

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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



U.S. Citizenship
and Immigration
Services

H₂

PUBLIC COPY

JAN 21 2010

FILE:

Office: LIMA

Date:

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)

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.

Perry Rhew
Chief, Administrative Appeals Office

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

The record establishes that the applicant, a native and citizen of Brazil, attempted to procure entry to the United States in 1991 by presenting a fraudulent nonimmigrant visa. She was thus found 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 having attempted to procure entry to the United States by fraud and/or willful misrepresentation. The applicant is applying for a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with her lawful permanent resident spouse and U.S. citizen daughter.

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 for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Officer in Charge*, dated May 30, 2007.

In support of the appeal, counsel submits a brief and referenced exhibits. The entire record was reviewed and considered in arriving at a decision on the appeal.

To begin, counsel asserts that the officer in charge should have more fully explored the intent of the applicant's fraud/misrepresentation, and its recency. Counsel notes that the applicant only committed a single act of misrepresentation, in 1991, and said misrepresentation was innocent, as opposed to willful. *Brief in Support of Appeal*.

The Department of State Foreign Affairs Manual states, in pertinent part, that in order to find an alien ineligible under section 212(a)(6)(C)(i) of the Act, it must be determined that:

- (1) There has been a misrepresentation made by the applicant;
- (2) The misrepresentation was willfully made; and
- (3) The fact misrepresented is material; or
- (4) The alien uses fraud to procure a visa or other documentation to receive a benefit....

DOS Foreign Affairs Manual, § 40.63 N2. Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis to be persuasive.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). As the record indicates, the applicant attempted to procure entry to the United States in 1991 by presenting a fraudulent nonimmigrant visa. No documentation has been submitted by counsel that proves by a preponderance of the evidence that

the misrepresentation was not willful or fraudulent. Moreover, the fact that there is only one incident of misrepresentation, and that it occurred in 1991, does not negate the fact that the applicant is inadmissible for fraud and/or misrepresentation, as section 212(a)(6)(c)(i) of the Act is applicable to a single act of fraud or willful misrepresentation, irrespective of when said offense occurred. The AAO thus concurs with the officer in charge that the applicant is inadmissible under section 212(a)(6)(C) 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 immigrant 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...

A section 212(i) waiver of the bar to admission resulting from a violation of section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Unlike waivers under section 212(h) of the Act, section 212(i) does not mention extreme hardship to a United States citizen or lawful permanent resident child. In the present case, the applicant's spouse, a lawful permanent resident, is the only qualifying relative, and hardship to the applicant and/or her U.S. citizen daughter, cannot be considered, except as it may affect the applicant's spouse.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include 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 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 applicant's lawful permanent resident spouse asserts that he will suffer extreme hardship were he to remain in the United States while the applicant resides abroad due to her inadmissibility. In a declaration he states that he would suffer emotional hardship due to the long and close relationship he has with his wife; the record establishes that they started dating as teenagers and have been married for 39 years. The applicant's spouse further notes that his U.S. citizen daughter suffers from Lupus and he needs his spouse to help care for her. *Affidavit of* [REDACTED] dated October 24, 2006.

In support, a letter has been provided by the applicant's U.S. citizen daughter's treating physician, confirming that she is suffering from severe Systemic Lupus Erythematosus [a chronic, inflammatory autoimmune disorder] and depression, and noting that for medical reasons it is important that the applicant be able to visit her daughter. *Letter from* [REDACTED] dated July 9, 2007. In addition, a letter has been provided by [REDACTED] confirming that the applicant's daughter's medical condition weighs heavily on the applicant's spouse and he is worried about her and is counting on the applicant to come to the United States to help with her care, particularly as her condition deteriorates. *Letter from* [REDACTED] [REDACTED], dated July 19, 2007.

Finally, a letter has been provided by the applicant's daughter, who confirms that in 1997, she became incapacitated by Lupus. Her joints swell, she oftentimes experiences high fevers, and she is suffering from depression. Moreover, she notes that she has pain in her chest from breathing, she has experienced anemia and hair loss, and she oftentimes can not get out of bed due to extreme fatigue. She asserts that her husband works six days a week to keep a roof over their heads, food on the table, and pay for her medications; they are unable to afford a personal care attendant. Although she notes that her father has played an integral role in her care, she needs her mother to assist her father in caring for her. *Affidavit of* [REDACTED], dated October 24, 2006.

Based on a thorough review of the record, the AAO concludes that were the applicant unable to reside in the United States, the applicant's spouse would suffer extreme hardship. The record establishes that the applicant and her spouse have been married since 1971. The applicant's spouse needs the support the applicant provides on a day to day basis, in light of their daughter's grave medical and mental health situation and its inherent burden on immediate family members. A prolonged separation at this time would cause hardship beyond that normally expected of one facing the inadmissibility of a spouse.

The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she relocates abroad based on the denial of the applicant's waiver request. In this case, the applicant asserts that he would suffer emotional hardship due to separation from his daughter, who has been diagnosed with grave medical and mental health conditions and is dependent on him for her care and survival, and financial hardship, due to the substandard economy in Brazil. The record reflects that although the applicant is employed in Brazil, her spouse sends her money from the United States.

Based on the applicant's spouse's need to remain in the United States to help care for his daughter who is suffering from medical and mental health hardships, and the substandard economy in Brazil, as documented by counsel, the AAO finds that the applicant's spouse would experience extreme hardship were he to relocate abroad to reside with the applicant due to her inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that her lawful permanent resident spouse would suffer extreme hardship were the applicant unable to reside in the United States. Moreover, it has been established that the applicant's lawful permanent resident spouse would suffer extreme hardship were he to relocate to Brazil to reside with the applicant. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. 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 . . . 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-Morales, 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 favorable factors in this matter are the extreme hardship the applicant's lawful permanent resident spouse and U.S. citizen daughter would face if the applicant were to remain in Brazil due to her inadmissibility, community ties, support letters, gainful employment, the apparent lack of a

criminal record, and the passage of more than 18 years since the offense which lead to the applicant's inadmissibility. The unfavorable factor in this matter is the applicant's attempted entry to the United States by fraud and/or willful misrepresentation.

While the AAO does not condone the applicant's actions, the AAO finds that the hardship imposed on the applicant's spouse as a result of the applicant's inadmissibility outweighs the unfavorable factors in this application. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The waiver application is approved.