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



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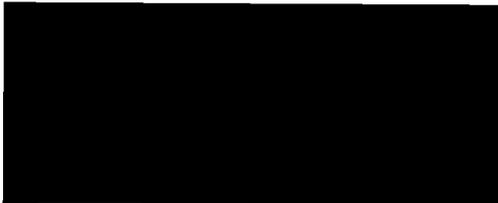
DATE: **SEP 30 2011** OFFICE: MILWAUKEE, WISCONSIN

FILE: 

IN RE: 

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 PETITIONER:



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 that reads "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Milwaukee, Wisconsin, 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 has resided in the United States since November 18, 1993, when she presented a photo-substituted passport with a B-1/B-2 nonimmigrant visitor visa to obtain admission into the United States.¹ She 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 attempted to procure admission to the United States through fraud or misrepresentation. The applicant is the spouse and child of U.S. Citizens and is the beneficiary of an approved Form I-130 Petition for Alien Relative. The applicant filed this I-601 Waiver of Grounds of Inadmissibility on March 4, 2009 and appealed the Field Office Director's decision on November 6, 2009. The applicant was then granted asylum status by an Immigration Judge on December 21, 2009. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her U.S. Citizen spouse and three children.

The Field Office Director concluded that the applicant failed to demonstrate extreme hardship to her qualifying relative beyond the normal consequences of deportation and denied the application accordingly. *See Decision of Field Office Director* dated October 5, 2009.

The AAO notes that the applicant did not apply for adjustment of status as an asylee under section 209(b) of the Act, but rather under section 245 of the Act, based on a Petition for Alien Relative filed by her spouse. *See Application to Register Permanent Residence or Adjust Status (Form I-485)* filed by the applicant on November 2, 2008.² Further, even if the applicant had applied for adjustment of status as an asylee, section 209(c) of the Act does not automatically waive inadmissibility under section 212(a)(6)(C)(i) of the Act, but rather allows an applicant to seek a waiver for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. The applicant would be eligible to seek a waiver under section 209(c) of the Act by filing an Application By Refugee For Waiver of Grounds of Excludability (Form I-602) if she filed for adjustment of status under section 209(b) of the Act. But as an applicant for adjustment of status under section 245 of the Act, she does not qualify for this waiver and must establish extreme hardship to a qualifying relative as provided in section 212(i) of the Act.

On appeal, counsel asserts the Field Office Director abused its discretion and erred by denying the I-601 waiver. *See brief in support of appeal*, December 2, 2009. The applicant's spouse contends he will suffer extreme hardship if he were to relocate to China or if he were separated from the applicant. The applicant's spouse explains if he had to relocate to China, he would 1) potentially lose his U.S. Citizenship, 2) then have difficulties visiting his family in the United States, 3) be separated from his immediate family, 4) suffer from social isolation, 5) lose his 11 year old

¹ The applicant was paroled into the United States that day.

² Again, it is acknowledged this I-601 waiver and I-485 Application to Register Permanent Residence or Adjust Status were filed before the applicant was granted asylum status by an Immigration Judge on December 21, 2009.

restaurant business, 6) suffer from financial hardship due to the Chinese social compensation fee for having more than one child, as well as difficulty earning money in China, 7) suffer from emotional distress because of his responsibilities towards his family in the United States, 8) lose his property in the United States, 9) suffer anxiety due to relocating his young children to China, and 10) also suffer anxiety if his children were to remain in the United States without their parents. *Affidavit of applicant's spouse*, March 3, 2009. The applicant's spouse claims he would suffer from the following if he were separated from the applicant: 1) extreme emotional distress, 2) financial inability to pay for airfare to China, 3) financial difficulties arising from the applicant's loss, 4) difficulty providing for his parents, 5) emotional distress from potential separation from his children, and 6) extreme emotional distress due to the separation between his children and their mother. *Id.*

The record includes, but is not limited to, birth, marriage, divorce and naturalization certificates, affidavits from the applicant and her spouse, a psychological report, photocopies of permanent resident cards and other identification documents, documentation about the China Kitchen Restaurant, Wikipedia articles on Chinese cuisine, income tax returns, wage comparison reports, research articles, evidence of property ownership and valuation, copies of Form I-864 affidavits of support, printouts about living in Fuzhou, China, documentation from [REDACTED] documentation on immigrating to China, and evidence regarding China's one-child policy. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

In the present case, the record reflects that in 1993 the applicant presented a photo-substituted passport with a B-1/B-2 nonimmigrant visa and falsely claimed she had two children in China and would be persecuted for violating the one-child policy in order to procure admission to the United States. The applicant is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for having attempted to procure admission to the United States through fraud or misrepresentation. The

applicant's qualifying relatives are her U.S. Citizen spouse and U.S. lawful permanent resident parents.

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).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The 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. *Id.* at 566. The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.*

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In support, the applicant's spouse submits a declaration outlining the difficulties he would face either separated from the applicant or living with the applicant in China.³ He first discusses his psychological and emotional issues: "When my father and stepmother came to live with us in 2004, the stress and anxiety increased because then what happens to [REDACTED] affects not just me but also my father, stepmother and my brother and soon my half sister. But it is the birth of my children in 2006 and 2009 that has made the stress unbearable... I have found myself more prone to severe headaches and insomnia... I am constantly tired. I am constantly anxious... Life seems like a struggle and I wonder how much longer I can cope." *Affidavit of applicant's spouse*, March 3, 2009. A psychologist, [REDACTED], who had been seeing the applicant's spouse for approximately 10 months, confirms a previous diagnosis of "Major Depressive Disorder, as [REDACTED] was already at that time showing symptoms of persistent sadness, sleep disturbance, worry, weight loss, difficulty focusing on and performing tasks at work and home, loss of sexual interest, and suicidal ideation, but no attempts." *Psychological evaluation*, February 27, 2009. The applicant's spouse also discusses his relationship and duties towards his parents, as well as his worries about what would happen to them if he relocated to China. *Affidavit of applicant's spouse*, March 3, 2009.

The applicant's spouse further contends he would suffer significant financial difficulties upon relocation to China. He states, "I do not expect to earn much money in China given my work skills and work experience. I think I would be lucky to earn \$300 a month." *Id.* In support, the applicant submits printouts as evidence of a restaurant manager and a waiter / waitress's salary in Fuzhou, China. *See printouts of Chinese salaries*, February 23, 2009. The applicant's spouse also presents evidence on the two houses he owns, as well as how much money he would make if he had to sell those houses and personal property to establish a life in China. He then asserts he

³ The applicant discusses hardship to her lawful permanent resident parents in her affidavit; however, little evidence is submitted to support her assertions regarding them.

“would have to see [his] business, again because [he] must release cash from [his] asserts to provide [him] with money to start a new life. This is more emotionally difficult for [him] than selling [his] houses... [his] business is a part of [him]. [He] is very upset that [he] might have to give up what [he has] worked so hard to build.” *Affidavit of applicant’s spouse*, March 3, 2009. The applicant’s spouse discusses his community ties in the United States, stating he does not have similar ties in China as he was a university student when he left. *Id.*

The applicant’s spouse explains the difficulty of visiting his family in the United States should he relocate to China. He asserts he “is no longer a citizen of China. China does not recognize dual citizenship. For [him] to live in China, either [redacted] would have to sponsor [him] for the Chinese equivalent of a green card or [he] would have to surrender [his] U.S. Citizenship... [His] allegiance is to the U.S. but now [he is] in [a] situation that if [he] want[s] to be with [his] wife, [he] will have to surrender that allegiance... What would a U.S. consulate think when [he] come[s] to] apply for a visitor visa as a person who surrendered his U.S. citizenship? [He] would think ‘Why bother with this man? We give him [an] opportunity to be [a] U.S. citizen and then he throws it away. Why should we allow him back into our country?’” *Id.* In support of his assertions, the applicant’s spouse submits documentation on Chinese immigration. *See Rules Governing the Implementation on the Entry and Exit of Aliens*, Consulate General of the People’s Republic of China, undated, *see also Measures or the Administration of Examination and Approval of Foreigner’s Permanent Residence in China*, AsianLII, Laws of the People’s Republic of China, undated.

The applicant’s spouse then sets forth difficulties he would face in China. He claims that although he knows how to cook American Chinese food, he would have to undergo extensive training on cooking Fujian Chinese food, which he could not do because he would have to start working immediately. *Id.* The applicant submits Wikipedia articles on American Chinese food and Fujian Chinese food.⁴ The applicant’s spouse also asserts he does not have sufficient business relationships required to set up a business in China. *Id.* In support, the applicant submits an article on the importance of business relationships in China. *See Business relationships in China: The Advantage of Quanxi, China Trade Winds*, undated. Without a business, the applicant’s

⁴ Online content from *Wikipedia* is subject to the following general disclaimer:

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spouse again states he and the applicant would not be able to earn a sufficient income: "The research I have done suggests I would earn only \$1,824 a year! If I am lucky enough to get a job as a restaurant manager, then I might earn \$5,473 a year. I know many things are cheaper in China, but even so, this would be a huge change in household income." *Affidavit of applicant's spouse*, March 3, 2009. The applicant's spouse additionally claims their lack of income would be exacerbated by difficulties with respect to their children. In his affidavit he explains, "In the Fujian Province, couples who have more than one child must pay what is called the 'social compensation fee.' For having three children, the fee is six times the couple's annual income. If [they] do not pay the social compensation fee, then [the] children are not eligible for public services." *Id.*, *See also articles on China's one-child policy*. The applicant's spouse worries about whether the three children will learn English in China, as he "would not succeed at helping them to be fluent. [His] own English is quite imperfect." *Id.* The applicant's spouse then explains, contrary to the Field Office Director's decision, it would not be "a simple matter" of enrolling the children in an English school in China, as the "school costs \$10,000 a year just for kindergarten and gets more expensive as the children grow older." *Id.* This is supported by a printout from the Xiamen International School. *See Xiamen International School Tuition Fees 2008-2009*, February 20, 2009. The applicant's spouse also asserts the Field Office Director similarly erred in the conclusion that the children, as U.S. Citizens, do not have to go to China, they can remain in the United States. The applicant's spouse explains, "how would the children feel if their parents [left] them behind? They would believe their parents abandon[ed] them. They would think their parents do not care about them, do not love them... I know from my own experience what it feels like to be abandoned by a parent." *Id.* The applicant's spouse then discusses how, in any event, no one in his or the applicant's family could take care of the three young children. *Id.*

The applicant's spouse explains how the hardship of separation from the applicant would be extreme. He states he could not raise the children to become "normal and emotionally healthy" adults when his "heart and soul are dying from the loss of [redacted] [and he] would feel equally devastated knowing how much [the applicant] suffers for the loss of her children." *Affidavit of applicant's spouse*, March 3, 2009. The applicant's spouse describes the financial difficulties he would suffer if the applicant left, including loss of business income, the inability to afford airfare to China for himself and the children, as well as the difficulties in balancing a work / life schedule with the three children without the applicant's assistance. *Id.*

In this case, the AAO finds the applicant has established the qualifying relative would suffer extreme hardship upon relocation to China. As aforementioned, the record reflects the applicant was granted asylum status by an Immigration Judge. The applicant has thus proven she has a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 101(a)(42) of the Act, 8 U.S.C. §1101(a)(42). In his affidavit in support of the applicant's asylum application, the applicant's spouse states:

According to the Chinese family planning policy in my locality in China, my wife has to undergo sterilization because she does not have any legal status in the U.S.A. and gave birth to three children. If my wife were forced to return back to

China, our children and I would definitely go back to China with her. Because the Chinese government continues to implement coercive family planning policy through comprehensive and often intrusive measures to assure the compliance of family planning policy, I strongly believe that my wife will suffer a forced sterilization if she goes back to China because she already had three children against the family planning policy. She would also be fined and subject to other penalties for violating the family planning policy.

Affidavit of the applicant's spouse, December 3, 2009. The U.S. Department of State Human Rights Report confirms:

Regulations requiring women who violate family-planning policy to terminate their pregnancies still exist in the 25th, 42nd, and 22nd provisions of the Population and Family Control Regulation of Liaoning, Jilin, and Heilongjiang provinces, respectively. An additional 10 provinces--Fujian, Guizhou, Guangdong, Gansu, Jiangxi, Qinghai, Sichuan, Shanxi, Shaanxi, and Yunnan--require unspecified "remedial measures" to deal with unauthorized pregnancies (see section 6)...

The law requires each person in a couple that has an unapproved child to pay a "social compensation fee," which can reach 10 times a person's annual disposable income. The law grants preferential treatment to couples who abide by the birth limits.

Social compensation fees were set and assessed at the local level. The law requires family-planning officials to obtain court approval before taking "forcible" action, such as detaining family members or confiscating and destroying property of families who refuse to pay social compensation fees. However, in practice this requirement was not always followed, and national authorities remained ineffective at reducing abuses by local officials.

The population control policy relied on education, propaganda, and economic incentives, as well as on more coercive measures. Those who violated the child limit policy by having an unapproved child or helping another do so faced disciplinary measures such as social compensation fees, job loss or demotion, loss of promotion opportunity, expulsion from the party (membership is an unofficial requirement for certain jobs), and other administrative punishments, including in some cases the destruction of private property.

U.S. Department of State, 2010 Human Rights Report: China, April 8, 2011. In addition, a psychological evaluation of the applicant's spouse reveals a "diagnosis of Major Depressive Disorder, as Peter was already at that time showing symptoms of persistent sadness, sleep disturbance, worry, weight loss, difficulty focusing on and performing tasks at work and home, loss of sexual interest, and suicidal ideation, but no attempts... [a]fter seeing Peter regularly over

the last nine months... it became clear that he suffers anxiety, and the resulting fatigue, exhaustion, and depression, on a daily basis on account of his fear that his wife will not be allowed to remain in the United States.⁵ *Psychological evaluation*, February 27, 2009. It is evident if the applicant returned to China, despite her well-founded fear of persecution in that country, the spouse's fear and anxiety would undoubtedly continue or be severely exacerbated. Additionally, the spouse may himself be subject to penalty due to the existence of his and the applicant's three children in light of China's one-child policy. Other than psychological and emotional hardship, the applicant has also submitted sufficient evidence of significant financial hardship. The applicant's spouse has not only demonstrated he would suffer financial difficulties in China due to greatly diminished income as well as payment of the social compensation fee, but he would also have to leave a restaurant business he and the applicant have spent several years establishing. The AAO thus finds when individual hardship factors are considered in the aggregate, the applicant has established extreme hardship to her U.S. Citizen spouse upon relocation to China.

The AAO also finds the applicant has established extreme hardship to a qualifying relative upon separation. As set forth above, the applicant's spouse suffers from psychological and emotional difficulties due to anxiety and fear about whether the applicant can remain in the United States. The spouse's anxiety would be increased due to the prospect of the applicant's return to persecution in China. It is also evident from the printouts on airfare to China that the \$6400 it would cost to fly the family to visit the applicant would constitute a significant portion of the applicant's spouse's net income, which adds to the financial difficulties experienced if the applicant were no longer available to help her spouse with the business and the children. *See printouts from www. Kayak.com*, February 20, 2009, *see also* 2007 Form 1040 U.S. Individual Income Tax Return.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). 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.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Morales*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

⁵ Despite the Field Office Director's statement that "[f]ortunately, your spouse is being treated for his depression by both therapy and with Chinese herbs and some western medicine at times," the psychological evaluation is clear that the applicant's spouse still suffers from psychological issues. *See Decision of Field Office Director*, October 5, 2009, *see also psychological evaluation*, February 27, 2009.

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez 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 states 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.* at 301.

The favorable factors include the extreme hardship to the applicant's spouse, the applicant's grant of asylum, the applicant's lack of a criminal history, the applicant's business and property ties in

the United States, and the applicant's residence of a long duration in the United States. The unfavorable factors include the applicant's 1993 presentation of a photo-substituted passport as well as falsely stating she feared persecution because she had two children in China in violation of the one-child policy, when in fact she had no children at that time.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

ORDER: The appeal is sustained.