

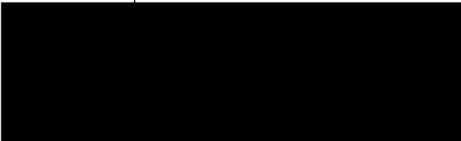


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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



MAR 12 2001

File: [Redacted] Office: [Redacted] Date: [Redacted]

IN RE: Applicant: [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)

IN BEHALF OF APPLICANT:



Public Entry

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

Identification data deleted to prevent unauthorized invasion of personal privacy.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Philadelphia, Pennsylvania, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Brazil who was found to be inadmissible to the United States under § 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 fraud and willful misrepresentation in April 1994 and February 1995. The applicant married a naturalized citizen of the United States in May 1997 and is the beneficiary of an approved petition for alien relative. He seeks the above waiver in order to remain in the United States and reside with his spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly.

On appeal, counsel argues that the district director did not consider the facts presented, erred in certain factual statements, drew a sexist and offensive conclusion that is unsupported by common belief or practice, and relied upon inapplicable law. In support of the appeal, counsel cites Bastidas v. INS, 609 F 2d 101 (3d Cir. 1979) which establishes the importance of family unity in determining discretionary relief in deportation proceedings.

On appeal, counsel also submits new documentation indicating that the applicant's spouse suffers from severe psychological disorders and is no longer able to work because of her condition. Counsel states that this new evidence establishes that the applicant's spouse is psychologically disabled and unable to support herself, and that the conclusion of the district director that there would be no economic detriment to the applicant's spouse is no longer true.

The record reflects that the applicant initially entered the United States as a temporary visitor in 1986. He remained longer than authorized and began working without Service permission as a self-employed contractor. He departed the United States in early 1993 after almost 7 years of unlawful residence and employment. In November 1993 and January 1994, the applicant applied for, but was denied, a second nonimmigrant visa for entry into the United States. Being unable to obtain a visa in his true identity, he then purchased documents in someone else's name and used them to fraudulently obtain a new Brazilian passport in an assumed identity. In April 1994, he was able to obtain a new nonimmigrant visa by presenting the fraudulent passport. He then used that passport and visa in order to gain admission into the United States by fraud and willful misrepresentation in April 1994, and again in February 1995. The applicant's failure to disclose the true facts on his nonimmigrant visa application, and upon his applications for admission into the United States, cut off lines of inquiry which were relevant to his eligibility for visa issuance and entry into

the United States.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-

(C) MISREPRESENTATION.-

(i) IN GENERAL.-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) ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

(1) The Attorney General may, in the discretion of the Attorney General, 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 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.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

In 1986, Congress expanded the reach of the ground of inadmissibility in the Immigration Marriage Fraud Amendments of 1986, P.L. No. 99-639, and redesignated as § 212(a)(6)(C) of the Act by the Immigration Act of 1990 (Pub. L. No. 101-649, Nov. 29, 1990, 104 Stat. 5067) effective June 1, 1991. Congress imposed the statutory bar on (a) those who made oral or written misrepresentations in seeking admission into the United States; (b) those who have made material misrepresentations in seeking entry admission into the United States or "other benefits" provided under the Act; and (c) it made the amended statute applicable to the receipt of visas by, and the admission of, aliens occurring after the date of the enactment based on fraud or misrepresentation occurring before, on, or after such date.

In 1990, § 274C of the Act, 8 U.S.C. 1324c, was inserted by the Immigration Act of 1990 (P.L. 101-649, Nov. 29, 1990, 104 Stat. 5059), effective for persons or entities that have committed violations on or after November 29, 1990. Section 274C(a) provided penalties for document fraud stating that "it is unlawful for any

person or entity knowingly-...(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act,...."

In 1994 Congress passed the Violent Crime Control and Law Enforcement Act (P.L. 103-322, September 13, 1994), which enhanced the criminal penalties of certain offenses, including 18 U.S.C. 1546:

(a)...Impersonation in entry document or admission application; evading or trying to evade immigration laws using assumed or fictitious name...knowingly making false statement under oath about material fact in immigration application or document....

(b) Knowingly using false or unlawfully issued document or false attestation to satisfy the Act provision on verifying whether employee is authorized to work.

The penalty for a violation under (a) increased from up to 5 years imprisonment and a fine or both to up to 10 years imprisonment and a fine or both. The penalty for a violation under (b) increased from up to 2 years imprisonment or a fine or both to up to 5 years imprisonment or a fine, or both.

In 1996, Congress expanded the document fraud liability to those who engage in document fraud for the purpose of obtaining a benefit under the Act. Congress also restricted § 212(i) of the Act in a number of ways. Sections 212(a)(6)(C) and 212(i) of the Act were amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. 104-208, 110 Stat. 3009. There is no longer any alternative provision for waiver of a § 212(a)(6)(C)(i) violation due to passage of time. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. See Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997).

If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George and Lopez-Alvarez, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

After reviewing the amendments to the Act and to other statutes regarding fraud and misrepresentation from 1957 to the present time, and after noting the increased impediments Congress has placed on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar, eliminating alien parents of U.S. citizens and resident aliens as applicants and eliminating children as a consideration in determining the presence of extreme hardship, it is concluded that

Congress has placed a high priority on reducing and/or stopping fraud and misrepresentation related to immigration and other matters.

To recapitulate, the record clearly reflects that the applicant knowingly obtained a Brazilian passport in an assumed name and used that document to obtain a nonimmigrant visa and gain admission into the United States by fraud and willful misrepresentation on two occasions. After entry, he remained longer than authorized and was self-employed without Service authorization. He subsequently married a naturalized United States citizen.

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from § 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Although extreme hardship is a requirement for § 212(i) relief, once established, it is but one favorable discretionary factor to be considered. See Matter of Mendez, 21 I&N Dec. 296 (BIA 1996).

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board of Immigration Appeals (BIA) stipulated that the factors deemed relevant in determining whether an alien has established extreme hardship pursuant to § 212(i) of the Act include, but are not limited to, the following: 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 finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

The record reflects that the applicant's spouse has resided in the United States since she was 16 years of age and has never visited Brazil. Her brother and sister visit her often and she depends upon them to provide her with a feeling of comfort and peace. Although the applicant's spouse speaks a dialect of Portuguese (as spoken in Portugal, not Brazil), she claims to have no family or cultural ties to Brazil.

On appeal, counsel states that the applicant's spouse would suffer psychological damage if she were to depart the United States to reside with her husband in Brazil. However, there are no laws that require her to leave the United States and live abroad. In Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

The assertion of financial hardship to the applicant's spouse

advanced in the record is contradicted by the fact that, pursuant to § 213A of the Act, 8 U.S.C. 1183a, and the regulations at 8 C.F.R. 213a, the person who files an application for an immigrant visa or for adjustment of status on or after December 19, 1997 must execute a Form I-864 (Affidavit of Support) which is legally enforceable in behalf of a beneficiary (the applicant) who is an immediate relative or a family-sponsored immigrant when an applicant applies for an immigrant visa. The statute and the regulations do not provide for an alien beneficiary to execute an affidavit of support in behalf of a U.S. citizen or resident alien petitioner. Therefore, a claim that an alien beneficiary is needed for the purpose of supporting a citizen or resident alien petitioner can only be considered as a hardship in rare instances.

The grant or denial of the above waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Attorney General and pursuant to such terms, conditions, and procedures as she may by regulations prescribe.

In its analysis conducted in Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), a § 212(i) matter, the BIA found cases involving suspension of deportation and other waivers of inadmissibility to be helpful given that both forms of relief require extreme hardship and the exercise of discretion. The BIA continued in Cervantes-Gonzalez to state that, "[a]lthough extreme hardship is a requirement for § 212(i) relief, once established, it is but one favorable discretionary factor to be considered." See Matter of Mendez-Morales, 21 I&N Dec. 296 (BIA 1996). The Associate Commissioner is bound by that decision.

In Matter of Cervantes-Gonzalez, the Board held that the underlying fraud or misrepresentation may be considered as an adverse factor in adjudicating a § 212(i) waiver application in the exercise of discretion. Matter of Tijam, Interim Decision 3372 (BIA 1998), followed. The Board declined to follow the policy set forth by the Commissioner in Matter of Alonso, 17 I&N Dec. 292 (Comm. 1979); Matter of Da Silva, 17 I&N Dec. 288 (Comm. 1979), and noted that the United States Supreme Court ruled in INS v. Yueh-Shaio Yang, 519 U.S. 26 (1996), that the Attorney General has the authority to consider any and all negative factors, including the respondent's initial fraud.

The Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in Matter of Tijam, Interim Decision 3372 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter entered the United States in 1994 and 1995 by fraud and married his spouse in 1997. He now seeks relief based on that after-acquired equity.

The favorable factors in the matter include the applicant's family tie, absence of a criminal record and hardship to a qualifying relative.



The unfavorable factors include the applicant's initial unlawful residence and employment in the United States from 1986 until 1993; procuring a passport in an assumed name in 1994 and using that passport to obtain a nonimmigrant visa and gain admission into the United States by fraud and willful misrepresentation in 1994 and 1995; and his having again overstayed his authorized period of admission (gained fraudulently) and worked without Service authorization after his last entry in 1995. His equity (marriage) gained after procuring admission into the United States by fraud can be given only minimal weight.

The applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

In proceedings for application for waiver of grounds of inadmissibility under § 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the appeal is dismissed.

ORDER: The appeal is dismissed.