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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



H2

FILE: [REDACTED] Office: PHILADELPHIA, PA

Date: **MAR 31 2009**

IN RE: [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)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

A handwritten signature in cursive script, appearing to read "John F. Grissom".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of China who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for procuring admission to the United States by fraud or willful misrepresentation. The applicant is married to a U.S. citizen, has two U.S. citizen children and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The acting district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Acting District Director's Decision*, at 2, dated November 2, 2007.

On appeal, counsel states that the acting district director failed to consider previously submitted materials in the file and failed to consider the hardship to the applicant's spouse based on his children's hardship. *Form I-290B*, at 2, received November 20, 2007.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statement, the applicant's statements, relevant case law and country conditions information on China. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that on February 26, 1999, the applicant procured admission to the United States by presenting another person's passport and visa. As a result of this misrepresentation, the applicant is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent 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 [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], 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 [Secretary] 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.

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, in this matter, the applicant's spouse. Hardship to the applicant and her children is not a permissible consideration in a 212(i) waiver proceeding except to the extent that such hardship may affect the qualifying relative. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals (BIA) deems relevant in determining whether an alien has established extreme hardship. These factors include the presence of lawful permanent resident or U.S. citizen family ties to 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 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 AAO notes that extreme hardship to the applicant's spouse must be established whether he resides in China or in the United States, as he is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to her spouse in the event that he resides in China. The applicant states that conditions in China are poor, there is great poverty and it is a communist regime. *Applicant's First Statement*, at 2, dated June 26, 2001. The applicant states that her children are in school and doing well, and that she does not wish to disrupt their education. *Applicant's Statement*, at 2, dated October 10, 2007. The applicant's spouse states that he has made great sacrifices to obtain permanent residence and live in the United States; he would lose his job, family, friends and the wonderful benefits of residing in the United States; China is a poor country and finding a job there would be difficult; his children would be subject to discrimination, and he and the applicant, as the parents of two children, would be subject to severe sanctions, including fines, imprisonment, and loss of other benefits, including housing, education and the other necessities of life. *Applicant's Spouse's Statement*, at 2-3, dated October 10, 2007. Counsel states that the family would suffer discrimination because they have two children, China has a one child per family policy, the applicant may require sterilization and fines will be levied against the family. *Brief in Support of Appeal*, at 3, dated January 4, 2008. The record reflects that China's birth planning policies retained harshly coercive elements in law and practice, the laws restrict the rights of families to choose the number of children they have and the period of time between births, some women have no choice but to abort pregnancies, officials in Fujian Province reportedly forcibly sterilize women, and couples who have an unapproved child are required to pay a fee which sometimes reaches ten times a person's annual disposable income. *U.S. Department of State Country Conditions Reports on Human Rights Practices, China*, at 8, dated March 6, 2007. The record reflects that the applicant is from the Fujian Province. *Applicant's Form G-325*, dated June 20, 2007. Counsel cites *Li v. U.S. Atty. Gen.*, 488 F. 3d 1371 (11th Cir.2007) in support of the applicant's case. *Brief in Support of Appeal*, at 3. The court in *Li v. U.S. Atty. Gen.* discusses

persecution of parents with two children in the Fujian Province, forced sterilization of women who give birth to a second child, and Chinese parents of foreign-born children being subject to the same coercion and penalties as parents of native children. *Li v. U.S. Atty. Gen.*, at 1373. Based on the factors presented, the applicant has established that her spouse would suffer extreme hardship as a result of relocating to China.

The second part of the analysis requires the applicant to establish extreme hardship in the event that her spouse remains in the United States. Counsel states that the applicant's spouse could not survive with the two children in the absence of the applicant. *Brief in Support of Appeal*, at 2. In the alternative, counsel states that the applicant's spouse would be forced to live in the United States without them. *Id.* at 3. The applicant's spouse states that he works on a daily basis to pay the bills and maintain the household, he could not afford daycare, he could not handle raising the children without the applicant, there would be many challenges in terms of helping them with their homework and advising them as the applicant's English is better than his, and he would have trouble with his job. *Applicant's Spouse's Statement*, at 1-2. The applicant's spouse states that he would be very lonely and heartbroken if his family was destroyed, and he would have a severe psychological problem. *Id.* at 3. The applicant's spouse states that the applicant's departure with their children would create a tremendous hardship due to what would happen if they returned. *Id.* The AAO notes the previously discussed issues related to the applicant's return to China. Considering the circumstances presented, the AAO finds the applicant has established that her spouse would suffer extreme hardship if he were to remain in the United States without her.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and

humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's misrepresentation and her unauthorized period of stay.

The favorable factors include the applicant's U.S. citizen spouse and two children, her lack of a criminal record, extreme hardship to her spouse and an approved Form I-130, Petition for Alien Relative.

The AAO finds that the immigration violations of the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.