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U.S. Department of Justice

Immigration and Naturalization Service

prevent clearly unwarranted
invasion of personal privacy

id to

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

[Redacted]

File:

[Redacted]

Office: SAN FRANCISCO, CA

Date:

DEC 13 2001

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:

[Redacted]

Public Copy

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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen and reconsider. The motion will be granted and the order dismissing the appeal will be affirmed. The application will be denied.

The applicant is a native and citizen of Bolivia who 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 having procured admission into the United States by fraud or willful misrepresentation in 1993. The applicant is married to a United States citizen and seeks the above waiver in order to remain in the United States and reside with her 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. The Associate Commissioner affirmed that decision on appeal.

On motion counsel submits new documentation including declarations from the applicant and her spouse dated August 17, 2001; a report from a licensed psychologist concerning the spouse dated October 18, 2000; a psycho-educational evaluation of the spouse's daughter dated April 19, 2001; and evidence that the spouse signed an agreement to acquire a medical practice on April 17, 2001. Counsel asserts that the evidence presented establishes that the applicant's spouse will suffer extreme emotional, financial, and professional hardship if the applicant's waiver request is denied.

The record reflects that the applicant procured admission into the United States as a nonimmigrant visitor for pleasure in December 1993 by accompanying a woman and posing as her daughter. The applicant testified that she had previously applied for a visa for admission into the United States, was denied, and then paid the woman \$2,000 to bring her to the United States. Subsequent to entry, the applicant remained longer than authorized and obtained employment in 1994 by falsely claiming to be a lawful permanent resident of the United States.

In November 1998, the applicant again falsely claimed to be a lawful permanent resident of the United States when stopped at a U.S. Border Patrol checkpoint. She was taken into custody and placed in removal proceedings. In April 1999, she was granted voluntary departure in lieu of deportation. The applicant departed the United States in July 1999.

In August 1999, the applicant applied for and was granted a fiancee visa (K-1) at a U.S. consulate abroad. According to the record, a notation was made regarding the applicant's prior admission into the United States by fraud. Counsel states that an application for waiver of inadmissibility had been prepared but that the consulate issued the visa without requiring that it be filed. The applicant

was admitted to the United States as a K-1 fiancée in September 1999 and married her spouse in October 1999.

Section 212(a) of the Act states:

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) of the Act states:

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).

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 section 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 penalties Congress has placed on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar 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.

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from section 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 section 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 section 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.

On appeal, counsel states that the new evidence presented establishes that the applicant's spouse will be subjected to extreme hardship if the applicant's waiver request is denied. Counsel asserts that the spouse will be subjected to a horrible choice between his wife and his daughter, will lose his significant financial and professional investment in his current pediatric practice, and will experience the anguish of leaving behind patients who depend on his care if he relocates to Bolivia with his wife.

On appeal, the applicant explains the situations surrounding her violations of immigration laws from 1993 through 1998. She states

that her place is with her husband in the United States and that if she is forced to leave the United States, her family life will be destroyed. The applicant's spouse explains the situation surrounding his meeting and marriage to the applicant and asserts that if his wife is denied residency, he would be forced to choose between moving to Bolivia to remain with his wife or staying in the United States separated from her. The spouse also discusses the detrimental effect his relocation to Brazil would have on his relationship with his daughter from a previous relationship and on his pediatric clients.

On appeal, counsel also submits evidence that the applicant's daughter from a previous relationship was seen for a psychoeducational evaluation due to concerns that she is easily distracted by her environment. The applicant's spouse states that he is very close to his daughter, who resides with her mother and step-father, and sees her quite often. Counsel also submits a letter from a licensed psychologist indicating that the spouse has anxieties related to the possibility of separation from his daughter and that the present circumstances are resulting in high levels of stresses that are affecting the spouse's personal life and disrupting his professional practice. There is no evidence in the record that the applicant's spouse currently has a significant condition of health for which treatment is unavailable in Bolivia.

Finally, counsel submits evidence that the spouse entered into an agreement for acquisition of his medical practice in April 2001. Based on the fact that the agreement was entered into after the denial of the applicant's initial waiver request and prior to the decision on her appeal, it may be concluded that the applicant and her spouse were aware that the spouse may face the decision of abandoning his practice if he chose to follow his wife to Bolivia. This factor undermines the applicant's argument that her husband would suffer extreme hardship financial and professional hardship if she is removed from the United States.

A review of the factors presented, and the aggregate effect of those factors, indicates that the applicant's spouse would suffer hardship due to separation if he were to remain in the United States separated from his spouse or that he would suffer prospective professional and financial hardship if he were to relocate to Bolivia. The applicant has failed, however, to show that the qualifying relative would suffer hardship that reaches the level of extreme as envisioned by Congress if the applicant is not permitted to remain in the United States.

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 he may by regulations prescribe. The favorable factors include the applicant's marriage to a United States citizen in October 1999, the absence of a criminal record either before or after entry into the United States, and the hardship that would be imposed upon her spouse if he were to

relocate to Bolivia. The unfavorable factors include the applicant's procuring of admission into the United States by fraud or willful misrepresentation in 1993, her employment without Service authorization, her lengthy stay in the United States without Service authorization, and her having falsely claimed to be a lawful permanent resident of the United States in 1998.

In Perez v. INS, 96 F.3d 390 (9th Cir. 1996), the court stated that "extreme hardship" is hardship that is unusual or beyond that which would normally be expected upon deportation.

The court held in INS v. Jong Ha Wang, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

There are no laws that require the applicant's spouse to leave the United States and live abroad. Further, the common results of deportation are insufficient to prove extreme hardship. See Hassan v. INS, 927 F.2d 465 (9th Cir. 1991). The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. See Shooshtary v. INS, 39 F.3d 1049 (9th Cir. 1994). 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 applicant's actions in this matter cannot be condoned. The applicant has not established extreme hardship to a qualifying relative or that the favorable factors in this matter outweigh the unfavorable ones. In proceedings for application for waiver of grounds of inadmissibility under section 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 order dismissing the appeal will be affirmed. The application will be denied.

ORDER: The Associate Commissioner's order dated July 20, 2001 dismissing the appeal is affirmed. The application is denied.