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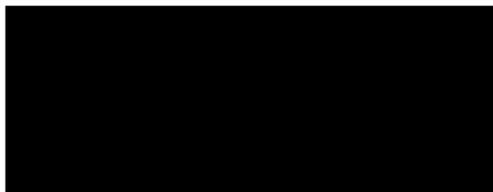
IN RE:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(i), under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B) and section 212(h) of the Act, 8 U.S.C. § 1182(h) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A).

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Mexico City, Mexico. 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 the Bahamas 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 having attempted to procure admission into the United States by fraud or willful misrepresentation. The applicant was also found inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States and under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen and seeks waivers for his grounds of inadmissibility.

In a decision dated June 30, 2008, the acting district director found that the applicant misrepresented his date of entry into the United States in order to qualify for relief under section 245(i) of the Act. The acting district director also found that the applicant did not qualify to file an application for adjustment under section 245(i) of the Act or any other section of the Act as he could not show that he illegally entered the United States prior to March 31, 2001 or in the alternative that he has a legal entry into the United States. The acting district director then found the applicant to also be inadmissible to the United States under section 212(a)(9)(B)(i)(II) and 212(a)(2)(A)(i)(I) of the Act and that he had failed to establish extreme hardship to his U.S. citizen spouse. Finally, the acting district director found that even if the applicant had shown that his U.S. citizen spouse was suffering extreme hardship he would not have warranted a favorable exercise of discretion given his multiple immigration violations and the criminal charges against him.

In a Notice of Appeal to the AAO (Form I-290B), dated July 31, 2008, counsel states that the acting district director erred in not finding that the applicant's spouse would suffer extreme hardship, in not considering the mitigating circumstances surrounding the applicant's multiple immigration violations, and in not considering the evidence of the applicant's good moral character.

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.

On July 23, 2004 during the applicant's adjustment interview he stated that his last entry into the United States was on July 9, 2000 and that his I-94 card for this entry was lost. U.S. Citizenship and Immigration Services' (USCIS) records indicate that the applicant left the United States at some time prior to June 29, 2001 and then re-entered at some time after June 29, 2001. The record indicates that on June 29, 2001 at the Port Huron port of entry the applicant attempted to enter the United States, but was refused admission. Therefore, the date of entry listed on the applicant's adjustment

application and the date stated during the applicant's adjustment interview was a misrepresentation of fact.

The AAO also finds that this misrepresentation was material. In *Kungys v. United States*, 485 US 759 (1988), the Supreme Court held that the test of whether concealments or misrepresentations are "material" is whether they can be shown by clear, unequivocal, and convincing evidence to have been predictably capable of affecting, i.e., to have has a natural tendency to affect agency decisions. In addition, in *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) the BIA held that the elements of a material misrepresentation are as follows:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well resulted in proper determination that he be excluded.

Based on this standard, the applicant's misrepresentation was material. The applicant misrepresented his date of entry which was an eligibility factor for section 245(i) relief. Qualifying for section 245(i) relief would have led to the benefit of lawful permanent resident status. Thus, the AAO finds that the applicant is inadmissible under 212(a)(6)(C) of the Act.

Section 212(i) of the Act provides, in pertinent part:

- (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.

The record also indicates that before his removal on November 9, 2007, the applicant had been residing in the United States since 1996 after entering on a B-2 visitor's visa. On November 28, 2003 the applicant filed his Adjustment of Status Application, and on March 22, 2006, this application was denied. The AAO notes that a proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* Thus the applicant accrued (at a minimum) unlawful presence from March 22, 2006, the day his adjustment application was denied, until November 9, 2007, the date he was removed from the United States. In applying for an immigrant visa the applicant is seeking admission within ten years of his departure from the United States. Therefore, the applicant is also inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record also indicates that on May 1, 2000 the applicant was charged with cruelty to children under section 15-5-70(a) of the Georgia Statutes. On August 16, 2001 a bench warrant was issued against the applicant in this case. On January 16, 2002 the charge was nolle prosequi in relation to the applicant's co-defendant and mother of the victim in the case. This order states that the co-defendant in the case (referring to the applicant) fled when his arrest warrant was issued and is still at large. On March 7, 2003, the charge in the applicant's case was nolle prosequi because the victim and mother had moved out of state and could not be located.

Section 212(a)(2)(A) of the Act states in pertinent part:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The AAO notes that cruelty to children has been held to be a crime involving moral turpitude. *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969) (held that a conviction under the California Penal code § 273(d) for the infliction of any cruel or inhuman corporal punishment upon a child is a crime involving moral turpitude); *Garcia v. Attorney General*, 329 F.3d 1217 (11th Cir. 2003) (held that the Florida offense of aggravated child abuse was a crime involving moral

turpitude). Furthermore, a conviction for cruelty to a child would have subjected the applicant to the heightened discretionary standard of 8 C.F.R. § 212.7(d). However, as the charge in the applicant's case was dismissed as nolle prosequi, he has not been convicted of a crime involving moral turpitude and is not inadmissible under 212(a)(2)(A)(i)(I) of the Act.

In sum, the AAO finds that based on the current record the applicant is not inadmissible under 212(a)(2)(A)(i)(I) of the Act, but is inadmissible under sections 212(a)(9)(B)(II) and 212(a)(6)(C) of the Act. Because the applicant has a U.S. citizen spouse he is eligible for waivers of these grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act.

Waivers of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act are 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. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. 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).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the

Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The record of hardship includes: a psychological evaluation for the applicant’s spouse; a brief from counsel; thirty letters from family, friends, and co-workers attesting to the hardship of the applicant’s spouse and the applicant’s good moral character; financial documentation regarding the applicant’s monthly expenses, home and business ownership; and a letter from the applicant’s spouse.

In a psychological evaluation, dated August 22, 2008, [REDACTED] states that she evaluated the applicant’s spouse on several occasions in regards to the extreme hardship she is facing as a result of the applicant’s removal from the United States. [REDACTED] states that the applicant’s spouse is a chiropractic doctor, licensed to practice in the state of Michigan, who has a private practice clinic in Michigan which employs six people. [REDACTED] states that the applicant’s spouse was in a very depressed state while in her office and had difficulty articulating her emotions. She states that the applicant’s spouse went through a significant period of stress, trauma, and loss when she suffered three miscarriages, the last one in January 2007 when she was five months pregnant. [REDACTED] states that around the time of this miscarriage the applicant became seriously ill and was hospitalized

due to diabetes. She states that adding to this stress for the applicant was the possibility that the applicant would be removed from the United States. [REDACTED] states that the applicant's spouse reported being very depressed, having difficulty concentrating and sleeping, and having uncontrollable crying spells. The applicant's spouse also reported feeling hopeless, helpless, angry, and trapped.

[REDACTED] states that the applicant indicated that if she relocated to the Bahamas she would have to give up the clinic, stop employing her six employees, and abandon her patients. [REDACTED] concludes that leaving the clinic would cause the applicant's spouse much pain and grief. She states that separation from the applicant is also causing the applicant's spouse financial, personal, and emotional hardship.

The AAO notes that the record indicates through supporting documentation that the applicant's spouse is licensed to practice chiropractic medicine in the state of Michigan; has significant student loans in excess of \$100,000; has a monthly mortgage and car payment; and owns her own chiropractic practice, which involves paying malpractice insurance and other business debts.

In her brief dated December 18, 2007, counsel states that the applicant's spouse will suffer emotionally and financially as a result of the applicant's inadmissibility. She also states that the applicant's spouse has to fulfill educational requirements to maintain her chiropractic license in Michigan which prevent her from extended stays in the Bahamas.

In addition, the AAO notes that the letters submitted by family and friends attest to the applicant and the applicant's spouse's good moral character, the applicant's spouse's hard work in establishing her practice, and the hardship the applicant's spouse is suffering from being separated from the applicant.

In a letter dated February 6, 2007, the applicant's spouse states that the applicant helped to provide for her in the early stages of her career and that she has spent significant time and money in starting her business. She states that relocating to the Bahamas would be financially devastating. She states that not only does she have her business in the United States, but she and the applicant own a home. She also states that she is very close with her family in the United States who would not have the means to travel to the Bahamas to see her.

The AAO acknowledges that the applicant's spouse has significant ties to the United States and would endure hardship as a result of relocation, but the AAO does not find that this hardship would rise to the level of extreme hardship. The record does not include any documentary evidence to show that the applicant's spouse would not be able to continue practicing chiropractic medicine in the Bahamas, or specifically detail the financial or other hardship she would experience there. The AAO acknowledges the past trauma the applicant's spouse has experienced in suffering three miscarriages, and, as evidenced by numerous letters from family and friends and the letter from [REDACTED] that the applicant's spouse is suffering emotionally as a result of the applicant's inadmissibility. However, because the applicant has not shown that she would suffer extreme hardship as a result of

relocation to be with the applicant, the AAO cannot find that she will suffer extreme hardship as a result of the applicant's inadmissibility.

Furthermore, even were the applicant were to show that his spouse would suffer extreme hardship as a result of his inadmissibility, the current record does not indicate that the applicant warrants the favorable exercise of discretion. The applicant lived in the United States from 1996 to 2007 with no lawful status. He misrepresented the date of this entries into the United States in an attempt to obtain an immigration benefit. Finally, the applicant fled an arrest warrant for a charge of cruelty to children. We find that the applicant has failed to address these negative factors. We concur with the finding of the acting district director that the applicant has demonstrated repeatedly a disregard for the laws of the United States, and that the positive factors in his case do not outweigh the numerous negative factors.

The AAO notes that the acting district director also denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision as his waiver application. If an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, no purpose is served in granting the application. *See Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964) As the applicant is inadmissible under sections 212(a)(9)(B)(II) and 212(a)(6)(C) of the Act, and as his waiver application will not be approved, no purpose would be served in addressing the applicant's Form I-212.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) and 212(a)(9)(B)(v) 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.