognizes that the input of any health professional is respected and valuable, the record does not show that the applicant's spouse's hardships are beyond those typically experienced when separated from a spouse. See *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996) (holding that the common results of deportation are insufficient to prove extreme hardship and defining extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation). The evidence on the record is insufficient to conclude that the emotional problems that the applicant's spouse is experiencing are resulting in hardship beyond the common results of removal or inadmissibility.

Counsel asserts that the applicant's spouse will suffer financial hardship if the applicant's waiver application is not approved, stating that the applicant provides all the financial support needed by the family, and without his presence, the family is due to suffer economic difficulties. As noted in the previous AAO decision, the financial documentation in the file indicates that in 2010, the applicant's spouse was employed as a cashier, earning \$16,560 per year. On motion, the applicant presents no further evidence regarding the financial status of the qualifying relative. The evidence in the record is insufficient to conclude that the qualifying spouse would be unable to meet her financial obligations in the applicant's absence. 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)).

On motion, counsel contends that the applicant's son, a child from a marriage prior to his marriage to the qualifying relative, will suffer psychological hardship if the applicant's waiver is not approved. In support of this contention, counsel submits an affidavit from the applicant's ex-wife, which indicates that the applicant's son lives with her, and documentation from a counseling center indicating that the applicant's son has behavioral problems and was diagnosed with separation anxiety disorder. As stated above, under 212(i) of the Act, children are not deemed to be qualifying relatives, and a child's hardship will only be considered to be a factor if it affects whether a qualifying relative experiences extreme hardship. There is no evidence in the record to indicate that the emotional problems of the applicant's son, who lives with his mother, are causing any hardship to the applicant's qualifying relative.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant's spouse. Considered in the aggregate, the AAO finds that the evidence is insufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship due to separation from the applicant.

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 in 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 application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reopen is granted and the prior decision of the AAO is affirmed.