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U.S. Department of Justice

Immigration and Naturalization Service

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

[Redacted]

File: [Redacted]

Office: SAN FRANCISCO, CA

Date: **JAN 31 2003**

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]

**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 District Director, San Francisco, California, and an appeal was dismissed by the Associate Commissioner for Examinations. Subsequently, the Associate Commissioner granted a motion to reopen and reconsider the matter and affirmed the dismissal of the appeal. The matter is now before the Associate Commissioner on a second motion to reopen and reconsider. The second motion will be granted and the prior orders dismissing the appeal will be reaffirmed. The application will be denied.

The applicant is a native and citizen of China who is 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. The applicant is married to a naturalized United States citizen and is the beneficiary of an approved petition for alien relative. She 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 and on a first motion to reopen and reconsider.

On appeal, counsel asserted that the applicant was advised by the immigration officer handling her case that sufficient evidence was submitted for approval of the application. Counsel stated that the applicant and her spouse did not know that a showing of extreme hardship required evidence of medical and other conditions.

On first motion, counsel asserted that the applicant's spouse would suffer extreme hardship should he be forced to choose between abandoning everything he has in the United States, including his elderly parents, or losing his wife, along with any hopes of being a father. Counsel stated that the spouse's mental state, which can be easily treated in the United States, would be exacerbated by the deep losses he would suffer no matter what choice he makes.

On second motion, counsel asserts that denial of the applicant's waiver request was based on incorrect application of federal law and precedent and agency policy. Counsel asserts specifically that the Associate Commissioner failed to consider several factors when determining hardship to the applicant's spouse, including: the psychological report of the applicant's spouse; the emotional and economic impact that hardship to third parties would have on the applicant's spouse; the impact of economic hardships on the spouse; the destruction of the family unit; the emotional impact of separation; country conditions in China; and the residence of the spouse's close relatives.

The record reflects that the applicant procured admission into the United States on August 29, 1995 by presenting a photo-substituted

Japanese passport.

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 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, *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.

The record reflects that the applicant and her spouse, also a native of China, were married in September 1997. Prior to her fraudulent entry into the United States, the applicant had resided in Japan for eight years on a student visa. After their marriage, the applicant and her spouse started a furniture store business together and in 2001, they opened a second store specializing in Japanese artifacts and antiques.

The record contains statements from the applicant and her spouse indicating that they would suffer economic and emotional hardship if the applicant is removed from the United States. On appeal, counsel stated that additional evidence existed to establish

extreme hardship to the applicant's spouse, but that the couple did not submit it as it concerned personal matters.

On first motion, counsel submitted a brief; declarations from the applicant, her spouse, and father-in-law; a medical report concerning the spouse; and information on country conditions in China. The applicant stated that she knew what she did was wrong and asked to be given a chance to remain in the United States and be a good wife to her husband. The applicant's father-in-law discussed his family's past persecution from the Chinese government and his family's happiness at now being together in the United States. The father-in-law asserted that he and his wife, the applicant's mother-in-law, would be in extreme pain and could not survive if their son and daughter-in-law were forced to separate, that the applicant could not survive in China, and that his son's life and career in the United States would be affected.

On first motion, the applicant's spouse stated that if his wife were to be removed to China, he feared that something would happen to her there. He stated that his fear was intensified because his wife is an anxious person and not mentally strong. In addition, he stated that he would be unable to support his parents if his wife were removed and that his dreams of being a father would be shattered.

The applicant's spouse also discussed his past experiences with the Chinese government. He stated that if he returned to China with the applicant to live, he would not feel safe, would be unable to support himself, would worry about his parents' well-being in the United States, his wife's mental state may deteriorate, and the couple would probably never be able to have a baby due to the unavailability of fertility treatments in China.

On second motion, counsel submits a brief asserting that the applicant aids her spouse in the financial and medical support of his parents, both lawful permanent residents of the United States who are too old to work and are not fluent in English. Counsel states that the applicant's spouse would be greatly impacted, economically and emotionally, if the applicant were removed, due to the hardships his parents would suffer. He would be forced to work more hours each week or neglect his business to properly care for his parents. Without the applicant's presence, counsel asserts that it would be impossible for her spouse to monitor his fledgling business and care for his parents at the same time.

It is noted that the opening of the couple's second store occurred after the September 22, 1999 denial of the applicant's initial waiver request. Based on the fact that the applicant entered the United States with a fraudulent passport in 1997 and her initial waiver request was denied, it may be concluded that the applicant and her spouse were aware when they opened their second store that they may face separation. This factor undermines counsel's argument that the applicant's spouse would suffer extreme financial hardship if the applicant were removed and could not assist him in the

management of their business.

On second motion, counsel also asserts that the psychological evaluation of the applicant's spouse indicates that he already suffers from severe anxiety disorder which will threaten his ability to operate his business if not properly treated. It is noted that the psychological evaluation contained in the record indicates that the applicant's spouse was interviewed and tested on October 19 and 26, 1999. There is no evidence contained in the record to indicate that the spouse's psychological condition is such that he has ever required psychiatric treatment and/or medication, or that he otherwise has a significant condition of health for which treatment would be unavailable abroad.

On second motion, counsel further asserts that because the applicant left China without proper authorization, she will assuredly be thrown into a prison, repatriation, or re-education camp upon her return and that her spouse would face a lifetime of trauma knowing that the applicant was being mistreated or imprisoned by the Chinese government. Counsel also indicates that in the unlikely event that the applicant is allowed to reintegrate into Chinese society, it would be difficult for her to find employment, housing or other necessities given her family's controversial background, her own efforts to escape China, and her status as a non-communist.

It is noted that hardship to the applicant herself is not a consideration in section 212(i) proceedings. In the event the applicant fears return to China, she may apply for asylum and be considered under the statute and regulations contained in section 208 of the Act and in 8 C.F.R. Part 208.

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.

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."

It is noted that 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 1995 by fraud and married her spouse in 1997. She now seeks relief based on that after-acquired equity. However, as previously noted, a consideration of the Attorney General's discretion is applicable only after extreme hardship has been established.

A review of the documentation in the record, when considered in its totality, fails to establish the existence of hardship to the applicant's spouse (the only qualifying relative in this matter) caused by separation that reaches the level of extreme as envisioned by Congress if the applicant is not allowed to remain in the United States. Hardship to the applicant herself or her parents-in-law is not a consideration in section 212(i) proceedings. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

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 previous orders dismissing the appeal will be affirmed. The application will be denied.

**ORDER:** The Associate Commissioner's orders dated June 13, 2001 and November 7, 2001 dismissing the appeal are reaffirmed. The application is denied.