



U.S. Department of Justice

Immigration and Naturalization Service

H2

PUBLIC COPY

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



FILE# [REDACTED]

Office: Guayaquil

Date:

FEB 25 2003

IN RE: Applicant:



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:



identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision 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.

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 that 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Assistant Officer in Charge, Guayaquil, Ecuador, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Ecuador who was found to be inadmissible to the United States by a consular officer 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 attempted to procure a nonimmigrant visa by fraud or willful misrepresentation on November 10, 1992. The applicant married a lawful permanent resident in Ecuador in May 1992, and she is the beneficiary of an approved Petition for Alien Relative. The applicant seeks the above waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i).

The assistant officer in charge 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 states that the assistant officer in charge ignores the weight of the evidence submitted and does not follow the standards enunciated in *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978). Counsel discusses the applicant's separation from her husband, their two children who are living in Ecuador, and her father-in-law, mother-in-law and sister-in-law who are naturalized U.S. citizens. Counsel states that the applicant's act was committed years ago and was not a crime, much less a serious crime. Counsel indicates that the fraud committed cannot be condoned, but it is not reflective of a permanently bad character or a serious threat to society.

Counsel refers to the issue of "extreme hardship" as that term was applied in matters involving suspension of deportation under section 244 of the Act, 8 U.S.C. § 1254, prior to its amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and recodification under section 240A of the Act, 8 U.S.C. 1230A, and redesignation as "cancellation of removal." *Matter of Piltch*, 21 I&N Dec. 627 (BIA 1996); *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

In *Matter of Kao*, 23 I&N Dec. 45 (BIA 2001), the Board of Immigration Appeals (the Board) held that the same standard for determining "extreme hardship" in applications for suspension of deportation is also applied in adjudicating petitions for immigrant status under section 204(a)(1) of the Act, 8 U.S.C. § 1154(a)(1), and waivers of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i).

The AAO has not suggested that the term "extreme hardship" has two different meanings, and is in agreement with the holding in *Matter of Kao*. However, it is clear from the statutes concerning both section 212(i) and former section 244 of the Act that the scope of application of that term, in what was formerly called suspension of deportation, was much broader. In the present proceedings and in

section 212(i) proceedings, a finding of "extreme hardship" is only applicable to a spouse or parent of a United States citizen or lawfully resident alien. Hardship to the applicant or to his or her children is not a consideration. In former section 244 proceedings, a finding of "extreme hardship" was applicable to the alien or to his/her spouse, parent or child who is a U.S. citizen or an alien lawfully admitted for permanent residence.

Section 212(a) (6) (C) of the Act provides, in 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 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. Nothing could be clearer than Congress' desire in recent years to limit, rather than extend, the relief available to aliens who have committed fraud or misrepresentation. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See *Fiallo v. Bell*, 430 U.S. 787 (1977); *Reno v. Flores*, 507 U.S. 292 (1993); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). See also *Matter of Yeung*, 21 I&N Dec. 610, 612 (BIA 1997).

Congress has increased the penalties on fraud and willful misrepresentation, 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. 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*, 22 I&N Dec. 560 (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.

The BIA in *Cervantes-Gonzalez*, also referred to *Silverman v. Rogers*, 437 F.2d 102 (1st Cir. 1970), cert. denied 402 U.S. 983 (1971), where 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."

Although the applicant alleges financial hardship in this matter, the BIA referred to *Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994), in which the court stated that the "extreme hardship requirement of section 212(h)(2) of the Act was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy."

In *Matter of Cervantes-Gonzalez*, the Board also held that the underlying fraud or misrepresentation may be considered as an adverse factor in adjudicating a section 212(i) waiver application in the exercise of discretion. *Matter of Tijam*, 22 I&N 408 (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. In *Matter of Tijam*, p.416, the Service contended that as a matter of policy it has decided to withdraw from *Matter of Alonso*.

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.

More than 10 years have elapsed since the applicant committed her fraudulent act. The record indicates that her husband is a cook in a small deli earning a minimum wage and is unable to visit his family on a regular basis. The applicant's spouse has no job skills which would help him find employment in Ecuador and would be unable to support his family if he chose to return and join them. The record indicates that the psychological impact of this lengthy separation on the applicant's spouse is significant. Although the uprooting of family and separation from friends does not necessarily amount to extreme hardship, the hardship to the qualifying relative increases with the passage of time to the point where it may be considered extreme.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has now shown that the qualifying relative suffers extreme hardship over and above the normal economic and social disruptions involved in the removal of a family member.

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 family ties, the absence of a criminal record, the absence of after-acquired equities, the absence of violating any other immigration laws, and extreme hardship to the qualifying relative.

The unfavorable factors include the applicant's attempt to procure a nonimmigrant visa by fraud or willful misrepresentation.

Although the applicant's actions in this matter cannot be condoned, 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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The assistant officer in charge's decision is withdrawn, and the application is approved.