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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



H6

Date: FEB 15 2012

Office: MOSCOW, RUSSIA

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v); 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.

Thank you,

for
Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant, a native and citizen of Armenia, entered the United States using a fraudulent B-2 visa on November 15, 2001. The applicant was thus 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 procuring entry to the United States through fraud or misrepresentation. The applicant was also found to be 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. He seeks a waiver of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(i) and 1182(a)(9)(B)(v), 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. *See Decision of the Field Office Director*, dated May 12, 2009.

The record contains the following documentation: a brief filed by the applicant's attorney, dated December 28, 2010; an affidavit from the applicant's spouse, dated August 10, 2010; a clinical psychological evaluation of the applicant's spouse, dated April 29, 2010; medical reports for the applicant's spouse; a letter from the applicant's former attorney, submitted on February 26, 2009, in conjunction with Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal; a declaration by the applicant; a declaration by the applicant's spouse; and other documentation in support of the application. 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 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.

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

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 indicates that the applicant applied for asylum on May 30, 2002. The applicant's case was referred to an immigration judge and the immigration judge denied the applicant's request for asylum on June 6, 2002. The applicant appealed the decision to the Board of Immigration Appeals, and later to the U.S. Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals issued a final denial of the applicant's petition for review on October 17, 2006, and upheld the removal order against the applicant. The applicant was subsequently removed from the United States on December 27, 2007. The applicant therefore accrued unlawful presence from October 17, 2006 to December 27, 2007 and is inadmissible 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.

The applicant contends that he paid a middleman to assist in procuring the B-2 visa from the U.S. Consulate in Yerevan, Armenia, and claims that he was unaware that the visa was fraudulent at the time he received it in 2001. *See Brief in Support of Appeal*, dated December 28, 2010. As the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for unlawful presence in the United States, and the requirements for a waiver under sections 212(a)(9)(B)(v) and 212(i) of the Act

are the same, the AAO does not need to determine whether the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for fraud or misrepresentation. However, in light of the fact that the applicant had twice been denied a non-immigrant visa to the United States, the applicant's testimony that then he paid \$6,000 to a middleman to obtain his non-immigrant visa, and that he was unaware that this visa was fraudulent, does not appear to be credible. The burden is on the applicant to establish that he is admissible. Section 291 of the Act, 8 U.S.C. § 1361.

A waiver of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) 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. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse is the only qualifying relative in this case. Under these provisions of the law, children are not deemed to be "qualifying relatives." However, although children are not qualifying relatives under these statutes, 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-Moralez*, 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 (BLA 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.

The applicant’s attorney contends that the applicant’s spouse has been suffering extreme hardship to the detriment of her health and emotional well-being and will continue to suffer so if the applicant’s waiver is not approved. *See Brief in Support of Appeal*. The applicant submitted a medical report which indicated that the applicant’s wife suffers from ongoing depression, and was prescribed 20 mg of Paxil to treat the depression. *See letter of* [REDACTED] dated October 15, 2008. In the supplemental submission of documents in support of the applicant’s appeal, he submitted a clinical psychological evaluation dated April 29, 2010, based upon evaluations of a clinical psychologist conducted on the applicant’s spouse on February 19 and March 31, 2010. The clinical psychologist diagnosed the applicant’s spouse with Major Depressive Disorder, Single Episode, Severe, and with Adjustment Disorder with Anxiety. The clinical psychologist concluded that the applicant’s spouse is currently suffering severe psychological harm directly related to her and her children being geographically separated from her husband, and, in addition, that the applicant’s spouse would suffer extreme and unusual hardship should this forced separation be further prolonged and the applicant be denied residency in the United States. *See Clinical Psychological Evaluation of* [REDACTED] *Ph.D.*, dated April 29, 2010.

In addition, the applicant submitted a letter from a doctor indicating that the applicant’s spouse was under the doctor’s care since May 1, 2009. The letter states that the applicant’s wife has major depression disorder, generalized anxiety disorder, and separation anxiety disorder; that the applicant’s wife has fear, anxiety, crying spells, and depression; and she feels depressed and

hopeless and has nightmares and insomnia. The doctor prescribed Zoloft, Lorazepam, Imitrex, and Topamax. *See Letter of* [REDACTED] dated February 12, 2010.

The applicant's spouse states that the applicant's removal from the United States was extremely devastating to her emotionally, that she has been diagnosed with major clinical depression, and that she has been to several professionals and counseling services to help her. *See Affidavit of* [REDACTED] dated August 10, 2010. The record includes evidence that the applicant's spouse has sought counseling services to treat her depression since 2009. *See Letter of* [REDACTED] dated November 2, 2009, and *Letter of* [REDACTED] dated September 14, 2010.

The applicant's attorney states that the applicant's spouse will suffer extreme financial hardship if the applicant's waiver is not approved. The attorney's brief states that the applicant's spouse is unable to work full time due to her depression and the need to take care of her two children as a single mother. *See Brief in Support of Appeal*, dated December 28, 2010. The applicant's spouse states that she cannot afford to rent an apartment, and has to live with her parents and siblings, with she and her two children sharing a bedroom with her sister. *See Affidavit of* [REDACTED] dated August 10, 2010. Further assertions of the applicant's financial hardship are indicated in the clinical psychological evaluation by [REDACTED], stating that the applicant's spouse is only able to work part-time, and earns approximately \$1,100 per month. *See Clinical Psychological Evaluation of* [REDACTED], dated April 29, 2010. Financial documentation in the record includes a Form I-864, Affidavit of Support, filed by the applicant's spouse in 2008, indicating that her last declared income for Internal Revenue Service purposes was in 2003, when she earned \$3,253, and that she has not filed income tax returns since 2003 as she has been unemployed, and taking care of her children. *See Form I-864*, dated December 24, 2008. Other financial documentation in the record include receipts for remittances that the applicant's spouse has sent to the applicant, and copies of telephone records, indicate the number of calls, and the cost of those calls, to the applicant in Armenia.

The applicant's spouse has established that she would experience extreme hardship in the United States should the applicant's waiver not be granted. She has established that she is having financial difficulty, and that she is suffering emotional hardship, which is jeopardizing her ability to support herself and to take care of the applicant's two children. These hardships, when considered in the aggregate, are beyond the common results of removal or inadmissibility.

The record indicates that the applicant's spouse would suffer hardship if she were to relocate to Armenia. The applicant's spouse has stated that the applicant has not been able to find employment in Armenia, given the extremely difficult economic conditions and a high unemployment rate. *See Affidavit of* [REDACTED] dated August 10, 2010. The applicant's attorney asserts that the unemployment rate in Armenia is very high, and, in support of this contention, submitted copies of the recent CIA Factbook on Armenia, and a news article from Radio Free Europe/Radio Liberty. *See Brief in Support of Appeal*. Documentation in the file includes receipts for remittances that the applicant's spouse has sent to the applicant. It appears from the record that the applicant would be unable to support his family were they to relocate to Armenia.

In addition, the record indicates that the applicant no longer has family ties in Armenia and thus cannot rely upon assistance from family members for himself and his family. The record indicates that the applicant has two siblings, both residing in the United States, one as a lawful permanent resident, and the other a U.S. Citizen. Although the applicant's parents live in Armenia, the record includes evidence in the form of two Forms I-797, Notice of Action, which indicate that the applicant's U.S. Citizen sister filed Form I-130 Immigrant Visa Petitions on behalf of the applicant's parents. Both petitions were approved on September 27, 2010, indicating that the applicant's parent will relocate to the United States, leaving the applicant without any ties in Armenia.

Counsel further states that the applicant's spouse fears for her safety and the safety of her children if she were to relocate to Armenia to reside with the applicant. The attorney cites Country Specific Information for Armenia, published by the U.S. Department of State, which, although indicating that crime against foreigners is relatively rare in Armenia, urges U.S. citizens to exercise caution and avoid traveling alone after dark in Yerevan. *See Brief in Support of Appeal.*

The applicant's spouse stated that she visited the applicant in Armenia with their children in 2008-2009. During this visit, the applicant's son contracted pneumonia, and the applicant and his spouse were unable to get proper treatment for their child, and were unable to access immediate attention at the hospital. They had to rely upon the services of a retired nurse who was a friend of the family in order to treat the child. The applicant's spouse stated that neither she nor her children would be able to receive necessary medical care or meaningful access to medical care if they were to relocate to Armenia. *See Affidavit of* [REDACTED] *dated August 10, 2010.*

The AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. In discretionary matters, the alien 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).

See Matter of Mendez-Morales, 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 factors in this matter are the extreme hardships the applicant's U.S. citizen spouse and his two U.S. Citizen children would face if the applicant were to reside in Armenia, regardless of whether they accompanied the applicant or remained in the United States; the applicant's apparent lack of a criminal record; support letters from family members and members of the community; and the passage of more than ten years since the applicant's unlawful entry to the United States.

The unfavorable factors in this matter are the applicant's use of a fraudulent B-2 visa to enter the United State on November 15, 2001, and the applicant's failure to depart the United States after his appeal to the U.S. Court of Appeals was denied on October 17, 2006, and the unlawful presence in the United States that accrued following this denial until the applicant's departure from the United States on December 27, 2007.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In regard to the matter of the applicant's inadmissibility under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), as an alien having been previously removed, the applicant seeks an exception to this inadmissibility through consent to reapply for admission under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), and submitted Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal on February 29, 2009. As the AAO has already concluded that a favorable exercise of the Secretary's discretion is warranted in conjunction with the applicant's Form I-601 waiver application, the same discretion is warranted for the applicant's Form I-212 application. The Field Office Director shall exercise discretion favorably, and approve the Form I-212.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the applications are approved.

ORDER: The appeal is sustained. The waiver application is approved.