



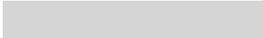
U.S. Citizenship
and Immigration
Services

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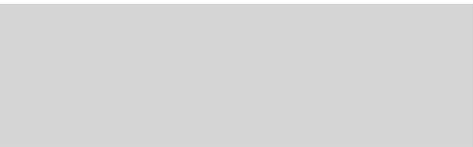


DATE: **AUG 18 2015**

FILE: 

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) and under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:


Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

Thank you,


for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Philadelphia, Pennsylvania, denied the application and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before us on motion. The motion will be granted and the AAO decision dismissing the appeal will be withdrawn.

The record reflects that the applicant is a native and citizen of the United Kingdom who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude and seeks a waiver of inadmissibility to remain in the United States.

The field office director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), and concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly. *See Decision of the Field Office Director*, dated January 12, 2008.

On appeal the applicant asserted that his U.S. citizen spouse would experience extreme hardship due to medical complications. On August 27, 2010, we issued the applicant a request for evidence in order to determine whether he was also inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for failing to disclose his convictions when he sought admission into the United States as a visitor under the Visa Waiver Program. The applicant stated that he was convicted on [REDACTED] 1980, for shoplifting, on [REDACTED] 1981, for handling stolen goods (receiving), and on [REDACTED] 1983, for burglary and theft (non-dwelling). He asserted that at the time of his entry into the United States on January 9, 2003, he believed that since it was 20 years from the date of his crimes and under British law the criminal convictions were expunged, that he answered truthfully that he did not have a criminal record when he sought entry into the United States. The applicant had not disputed that he is inadmissible for having committed crimes involving moral turpitude, but claimed that he is not inadmissible for willful misrepresentation of his criminal record.

On appeal we determined that the applicant was inadmissible for fraud or misrepresentation under section 212(a)(6)(C)(i) of the Act. We further found that the applicant had established that his spouse would experience hardship due to separation from him, but that he had not established that his spouse would experience extreme hardship if she were to relocate abroad to reside with him. *See Decision of the AAO*, dated April 7, 2011.

On motion, filed on May 5, 2011, and received at the AAO on January 13, 2015, the applicant contended in the Notice of Appeal or Motion (Form I-290B), that we erred by not properly considering that the applicant's conviction occurred more than 15 years ago and that he had been rehabilitated; that we erred in finding that he had misrepresented a material fact; and that additional information being submitted demonstrates his spouse would suffer extreme hardship if she were to join him in the United Kingdom. On November 25, 2014, the applicant submitted a Certificate of Death showing that his spouse had died on [REDACTED] 2014, and asserted that he qualifies for a waiver pursuant to section 204(l) of the Act and a USCIS policy memorandum dated December 16, 2010, regarding petitions and applications after the death of a qualifying relative.

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.

To find the applicant inadmissible under section 212(a)(6)(C)(i) of the Act, his failure to disclose his criminal record must be a material misrepresentation and by the misrepresentation he must have sought to procure admission into the United States. In *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1960; AG 1961), the Attorney General has found that a misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

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

The Attorney General states that “[w]hile a misrepresentation as to identity will generally have the effect of shutting off an investigation, so also will misrepresentations as to place of residence, prior exclusion or deportation from the United States, criminal record, Communist Party membership, etc.” *Id.* at 448.

We concluded that the record establishes that the applicant's misrepresentation of his criminal history was made in connection with his entry into the United States and was willful as it was deliberately made with knowledge of its falsity and the immigration officer would not have known of the applicant's convictions unless the applicant divulged them. As we found that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for misrepresentation, he must demonstrate eligibility for a waiver under section 212(i) of the Act.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section states 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.

In dismissing the applicant's appeal we concluded that although the applicant had established that his spouse would experience extreme hardship if she remains in the United States without him, the applicant made no claim of hardship to his spouse if she were to join him to live in the United Kingdom. Thus, we found that based upon the record, the applicant failed to establish extreme hardship to a qualifying family member.

The record reflects that a Petition for Alien Relative (Form I-130) filed on behalf of the applicant by his U.S. citizen spouse was approved on January 3, 2006. An application for waiver of inadmissibility (Form I-601) was denied by the field office director on January 12, 2008, and an Application to Adjust Status (Form I-485) filed by the applicant was denied on the same date based on the denial of the Form I-601. The applicant timely appealed the denial of the Form I-601 and subsequently submitted the current motion to reopen our April 2011 decision dismissing the appeal.

As noted, on November 25, 2014, the applicant submitted a Commonwealth of Pennsylvania Certificate of Death showing that his spouse died on [REDACTED], 2014. With respect to the spouse's death and its impact on the applicant's Form I-601, the new section 204(l) of the Act, which became effective on October 28, 2009, before the instant motion was adjudicated, states as follows:

l) Surviving Relative Consideration for Certain Petitions and Applications-

(1) IN GENERAL- An alien described in paragraph (2) who resided in the United States at the time of the death of the qualifying relative and who continues to reside in the United States shall have such petition described in paragraph (2), or an application for adjustment of status to that of a person admitted for lawful permanent residence based upon the family relationship described in paragraph (2), and any related applications, adjudicated notwithstanding the death of the qualifying relative, unless the Secretary of Homeland Security determines, in the unreviewable discretion of the Secretary, that approval would not be in the public interest.

(2) ALIEN DESCRIBED- An alien described in this paragraph is an alien who, immediately prior to the death of his or her qualifying relative, was--

(A) the beneficiary of a pending or approved petition for classification as an immediate relative (as described in section 201(b)(2)(A)(i));

(B) the beneficiary of a pending or approved petition for classification under section 203 (a) or (d);

(C) a derivative beneficiary of a pending or approved petition for classification under section 203(b) (as described in section 203(d));

(D) the beneficiary of a pending or approved refugee/asylee relative petition under section 207 or 208;

(E) an alien admitted in 'T' nonimmigrant status as described in section 101(a)(15)(T)(ii) or in 'U' nonimmigrant status as described in section 101(a)(15)(U)(ii); or

(F) an asylee (as described in section 208(b)(3)).

The applicant qualifies for relief under section 204(l) of the Act as the record indicates that he was residing in the United States when his spouse died, he continues to reside in the United States at this time, and he is the beneficiary of an approved family-based visa petition. Consequently, the applicant is eligible to obtain a waiver based on extreme hardship to his spouse, the petitioner of the Form I-130 filed on his behalf, who is now deceased.

Pursuant to a USCIS policy memorandum dated December 16, 2010, section 204(l) of the Act allows USCIS to grant a waiver application even if "the qualifying relationship that would have supported the waiver has ended through death," and the fact that the qualifying relative has died will be "deemed to be the functional equivalent of a finding of extreme hardship..." *USCIS Policy Memorandum PM-602-0017: Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act*, dated December 16, 2010. The memorandum is in effect in adjudicating any petition or application to which section 204(l) applies on or after October 28, 2009, regardless of whether the case was filed before October 28, 2009. The applicant's waiver application was filed before October 28, 2009, and the appeal of the denial of the Form I-601 that is the subject of the current motion was pending on that date. Consequently, section 204(l) of the Act and the December 16, 2010, policy memorandum apply to the applicant's case, and we find that the fact that the qualifying relative has died is deemed to be the functional equivalent of a finding of extreme hardship, and the applicant has therefore established extreme hardship pursuant to section 212(i) of the Act.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. at 301. For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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).

Id. at 301.

The BIA further stated that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.*

The unfavorable factors in this case include the applicant's fraud or misrepresentation in procuring admission to the United States and his convictions for crimes involving moral turpitude in the United Kingdom. The favorable factors include the extreme hardship established in this application, letters of support for the applicant from his spouse's family, his apparent lack of a criminal record in the United States, and the passage of more than 30 years since his convictions and more than 12 years since his immigration violation of entering the United States through fraud or misrepresentation. Although the applicant's immigration violations are serious, the record establishes that the positive factors in this case outweigh the negative factors and a favorable exercise of discretion is warranted.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The motion is granted and the underlying decision of the AAO dismissing the appeal is withdrawn.