



U.S. Department of Justice

Immigration and Naturalization Service

**HA**

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

File:

Office: COPENHAGEN, DENMARK

Date: JAN 29 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:



**PUBLIC COPY**

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.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer in Charge, Copenhagen, Denmark, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained, the decision of the district director will be withdrawn and the application will be approved.

The applicant is a native and citizen of Iceland 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 a visa for admission into the United States by fraud or willful misrepresentation. The applicant is married to a citizen of the United States and is the beneficiary of an approved petition for alien relative. She seeks the above waiver in order to travel to the United States and reside with her spouse.

The 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 submits new and additional evidence to support the applicant's claim that her husband would suffer extreme hardship if her waiver request is denied. Counsel asserts that the applicant's misrepresentations pale in comparison to the severity of the hardship the applicant's spouse would suffer if separated from the applicant, or if forced to separate from his elderly parents and business in the United States. Counsel asserts that the effect on the spouse's severe medical conditions, ties to his elderly parents who depend upon him, self-created business in the United States which supports his self-esteem, and hardships he would suffer in Iceland, individually and cumulatively, establish extreme hardship to the extent that the spouse would not be able to function under either scenario. Counsel asks that the waiver request be approved so that the couple may live together in the United States, where the spouse will be in the best position to combat his severe mental disorders, continue to support his elderly parents, and maintain his business.

The record reflects that the applicant was found by a consular officer to have procured a nonimmigrant visa on October 4, 2001 by willfully misrepresenting her employment status in Iceland and the amount of time she had spent during her last visit to the United States. The record further reflects that when applying for admission into the United States as a nonimmigrant visitor on October 10, 2001, the applicant admitted that she had been living in the United States off and on since about 1992 and had been employed in the United States without Service authorization. The applicant was permitted to withdraw her application for admission and return to Iceland voluntarily.

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 Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999).

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 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).

The Board has held that extreme hardship is not a definable term of fixed and inflexible meaning, and that the elements to establish extreme hardship are dependent upon the facts and circumstances of each case. These factors should be viewed in light of the Board's statement that a restrictive view of extreme hardship is not mandated either by the Supreme Court or by its own case law. See Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996).

In Matter of Cervantes-Gonzalez, *supra*, 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 submits documentation including a brief; an affidavit from the applicant's spouse; medical reports from the spouse's physician; descriptions of the drugs the spouse has been prescribed; a declaration from the applicant; photographs; and letters of support from the applicant's cousin (and business associate of her spouse), parents, aunt, and parents-in-law. Based on the information supplied, the applicant has established the presence of a qualifying relationship; that her spouse has strong ties to the United States; that it would be financially detrimental for her spouse to terminate his employment in the United States and

relocate to Iceland; and that the spouse suffers from a depressive illness that would be exacerbated either by separation from the applicant or by relocation to Iceland. Based on the foregoing, it is concluded that the applicant has shown that the qualifying relative would suffer extreme hardship over and above the normal economic, emotional and social disruptions involved in separation.

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.

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, 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 favorable factors include the applicant's family ties, the absence of a criminal record, and hardship to the qualifying relative. The unfavorable factors in this matter include the applicant's having procured a visa for admission into the United States by fraud or willful misrepresentation, and her unlawful residence and employment in the United States.

The applicant gained her equity or family tie while abroad and she has never attempted to circumvent immigration laws in any other manner since her voluntary return to Iceland in October 2001. Although the applicant's actions in this matter cannot be condoned, the favorable factors in this matter are considered to 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 now met that burden. Accordingly, the appeal will be sustained. The decision of the district director will be withdrawn and the application will be approved.

**ORDER:** The appeal is sustained. The decision of the district director is withdrawn and the application is approved.