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U.S. Citizenship and Immigration Services

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SEP 07 2007

FILE: [redacted] Office: CLEVELAND Date:

IN RE: [redacted]

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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Cleveland, Ohio, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Malaysia 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 procured admission into the United States by misrepresentation of his nonimmigrant intent. The applicant 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 his U.S. citizen spouse.

The record reflects that the applicant was admitted to the United States on August 10, 2004 on a B-2 visa with a period of authorized stay expiring February 9, 2005. In an affidavit submitted in support of his waiver application, the applicant stated as follows concerning the manner of his entry:

> When I entered the United States I was never asked whether [redacted] and I planned on being married but I was asked how long I was planning on staying in the U.S. I replied that I was planning staying for two weeks and had a return flight on the 28th of August. [redacted] and I planned on being married when I came to the U.S. on this visit but did not know what my status would be after we married and whether I could stay in the United States or would have to return to Malaysia following our marriage. I did intend to stay in the United States once we married if I could, and to that extent I mis-stated my non-immigrant intent upon entry.

The applicant and his spouse were married on August 11, 2004, the day after he was admitted, in Toledo, Ohio. The applicant's spouse filed a Petition for Alien Relative (Form I-130) on the applicant's behalf on October 8, 2004. The petition was approved on July 20, 2005. The applicant also filed an Application to Register Permanent Residence or Adjust Status (Form I-485) and Application for Waiver of Grounds of Excludability (Form I-601) on October 8, 2004.

The district director determined that the applicant's failure to disclose his intention to marry his fiancée and remain the United States at the time of his inspection on August 10, 2004 constituted a misrepresentation of a material fact that renders the applicant inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. *Decision of District Director,* dated September 25, 2005. He concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the waiver application accordingly. *Id.*

On appeal, counsel asserts that the waiver application was unnecessary as section 245.3(b) of the Immigration and Naturalization Service Operating Instructions provides that adjustment application should be granted in the exercise of discretion when the only adverse factor is a misstatement of nonimmigrant intent. This assertion notwithstanding, counsel also submits additional evidence of hardship and asserts that the evidence shows that denial of the waiver would result in extreme hardship to the applicant's U.S. citizen spouse. *Brief in Support of Motion for Reconsideration of Denial of I-481 and I-601*, dated October 4, 2005.

The record reflects that the applicant was admitted to the United States on August 10, 2004 in B-2 status with a period of authorized stay through February 9, 2005. The applicant has admitted that he intended to get married during his visit to the United States and remain in the country "if [he] could," but that he failed to

disclose this intention at the time of his entry, informing the immigration inspector only that he intended to depart the United States on a return flight two weeks later.

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.

Section 212(i) of the Act provides that:

> (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 Department of State Foreign Affairs Manual states that, "in determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving aliens in the United States who conduct themselves in a manner inconsistent with representations they made to the consular officers concerning their intentions at the time of visa application. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants, either: (1) Apply for adjustment of status to permanent resident; or (2) Fail to maintain their nonimmigrant status . . . ." *DOS Foreign Affairs Manual,* § 40.63 N4.7(a).

The Department of State developed the 30/60-day rule which applies when "an alien states on his or her application for a B-2 visa, or informs an immigration officer at the port of entry, that the purpose of his or her visit is tourism, or to visit relatives, etc., and then violates such status by . . . (3) Marrying and takes [sic] up permanent residence." *Id.* at § 40.63 N4.7-1.

Under this rule, "if an alien violates his or her nonimmigrant status . . . within 30 days of entry, the consular officer may presume that the applicant misrepresented his or her intention in seeking a visa or entry." *Id.* at § 40.63 N4.7-2. If an alien "initiates . . . violation of status more than 30 days but less than 60 days after entry into the United States, no presumption of misrepresentation arises." *Id.* at § 40.63 N4.7-3. When "violative conduct occurs more than 60 days after entry into the United States, the Department does not consider such conduct to constitute a basis for an INA 212(a)(6)(C)(i) ineligibility." *Id.* at § 40.63 N4.7-4.

Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis in these situations to be persuasive. In the case at hand, the applicant married one day after entering on a B-2 visa and did not depart in accordance with his stated intent. The applicant subsequently applied for permanent residence on October 8, 2004. The AAO finds that the applicant's marriage and failure to depart the United States two weeks after his entry (contrary to his statement to the immigration inspector) occurred within 30 days of entry and is

indicative of the applicant's intent to remain permanently in the United States. Accordingly, the AAO concurs with the district director that the applicant misrepresented a material fact in procuring admission into the United States and is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

Counsel's assertion that INS Operating Instruction (OI) 245.3(b) makes the waiver application "surplusage" is not correct. That instruction reads, in pertinent part:

> In the absence of other adverse factors, an application for adjustment of status as an immediate relative should generally be granted in the exercise of discretion notwithstanding the fact that the applicant entered the United States as a nonimmigrant with a preconceived intent to remain. *Matter of Cavazos*, Int. Dec. 2750 (BIA 1980) clarified and reaffirmend [sic]. *Matter of Ibrahim*, Int. Dec. 2866 (BIA 1981).

Contrary to counsel's contention, OI 245.3(b), and the case law cited therein, refer to the discretionary power to grant or deny an adjustment application, not to the requirement that an applicant for adjustment of status found inadmissible apply for and receive a waiver of inadmissibility. An applicant for adjustment of status who has been found inadmissible under section 212(i) of the Act must show that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996). Hardship to the applicant is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's U.S. citizen spouse is the only qualifying relative.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

U. S. courts have stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant,

weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In an affidavit dated October 5, 2005, the applicant's spouse, a native of Korea, states that if she relocated to Malaysia she would be "forced to live in a third world country" where she doesn't speak the language. She states that she would be persecuted because she is a Christian, and that her husband would be unable to practice Christianity with her because he "was born of a mixed religious marriage of a Muslim and a Christian." She maintains that she would be forced to leave her job as a substitute teacher and would be unable to use her graduate degree in education obtained from a U.S. university to obtain employment in Malaysia. The applicant's spouse contends that her rights would be curtailed in Malaysia because she is a woman and she would not be permitted, among other things, to own a dog or eat pork. She also states that she would suffer emotionally from being separated from her immediate family in the United States. The applicant's spouse states that she assists in caring for her bedridden grandmother, and she would suffer from not being able to provide this care.

In an affidavit dated October 6, 2005, the applicant's mother-in-law states that the applicant's spouse would be unable to find employment in Malaysia and the family "could not provide the financial support that we are able to with her being in the local area."

The record includes an affidavit from the applicant, an affidavit from the applicant's spouse, an affidavit from the applicant's mother-in-law with supporting documents, employment and financial records for the applicant's spouse, a copy of the applicant's spouse's college transcript and documentation of student loans, country conditions reports and articles for Malaysia, the applicant's birth certificate and copies of the passports for the applicant's spouse and members of her immediate family. The entire record was reviewed and considered in rendering a decision on the appeal.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse faces extreme hardship if the applicant is not granted a waiver of inadmissibility.

There is insufficient evidence to support the assertions made by the applicant's spouse concerning hardship she would experience if she relocated to Malaysia. The applicant's spouse states that she is a Christian and that she would be persecuted for her religious beliefs in Malaysia. The applicant's spouse also states that her husband would not be able to practice Christianity with her because he is from a mixed religious marriage. However, the applicant has failed to submit evidence apart from her assertions showing that she and her

husband are practicing Christians or that her husband is from "a mixed religious marriage of a Muslim and a Christian" as claimed. The applicant has not submitted evidence showing that individuals similarly situated to her and her husband face religious persecution in Malaysia. The U.S. Department of State report submitted by the applicant indicates that although Islam is the predominant and official religion of Malaysia, "non-Muslims are free to practice their religious beliefs with few restrictions" and "the generally amicable relationship among religions in society contributed to religious freedom." U.S. Department of State, *International Religious Freedom Report 2004 – Malaysia*, September 15, 2004. It further indicates that "[s]tate governments impose Islamic religious law on Muslims in some matters but generally do not interfere with the religious practices of the non-Muslim community." *Id.*

Likewise, the applicant's spouse asserts that she would be unable to find employment in Malaysia because she is unlicensed and doesn't speak the language, but she has submitted only evidence of her education and employment in the United States rather than evidence specifically demonstrating that no employment is available for individuals such as herself in Malaysia. The applicant's spouse also failed to submit specific evidence demonstrating that her rights would be curtailed in Malaysia because she is a woman.

Although the statements by the applicant's spouse are relevant and have been taken into consideration, little weight can be afforded it in the absence of supporting evidence. *Matter of Kwan,* 14 I & N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). 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)).

The AAO recognizes that the applicant's spouse would suffer emotionally from being separated from her immediate family if she relocated to Malaysia, but the applicant has not demonstrated that her situation is different from most individuals separated as a result of removal or inadmissibility and that it rises to the level of extreme hardship based on the record. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

There is also insufficient evidence showing that the applicant would experience extreme hardship if she did not relocate to Malaysia with the applicant. The AAO recognizes that the applicant's spouse would suffer emotionally as a result of separation from the applicant, but the applicant has not asserted any other hardship or demonstrated that the emotional hardship of separation would be atypical of most individuals separated as a result of removal or inadmissibility.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to her U.S. citizen spouse as required under section 212(i) of the Act. Having found the applicant

statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility rests 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.