

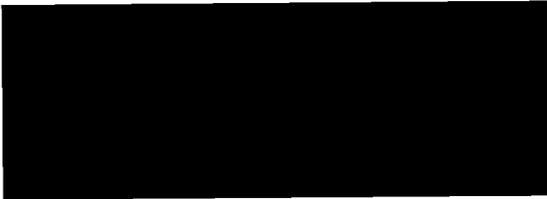
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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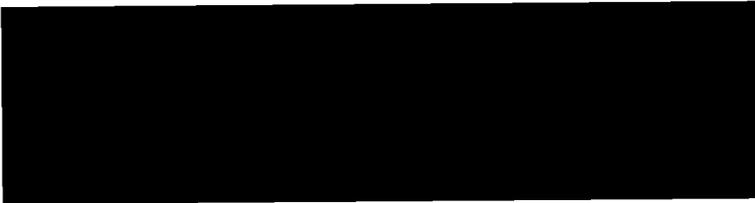
Applicant:



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 District Director, Bangkok, Thailand, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of New Zealand who resided in the United States from April 19, 1999, when he was paroled in the public interest, to August 2003, when he was removed to New Zealand. He was found to be 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 to the United States through fraud or misrepresentation of a material fact. The applicant is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to return to the United States and reside with his spouse and stepchildren.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated January 3, 2008.

On appeal, counsel for the applicant asserts that U.S. Citizenship and Immigration Services (USCIS) failed to properly analyze both the positive and negative factors in the case and considered factors not appropriate for the process of determining eligibility for the waiver. *See Notice of Appeal to the AAO (Form I-290B)*. Counsel states that the applicant submitted documentation establishing that his wife suffers from an emotional disorder, and USCIS erred in dismissing a statement from a clinical social worker and in substituting the adjudicator's own medical conclusion for the assessment of her physician concerning the onset of her chronic depression. *Brief in Support of Appeal* at 4-5. Counsel further contends that USCIS failed to consider evidence of the behavioral disturbances of the applicant's younger daughter or of her father's medical condition. *Brief* at 6. Counsel additionally asserts that evidence of financial hardship and the applicant's wife's "meager income" as a teaching assistant in a rural school district were disregarded and states that USCIS's statements concerning the applicant's wife bankruptcy and "living within one's means" demonstrate arrogance on the part of the adjudicator. *Brief* at 6-7. Counsel further maintains that the applicant's wife is being forced to choose between living apart from her husband and abandoning her children. *Brief* at 7. In support of the appeal counsel submitted affidavits from therapists and school officials concerning the applicant's older daughter, medical records for the applicant's older daughter, a letter from a licensed clinical social worker concerning the applicant's wife, a letter from the applicant's wife's physician, medical records for the applicant's wife, an article concerning the alien smuggling case in which the applicant served as a material witness, and an article on public understanding of depression. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (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:

- (1) The [Secretary] may, in the discretion of the [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 [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.

The record contains references to hardship the applicant's stepchildren would experience if the waiver application is denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(i) of the Act, and hardship to the applicant's children will not be separately considered, except as it may affect the applicant's spouse.

Section 212(i) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. 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, 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.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

In addition, the Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United States," and that, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted.) The AAO notes that the applicant's wife has remained in the

United States since the applicant's departure. Separation of family will therefore be carefully considered in the assessment of hardship factors in the present case.

The record reflects that the applicant is a fifty-six year-old native and citizen of New Zealand who resided in the United States from April 1999, when he was paroled into the United States in the public interest, to August 18, 2003, when he was removed to New Zealand. The applicant had previously entered the United States with a B1/B2 visa and was employed without authorization with a trucking company in Missouri. The applicant withdrew an application for admission as a B1 visitor in 1997 and reentered the United States on July 7, 1998 with a fraudulent New Zealand passport and B1/B2 visa under the name [REDACTED]. He is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for having procured admission to the United States through fraud or misrepresentation of a material fact.¹ The record further reflects that the applicant's wife is a forty-eight year-old native and citizen of the United States. The applicant currently resides in New Zealand and his wife resides in Sikeston, Missouri with her two daughters.

Counsel for the applicant asserts that the applicant's wife is suffering emotional and psychological hardship due to separation from the applicant and the effects of their separation on her two daughters. In support of these assertions counsel submitted a psychological evaluation of the applicant's wife and a letter from her physician stating that she was being treated for depression. *See Letter from [REDACTED] dated April 19, 2007.* [REDACTED] further states,

[S]he has begun to suffer from chronic depression related to the lack of interaction with her spouse. She is currently at a point in her depression where she is needing to take daily medication for treatment and clearly this is negatively impacting her overall health. . . She does not have health insurance and had difficulty making ends meet, which only adds to her stress . . . *Letter from [REDACTED] dated April 19, 2007.*

In response to a statement in the decision denying of the waiver application that the "flavor" of [REDACTED] letter "gives the impression that the applicant's spouse's medication has been recent," and a statement that "a large portion of Americans experience depression and anxiety on a daily basis and take prescription medication," counsel submitted a second letter from [REDACTED] as well as medical records for the applicant's wife. The letter states that the applicant's wife "has been on antidepressant medications essentially daily with occasional discontinuations since 2001." *Letter from [REDACTED] dated February 15, 2008.* [REDACTED] further states, "I think this should shed some light on the issue regarding the chronicity of her depression. It has certainly been present for at least seven years now," and the depression "has been worsened by the loss of association with her spouse." *Letter from [REDACTED] dated February 15, 2008.*

¹ The record reflects that the applicant may also be inadmissible under section 212(a)(9)(B) of the Act for having accrued unlawful presence in the U.S., but, as a waiver under section 212(a)(9)(B)(v) of the Act has the same criteria as a waiver under section 212(i) of the Act, the AAO will not examine this inadmissibility further.

In her declaration the applicant's wife states that she is very concerned about the effects of separation from their stepfather on her daughters and further states that they formed a very strong bond with the applicant. She further states,

My youngest daughter [REDACTED] has a behavioral problem. She was diagnosed with Oppositional Defiance Disorder several years ago. I have been told it is a condition that will only get worse. . . Within the past 6 months her behavior has become worse at home, at times violent and it has become necessary to seek professional help. . . . She tells me she is angry about her parents' divorce and about [REDACTED] deportation. I cannot bear this stress alone. [REDACTED] requires a huge amount of exhaustive attention. [REDACTED] is very supportive of us all. If he were able to return home, his support and presence would be extremely beneficial to [REDACTED] *Affidavit of [REDACTED]* dated July 18, 2007.

In support of these assertions counsel submitted with the waiver application a letter from the applicant's daughter's pediatrician and records dating back to 2002 stating that she has oppositional-defiant disorder and possible features of borderline personality disorder with "intense explosive interactions," and she is at times very violent. *See medical records and letter from [REDACTED]*, dated March 26, 2007. The decision denying the waiver application does not address this evidence, but concludes that hardship to the applicant's daughters "cannot be entertained" because they are not qualifying relatives. The decision further states, "We do not find that the absence of a stepfather precludes a child from experiencing a healthy childhood." *Decision of the District Director*, dated January 3, 2008.

Evidence of additional hardship was submitted after the appeal was filed, including documentation related to the applicant's older stepdaughter's psychological condition and the recent discovery that she suffers from depression and had been engaging in self-mutilation or "cutting" since she was in the eighth grade. *See Letter from [REDACTED]*, dated May 11, 2009. The letter states that this behavior, which is engaged in to relieve anxiety, began at the time the applicant was deported and the stress brought on by the deportation appears to be the "root cause" of the cutting. A letter from a clinical therapist states that the applicant's stepdaughter began counseling shortly after this behavior was discovered, but she has been unable to attend subsequent appointments due to financial constraints. *See Letter from [REDACTED]* dated June 1, 2009.

Although the applicant's daughters are not qualifying relatives, evidence of the emotional effects of a physical or mental condition of a child of a qualifying relative is relevant in assessing a claim of extreme hardship. Documentation submitted with the waiver application further indicates that the applicant's younger daughter has suffered from a serious behavioral problem for several years, and the applicant's wife, who is also under treatment for depression, states that she cannot handle the stress of this situation without the support of the applicant. In light of the psychological condition of the applicant's wife and the additional hardship posed by her daughters' psychological problems, and the financial hardship created by loss of the applicant's income, the AAO finds that the applicant's wife is suffering extreme hardship as a result of separation from the applicant. The AAO

notes that according to income tax returns submitted with the affidavit of support, the applicant earned most of the family's income through employment as a truck driver, and the record indicates that the applicant's wife has filed for bankruptcy since his departure and received public assistance in the form of medical insurance for her daughters. The record further establishes that the applicant's wife lost her medical insurance, and, as noted by her physician, this has created financial difficulty since she requires daily medication for her depression. When considered in the aggregate, the emotional and psychological hardship caused by separation from the applicant and the added stress of her daughters' psychological conditions, combined with the financial hardship brought on by the applicant's removal amount to hardship beyond that which would normally be expected as a result of removal or inadmissibility for the applicant's wife.

The record further indicates that the applicant's wife would be unable to relocate to New Zealand with her daughters because their father resides in the United States and would not allow them to leave the country. *See Affidavit of Understanding Regarding Jurisdiction* dated March 12, 2004. The applicant's wife would therefore experience significant emotional hardship if she relocated to New Zealand and were separated from her daughters, particularly in light of her psychological condition and the psychological problems her daughters are already experiencing. The applicant's wife has resided in the United States her entire life, and the emotional hardship that would result from separation from her daughters as well as from her parents, when combined with the hardship of abandoning her employment and severing her ties to the United States, would rise to the level of extreme hardship for the applicant's wife. As noted above, separation from close family members is a primary concern in assessing extreme hardship. *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998).

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. 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(i) 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 “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 negative factor in this case is the applicant’s use of a fraudulent passport to enter the United States and his previous unlawful presence and employment in the United States. The AAO further notes that although the applicant has no criminal record in the United States, the applicant has been convicted in New Zealand of obscene language and “resisting police”, breach of social security act, and driving with excess breath alcohol level. There is no indication that any of these convictions would constitute a separate ground of inadmissibility against the applicant, and the AAO further notes that the arrests occurred in 1974, 1979, and for the most recent conviction of driving under the influence of alcohol, in 1993.

The positive factors in this case include the applicant’s family ties to the United States, including his wife and stepdaughters, and hardship to the applicant’s wife and stepdaughters if he is denied admission to the United States. The record further indicates that although the applicant worked without authorization as a truck driver for at least one company found to be smuggling aliens into the United States to perform this work, he later cooperated with authorities and was granted parole in exchange for agreeing to serve as a witness against the employers in this case. Although the applicant’s immigration violations cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an application for 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. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.²

ORDER: The appeal is sustained.

² The AAO notes that the applicant also requires an approved Form I-212, Application for Permission to Reapply for Admission to the United States After Removal (Form I-212), based on his 2003 removal. The applicant’s Form I-212 was denied on January 3, 2008 based on the denial of his Form I-601. As the AAO has determined that his Form I-601 should be approved, the director shall reopen the Form I-212 and render a new decision it on its merits.