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



U.S. Citizenship
and Immigration
Services

DATE: APR 05 2013

OFFICE: GUANGZHOU, CHINA

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), section 212(i) and section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), § 1182(i) and § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Guangzhou, China 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)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude, section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having obtained an immigration benefit through fraud or the willful misrepresentation of a material fact, and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking admission within ten years of his last departure.¹ The applicant is the spouse and father of U.S. citizens. He seeks waivers of inadmissibility pursuant to section 212(h), section 212(i) and section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(h), 8 U.S.C. § 1182(i), and 8 U.S.C. § 1182(a)(9)(B)(v), respectively, in order to reside in the United States.

The Field Office Director concluded that the applicant had established that the bar to his admission would result in extreme hardship for a qualifying relative, but denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, based on his inadmissibility under section 212(a)(9)(C)(i) of the Act. The Field Office Director further found that the applicant had failed to demonstrate that a favorable exercise of discretion was warranted in his case. *Field Office Director's Decision*, dated March 4, 2011.

On appeal, the applicant states that his spouse has been suffering from major depression since 2007, that medical treatment for depression in China is outdated and that Chinese society is not friendly to anyone with mental health issues. He also asserts that his son has asthma, requiring him to see a doctor regularly and that, given the air pollution in China, relocation would endanger his son's life. He also states that without his financial assistance, his spouse must depend on her sister for food and a place to live. *Form I-290B, Notice of Appeal or Motion*, dated March 26, 2011; *Applicant's statement on appeal*, dated March 26, 2011.²

The record of evidence includes, but is not limited to: statements from the applicant and his spouse; medical documentation relating to the applicant's spouse and son; a psychological evaluation of the applicant's spouse; tax returns and W-2 Wage and Tax Statements for the applicant and his spouse; evidence of the applicant's spouse's financial obligations; country conditions information on China; documentation relating to the applicant's criminal record; and evidence submitted in support of

¹ Although the Field Office Director's decision also initially states that the applicant is inadmissible pursuant to section 212(a)(2)(D)(iii) of the Act, 8 U.S.C. § 1182(a)(2)(D)(iii), i.e., coming to the United States to engage in unlawful commercialized vice, it appears that this finding is a misstatement of the applicant's inadmissibility under section 212(a)(2)(A)(i) of the Act. The record does not indicate that the applicant is inadmissible pursuant to section 212(a)(2)(D)(iii) of the Act.

² The AAO notes that the record contains a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, dated October 12, 2010, which indicates the applicant was previously represented. However, pursuant to regulation at 8 C.F.R. § 292.4(a), as well as the instructions to the Form I-290B, a new Form G-28 must be submitted when an appeal is filed with the AAO. This requirement applies to all appeals filed on or after March 4, 2010. See 75 Fed. Reg. 5225 (Feb. 2, 2010). In that the appeal was not submitted with a new Form G-28, the applicant will be considered to be self-represented, although any evidence submitted by prior counsel will be considered.

previously-filed immigrant visa petitions and adjustment applications. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Prior to considering the applicant's eligibility for waivers of his inadmissibilities, the AAO will review his immigration history, which began with his initial arrival in the United States on October 18, 1994. The applicant arrived without documents and applied for asylum under the name of [REDACTED]. An immigration judge denied the applicant's request for asylum and ordered him excluded and deported on October 24, 1995. The applicant appealed to the Board of Immigration Appeals (BIA). Although the BIA dismissed his appeal on January 16, 1997, the applicant did not depart the United States. On June 5, 1998, he was convicted of Conspiracy to Commit the Crime of Cheating at Gambling, [REDACTED]. On July 8, 1998 he was removed from the United States by the legacy Immigration and Naturalization Service (INS), now United States Citizenship and Immigration Services (USCIS) under section 235(b) of the Act. The applicant's removal barred him from returning to the United States for five years pursuant to section 212(a)(9)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i)(I).³

On August 9, 1999, the applicant entered the United States under his true identity with a K-1 fiancé(e) visa, based on a Form I-129F, Petition for Alien Fiancé(e), filed by the woman who would become his first wife. The applicant applied for adjustment of status on August 19, 1999, which was denied by legacy INS on August 7, 2004.⁴ On September 8, 2006, the applicant married his current spouse, who filed a Form I-130, Petition for Alien Relative, on his behalf on February 2, 2007. The applicant concurrently submitted a Form I-485, Application to Register Permanent Residence or Adjust Status. Although USCIS approved the Form I-130, it denied the Form I-485 on August 2, 2007. On September 11, 2007, an immigration judge granted the applicant voluntary departure from the United States on or before October 11, 2007. The applicant departed the United States for China on September 28, 2007 and has remained there.

The AAO turns first to the Field Office Director's discretionary denial of the applicant's Form I-601 based on his inadmissibility under section 212(a)(9)(C)(i) of the Act, which states:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

³ As the applicant has resided outside the United States since 2007, he is no longer inadmissible to the United States under section 212(a)(9)(A)(i)(I) of the Act.

⁴ It appears that the applicant's Form I-485 may have been terminated as early as March 15, 2001, following the withdrawal of the Form I-130 filed on his behalf by his first spouse. The record, however, does not reflect that USCIS issued a decision prior to August 7, 2004.

and who enters or attempts to reenter the United States without being admitted is inadmissible.

The Field Office Director found the record to establish the applicant's inadmissibility under both prongs of 212(a)(9)(C)(i) of the Act, based on his 1999 entry into the United States after having accrued unlawful presence in excess of one year and after having been removed. However, the bar imposed by section 212(a)(9)(C)(i) of the Act applies only to individuals who, having accrued more than a year of unlawful presence or having been ordered removed, enter the United States without inspection or attempt to do so. In the present case, the applicant returned to the United States on August 9, 1999 as a K-1 fiancé. Therefore, his admission to the United States is not barred pursuant to section 212(a)(9)(C)(i) of the Act and the AAO withdraws the Field Office Director's finding in this regard.

Section 212(a)(2)(A) of the Act states, in pertinent part:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The record reflects that on June 5, 1998, in the [REDACTED] in and for the [REDACTED] the applicant pled guilty to Conspiracy to Commit The Crime of Cheating at Gambling, [REDACTED]. He was sentenced to 36 months in prison, with credit for 72 days served, and ordered to pay restitution in the amount of \$1,524 and an administrative assessment fee of \$25. The Court suspended the applicant's prison term and placed him on probation for an indeterminate period not to exceed three years.

In the present matter, the AAO does not find it necessary to consider at length whether the applicant's conviction bars his admission to the United States under section 212(a)(2)(i)(I) of the Act. The applicant, as discussed below, is inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act. As a result, he must satisfy section 212(i) and section 212(a)(9)(B)(v) waiver requirements, which are more restrictive than those in section 212(h) of the Act. Should the applicant establish extreme hardship under sections 212(i) and 212(a)(9)(B)(v) of the Act, he will also satisfy the requirements for a waiver of his potential inadmissibility pursuant to section 212(a)(2)(A)(i)(I) of the Act.

Section 212(a)(6)(C) states in pertinent part:

- (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 chapter is inadmissible.

⁵ The applicant was convicted under the identity of [REDACTED] the name he used at the time of his arrival in the United States on October 18, 1994.

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.

As previously noted, the applicant entered the United States on August 9, 1999 with a K-1 fiancé(e) visa, based on the Form I-129F, Petition for Alien Fiancé(e), filed by the woman who would become his first wife. In obtaining his K-1 visa, the applicant did not reveal to the consular officer who conducted his interview that he had previously been in the United States under another identity, had been convicted of a crime while in the United States or had been formally removed from the United States.

The Supreme Court in *Kungys v. United States*, 485 U.S. 759 (1988) found that the test of whether concealments or misrepresentations were "material" was whether they could be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, i.e., to have had a natural tendency to affect, the legacy Immigration and Naturalization Service's (now USCIS') decisions. In addition, *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements of a material misrepresentation are as follows:

A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

- a. the alien is excludable on the true facts, or
- b. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (AG 1961).

In obtaining his K-1 visa in 1999, the applicant did not inform the consular officer who interviewed him of his U.S. immigration history, thereby concealing the fact that he was statutorily inadmissible to the United States until 2003 based on his July 8, 1998 removal. Further, by not acknowledging that he had previously resided in the United States under another identity and had been convicted of a crime under that identity, he shut off lines of inquiry which were relevant to his eligibility for a K-1 visa and would likely have resulted in the denial of his visa application. Accordingly, the AAO finds the applicant's failure to provide the consular officer with his full immigration history to be a material misrepresentation and to bar his admission to the United States under section 212(a)(6)(C)(i) of the Act.

Section 212(a)(9)(B) states in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record reflects that the applicant was not in a lawful immigration status on April 1, 1997, the effective date of the unlawful presence provisions under the Act and, therefore, accrued unlawful presence from this date until his July 8, 1998 removal from the United States. The applicant returned to the United States on August 9, 1999 as a K-1 visa beneficiary. On August 19, 1999, he filed a Form I-485 seeking adjustment of status based on the immigrant visa petition filed by his then spouse. The Form I-485 was denied by USCIS on August 7, 2004 and the applicant's accrual of unlawful presence began the following day, continuing until he filed his second Form I-485 on February 2, 2007. With the denial of the applicant's second adjustment application on August 2, 2007, his accrual of unlawful presence resumed, ending on September 11, 2007, the date on which an immigration judge granted him voluntary departure. The applicant departed the United States on September 28, 2007 in compliance with the immigration judge's order. Based on this history, the AAO finds that the applicant has accrued more than a year of unlawful presence in the United States and that he is subject to section 212(a)(9)(B)(i)(II) of the Act as he is seeking admission within ten years of his 2007 departure.

A waiver of inadmissibility under section 212(i) or section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission would result in extreme hardship for a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or other family members will be considered only insofar as it results in hardship to a qualifying relative, which, in the present case, is the applicant's spouse. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then

assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez*, 21 I&N Dec. 296, 301 (BIA 1996).

In the present case, the Field Office Director concluded that the applicant had established that his spouse would experience extreme hardship as a result of his inadmissibility and the AAO concurs in this finding. Our determination that the applicant's spouse's hardship in China would exceed that normally created by relocation has taken note of her fears for her son's health if the family moves to China, as well as her concerns for her own health; the record's documentation of her chronic Hepatitis B infection and her son's asthmatic condition; the country conditions materials reporting the role that air pollution in China's large cities has played in the dramatic increase in asthma among urban children; and the likelihood that she and her son would relocate to Jiangmen, a large manufacturing center in Southern China, where the applicant has been employed since 2007. We have further considered the lower standards of medical care in China, as reported in the Country Specific Information for China, issued by the Department of State on January 28, 2013, as well as this publication's warning that many medications commonly used in the United States are not available in China, may not contain the same ingredients or may be counterfeit. The report also indicates that poor sterilization practices in China's medical facilities pose health hazards to those seeking medical care. As a result, we find that when the health issues faced by the applicant's spouse and her son, the obstacles she would be likely to encounter in obtaining adequate medical care and medication, and the difficulties and disruptions normally created by relocation are considered in the aggregate, the applicant has established that returning to China would result in extreme hardship for his spouse.

We also find that when the applicant's spouse's documented medical problems, including chronic Hepatitis B and migraine headaches; the depression she is experiencing as a result of the separation of her family, as discussed in a June 2, 2010 statement prepared by psychiatrist [REDACTED] and her responsibilities as a single parent for a child with asthma and bilateral hearing loss are combined with the hardships that regularly result from the separation of families, the record also establishes that she would experience extreme hardship if the waiver application is denied and she continues to reside in the United States. Accordingly, the applicant has established statutorily eligibility for a waiver under sections 212(a)(9)(B)(v) and 212(i) of the Act and the AAO turns to a consideration of whether or not he is eligible for a favorable exercise of discretion.

In discretionary matters, the applicant 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 "balance 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 applicant's case are his unlawful presence in the United States, his misrepresentation at the time of his 1999 visa interview, his 1998 gambling conviction, and his failure to comply with an order of removal. The mitigating factors include the applicant's U.S. citizen spouse and children, the extreme hardship to his spouse if the waiver application is denied, his son's medical conditions, his compliance with the 2007 order of voluntary departure and the absence of a criminal record other than his 1998 gambling offense.

The AAO acknowledges the negative factors in this case and finds them to be serious. Nevertheless, we find that when taken together, the mitigating factors in the present case outweigh the adverse factors such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for an application for a waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden.

ORDER: The appeal is sustained.