INTERPRETER RELEASES®
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IN THIS ISSUE

1. USCIS Updates H-1B and H-2B Cap Counts; H-1B Advance Degree Cap Met

H-1B

On October 24, 2011, U.S. Citizenship and Immigration Services (USCIS) announced that, as of October 21, 2011, it has received approximately 46,200 H-1B nonimmigrant petitions[1] that are subject to the Fiscal Year (FY) 2012 cap. It has also received approximately 20,000 petitions counting toward the 20,000 U.S. master's degree or higher cap exemption. Petitions filed on behalf of beneficiaries who have obtained a U.S. master's degree or higher will now be counted toward the remaining numbers in the general cap except for those petitions for new H-1B employment that are exempt from the annual cap because the beneficiaries will work at institutions of higher education or related or affiliated nonprofit entities or at nonprofit research organizations or governmental research organizations. Petitions filed on behalf of current H-1B workers who have been counted previously against the cap also do not count towards the H-1B cap.

H-2B

On October 26, 2011, USCIS posted updated statistics on the current cap count for H-2B nonimmigrant workers[2] for Fiscal Year (FY) 2011 and FY 2012. This is the first update

> permits the CO to match the employer's advertisement to the sponsored job opportunity. Additionally, the Employer has provided unrebutted evidence that blind advertisements are the usual method by which a private employment firm advertises a job. In rulemaking, ETA explained that the additional recruitment steps were intended to replicate employer's normal recruitment methods. 69 Fed. Reg. at 77345. There is nothing in the regulations or in [the] rulemaking to indicate that an employer using a private employment firm to recruit U.S. workers cannot recruit in the normal method, i.e. by placing blind advertisements. Indeed, we agree with the Employer that a major purpose of using a private employment firm is so that the employer does not have to handle the recruitment. As such, we find that there is a reasonable and legitimate reason why a private employment firm would not include an employer's name. Finally, as noted earlier, the Employer did not even need to include the actual Placement Services USA posting, as the Letter of Certification clearly complied with the regulatory requirement that the employer be able to demonstrate that recruitment was conducted by a private firm for the occupation for which certification is sought. Based on the foregoing, we find that the Employer provided adequate documentation that recruitment was conducted by a private firm for the occupation for which certification is sought and that the position advertised by the private firm was clearly open to U.S. workers.

Accordingly, the Board reversed the denial of certification and remanded the matter for the CO to grant certification.

Notes

[29] *Matter of Credit Suisse Securities* is discussed in 87 Interpreter Releases 2083 (Oct. 25, 2010).

[30] *Matter of Josef* is discussed in 87 Interpreter Releases 400 (Feb. 15, 2010).

[31] 69 Fed. Reg. 77326 (Dec. 27, 2004), discussed in 82 Interpreter Releases 1 (Jan. 4, 2005). ■

14. AAO Finds Extreme Hardship,Grants INA § 212(i) Waiver to Wife of U.S. Citizen

In *Matter of [Redacted]*, File No. A72 473 806 (AAO Oct. 18, 2011), the Administrative Appeals Office (AAO) granted an appeal by a native and citizen of China whose application for a waiver of inadmissibility under INA § 212(i) [8 USCA § 1182(i)] had been denied by the district director. In 1992, the applicant attempted to gain admission to the U.S. using a photo-substituted Taiwanese passport and was found inadmissible under INA § 212(a)(6)(C)(i) [8 USCA § 1182(a)(6)(C)(i)] for attempting to gain entry through fraud or misrepresentation. She is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her husband, a U.S. citizen (USC). They were married in 1997 and have a USC daughter. In 2009, the district director denied the applicant's petition for a waiver of inadmissibility on the ground that she failed to establish that a bar to her admission would result in extreme hardship to a qualifying relative (her husband).

On appeal, the applicant submitted a memorandum in which she asserted that her husband would face emotional, psychological, medical, and financial hardships whether she returned to China without him or he accompanied her to China. She noted that her husband has lived in the U.S. for over 30 years (since he was a child), has no family or friends in China, and would have difficulty finding a job in China because of country conditions there, his field (Chinese-American cooking), and the fact that he does not speak Mandarin. She also noted that her husband would have difficulty operating the couple's Chinese restaurant without her if she returned to China without him because her ability to speak Mandarin enables her to deal with the restaurant's suppliers. She submitted voluminous documentation in support of her appeal, including psychiatric evaluations indicating that her husband has severe major depression and generalized anxiety disorder and medical records and doctor's letters confirming that he has pain in his neck and back.

The AAO determined that the positive factors, including the extreme hardship that the applicant's husband would face and the applicant's lack of a criminal record, outweighed the negative factors, including the applicant's use of a fraudulent document in an attempt to gain entry and her failure to appear at her exclusion hearing, and that the applicant warranted a favorable exercise of discretion. Accordingly, the appeal was sustained.

The AAO's decision is reproduced in Appendix IV of this Release.

The applicant was represented by Alan Lee, Esq., of New York City, New York, who provided this decision to Interpreter Releases. Similar submissions, including unpublished AAO and BIA decisions, may be directed to Carolyn Bower, Principal Attorney Editor, carolyn.bower@thomsonreuters.com. ■

Appendix IV

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

JU CHAI [redacted]
[redacted]
WHITE PLAINS, NEW YORK 10[redacted]

Date: OCT 1 8 2011 Office: NEW YORK FILE: A72 473 806

IN RE: JU CHAI [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:

ALAN LEE, ESQ.
408 8th AVENUE
SUITE 5A
NEW YORK, NEW YORK 10001

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,

Perry Rhew
Chief, Administrative Appeals Office

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DISCUSSION: The waiver application was denied by the District Director, New York, New York. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of China who attempted to gain admission to the United States with a photo-substituted Taiwanese passport on December 14, 1992 at John F. Kennedy Airport, New York. She 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 attempting to gain entry into the United States through fraud or misrepresentation. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130), and her husband, a United States citizen, is her petitioner. 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.

The District Director concluded that the applicant failed to establish that a bar to her admission to the United States would result in an "extreme hardship" to the qualifying relative and denied the application accordingly. *See Decision of the District Director* dated May 12, 2009.

On appeal, the applicant's attorney provided a memorandum in support of the applicant's waiver application. The applicant's attorney asserts that the qualifying spouse would face emotional, psychological, medical and financial hardships if the applicant returned to China without the qualifying spouse. The applicant's attorney also stated that the qualifying spouse has no family or friends in China, and would have issues finding a job in China due to country conditions and his lack of knowledge of the Mandarin language should the qualifying spouse relocate to China with the applicant. Further, the attorney states that the applicant has been in the United States for over thirty years. The applicant's attorney also indicates that the applicant's mother, a lawful permanent resident, would face hardships should the applicant return to China or should her mother relocate to China with her.

The record contains the following documentation: the original Application for Waiver of Grounds of Inadmissibility (Form I-601), the Notice of Appeal (Form I-290B), a memorandum in support of the applicant's appeal, affidavits and letters from the applicant and qualifying spouse, the qualifying spouse's naturalization certificate, a marriage certificate, medical documentation regarding the qualifying spouse, a psychological evaluation, an affidavit from the applicant's mother, an affidavit from the applicant's daughter, a birth certificate for the child, a psychological report regarding the child, scholastic and medical documentation regarding the child, photographs, financial documentation, proof of the applicant and qualifying spouse's community involvement, reference letters, and an Application to Register Permanent Residence or Adjust Status (Form I-485), as well as the accompanying materials submitted in conjunction with 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

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> admission into the United States or other benefit provided under this Act is inadmissible.

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.

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 husband 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-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*

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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.

The applicant's qualifying relative is her husband, and as aforementioned, the Form I-130 has already been approved. The documentation provided that specifically relates to the qualifying spouse's hardship includes Form I-601, Form I-290B, a memorandum in support of the applicant's appeal, affidavits and letters from the applicant and qualifying spouse, medical documentation regarding the qualifying spouse, a psychological evaluation, an affidavit from the applicant's mother, an affidavit from the applicant's daughter, a birth certificate for the child, a psychological report regarding the child, scholastic and medical documentation regarding the child, financial documentation and other documentation submitted with the Form I-485. The entire record was reviewed and considered in rendering a decision on the appeal.

As aforementioned, the applicant's attorney asserts that the qualifying spouse would face emotional, psychological, medical and financial hardships if the applicant returned to China without the qualifying spouse. The applicant's attorney also stated that the qualifying spouse has no family or friends in China, and would have issues finding a job in China due to the country conditions, his field, and his lack of knowledge of the language, should the qualifying spouse relocate to China with the applicant. Further, the attorney states that the applicant has been in the United States for over thirty years. The applicant's attorney also indicates that the applicant's

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mother, a legal permanent resident, would face hardships should the applicant return to China or should her mother relocate to China with her.

The AAO finds that the applicant's spouse would suffer extreme hardship as a consequence of being separated from the applicant. With respect to the qualifying spouse's emotional and psychological issues, the psychiatric evaluations indicate that the qualifying spouse has been suffering from severe major depression and generalized anxiety disorder. The psychological evaluations also state that the qualifying spouse is suffering from pessimism, suicidal thoughts, psychomotor retardation, poor memory and feelings of hopelessness. Further, the qualifying spouse indicates that he is "terrified" of losing his wife. He further explains that he has been estranged from his own family, who all reside in the United States, and his wife and child are his only family in the United States. He also indicates that he and the qualifying spouse are "inseparable" and have been married since 1997, almost fifteen years.

In addition, the applicant's attorney asserts that the applicant's husband has health issues, namely pain in his neck and back. Supporting documentation, including medical records and various letters from the qualifying spouse's doctor, was submitted to confirm the qualifying spouse's medical problems. The qualifying spouse's affidavit also states that his wife assists him with some daily activities and lifting due to pain in his back.

The applicant's attorney also contends that the qualifying spouse would suffer financial hardship if the applicant returned to China because the applicant works at the qualifying spouse's restaurant and also takes care of their daughter. The record contains documentation including affidavits and letters from the qualifying spouse and applicant, proof of their restaurant business, their income and expenses. The record reveals that the applicant works at the restaurant, deals with stocking the restaurant since she speaks Mandarin, and also takes care of their daughter. Given their financial situation, it appears that it would be difficult for the qualifying spouse to hire another person to take care of these responsibilities. As such, the record reflects that the cumulative effect of the emotional, psychological, medical and financial hardships the applicant's spouse would experience in the United States without the applicant rises to the level of extreme.

The AAO further concludes that the applicant has demonstrated that her spouse would suffer extreme hardship in the event that he relocates to China. The qualifying spouse came to the United States as a child, and has resided here for over thirty years. Further, the qualifying spouse has no family or friends in China, and his entire immediate family and United States citizen daughter live in the United States. Further, the affidavits and letters from the applicant indicate that it would be difficult for the qualifying spouse to assimilate and to find a job in China because he does not speak the language and specializes in Chinese-American food, which is not the cuisine people in China eat. In addition to the qualifying spouse's restaurant business, he also owns three properties and has provided documentation supporting these financial ties that he has to the United States. When considered in the aggregate, the hardships that would result if the applicant's husband relocated to China, including separation from his family members, having to readjust to conditions in China after over thirty years in the United States and potential issues with finding employment in China, rise to the level of extreme hardship.

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Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 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.

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 relief must bring forward to establish that she 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 in this matter are the extreme hardships the applicant's United States citizen spouse and child would face if the applicant is not granted this waiver, regardless of whether they accompanied the applicant or remained in the United States, his support from family and friends, his business and property ties to the United States and the apparent lack of a criminal record. The unfavorable factors in this matter are the applicant's use of fraudulent document to attempt to enter the United States and her failure to appear at her exclusion hearing.

Although the applicant's violations of the immigration laws are serious and cannot be condoned, the positive factors in this case outweigh the negative factors. The AAO therefore finds that a

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favorable exercise of discretion is warranted. 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 her burden and the appeal will be sustained.

ORDER: The appeal is sustained.