

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
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DATE: **APR 23 2012** Office: NAIROBI, KENYA



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 APPLICANT:



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,

Perry R. New
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director (FOD), Nairobi, Kenya and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Somalia who 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 sought to procure admission to the United States through fraud or misrepresentation. The applicant is the son of a U.S. citizen father and a lawful permanent resident mother 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 reside in the United States with his parents.

The FOD concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative and denied the application accordingly. *See Decision of Field Office Director* dated September 15, 2009.

On appeal, the applicant's father requests that his son be forgiven on humanitarian grounds. The applicant's father asserts that his son was a minor when the misrepresentation occurred and that he would suffer extreme hardship if his son's waiver application is denied.

The evidence of record includes, but is not limited to: statements from the applicant and his father; letters from the applicant's father's employers; copies of medical records; identification documents; and school acceptance letters of the applicant's siblings. The entire record was reviewed and all relevant evidence considered in reaching 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.

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.* 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.* at 566.

The BIA 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, 631-32 (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, “[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., In re 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.

The record reveals that the applicant misrepresented his identity on Form I-590, Registration for Classification as Refugee, dated June 26, 2002, as [REDACTED] and his birthdate as January 1, 1985. The record indicates that the applicant's birthdate is [REDACTED], and the applicant was 13 years old instead of 17 years old at the time his Form I-590 was completed. The applicant does not dispute the falsity of the information regarding his name and birthdate on Form I-590. However, he states that he was a "minor when the documents were submitted . . . consequently [he] did not knowingly or willingly commit fraud."

Based on the record before us, the AAO finds the applicant to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for having sought admission to the United States through fraud or the willful misrepresentation of a material fact. In reaching this decision, the AAO has considered the applicant's age at the time of his misrepresentation. We observe that an exception is provided under section 212(a)(2)(A)(ii)(I) of the Act for individuals who, prior to turning 18, committed a single crime involving moral turpitude more than five years prior to applying for admission. Also, individuals who are under 18 do not accrue unlawful presence pursuant to section 212(a)(9)(B)(iii)(I) of the Act. However, section 212(a)(6)(C)(i) of the Act does not include such an age-based exception, and the AAO cannot assume such an exception was intended. *See In re Jung Tae Suh*, 23 I&N Dec. 626 (BIA 2003) (citing *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999) and noting that where a provision is included in one section of law but not in another, it is presumed that the Congress acted intentionally and purposefully). Accordingly, the applicant is subject to section 212(a)(6)(C)(i) of the Act despite the fact that he was a minor at the time of his misrepresentation.

Section 212(a)(6)(C)(i) of the Act may be violated by committing fraud or willfully misrepresenting a material fact. *See Mwongera v. INS*, 187 F.3d 323, 330 (3d Cir. 1999); *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). Fraud consists of "false representations of a material fact made with knowledge of its falsity and with intent to deceive." *See Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956). In the immigration context, a finding of fraud requires that an individual "know the falsity of his or her statement, intend to deceive the Government official, and succeed in this deception." *In re Tijam*, 22 I&N Dec. 408, 424-25 (BIA 1998). Willful

misrepresentation does not require an intent to deceive, only the knowledge that the representation is false. *See Parlak v. Holder*, 57 F.3d 457 (6th Cir. 2009) (citing to *Witter v. I.N.S.*, 113 F.3d 549, 554 (5th Cir. 1997); *see also Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995); *In re Tijam*, *supra*. “The element of willfulness is satisfied by a finding that the misrepresentation was deliberate and voluntary.” *See Mwongera*, *supra*.

The record contains evidence that the applicant submitted a refugee application containing a false name and birthdate. The record contains no evidence that the applicant’s misrepresentation was involuntary or that he did not know that the name and the birthdate on the form were false. Although the record indicates that the applicant was illiterate and provided his fingerprint on the form in lieu of his signature, the AAO cannot presume that he did not know that the information regarding his identity was false. Furthermore, the record contains evidence that during his immigrant-visa interview, the applicant admitted to misrepresenting himself when he applied for refugee status. The AAO finds the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for having sought admission to the United States through fraud or willful misrepresentation of a material fact.

The AAO now turns to the question of whether the applicant has established that a qualifying relative would experience extreme hardship. The applicant’s qualifying relatives are his U.S. citizen father and his mother who is a lawful permanent resident of the United States.

In his statements, the applicant’s father states that he is an elderly man and suffers from mental stress regarding his son’s situation. He states that the applicant lives in Kenya, though as a Somali refugee, he has no legal residency in Kenya and is under a constant threat of arrest and deportation. He states that if his son’s visa is denied, he would be deported to Somalia, and it would be like “sentencing him to death.” He also states that he is financially drained because he pays a “weekly fine (bribe)” to Kenyan police to keep the applicant from being deported to Somalia. The applicant’s father states that his family financially depends on him as his wife has health problems and does not work, and two of his children are in college and also do not work. He supports the applicant in Kenya, his blind mother, and the orphaned children of his deceased brother. He is having health issues and is not sure how much longer he can continue to work. He had hernia surgery in 2008. He states that he and his family need the applicant’s help.

The record indicates that the applicant’s parents, all of his siblings, and his five cousins reside in the United States. The applicant’s father is employed as a part-time security officer by Allied Barton Security Services and as a full-time custodian by Dart Container Corporation, earning \$12.10 an hour. Letters from [REDACTED] dean of the Interactive College of Technology, indicate that two of applicant’s siblings were accepted as students. Medical documentation in the record indicates that the applicant’s father was scheduled for an inguinal hernia surgery in 2008. The record also indicates that the applicant’s mother is at risk for blindness and has high eye pressure and abnormal optic nerves.

The AAO finds the record to establish that the applicant's father would experience extreme hardship if the applicant remains in Kenya. In reaching this conclusion, we have noted the applicant and his family are Somali refugees who were displaced to Kenya. The applicant's parents and his siblings were accepted by the U.S. refugee program and now live in the United States. The applicant is the only family member living in Kenya as a displaced refugee. The applicant's father fears for the applicant's life should he be deported to Somalia. The applicant's mother is having vision problems with a risk of going blind and is financially dependent on the applicant's father. The applicant's father is 82 years old working two jobs, one full-time and one part-time, to support his family. The record suggests that the father is the sole income provider for the family. Considering the applicant's father's age, health, employment, concerns about the applicant's safety and well-being, and his extended family obligations, the AAO concludes that he is experiencing extreme hardship in the United States as a result of separation from the applicant.

The AAO also finds the record to establish that the applicant's father would experience extreme hardship if the waiver application is denied and he returns to Somalia. The AAO notes that the applicant's father was granted refugee status, and therefore, either was persecuted in Somalia in the past or has a well-founded fear of future persecution on account of a protected ground. The record indicates that the applicant's father continues to fear returning to Somalia; he describes the possibility of the applicant's deportation to Somalia as a "death sentence." Additionally, the U.S. Department of State (DOS) issued a travel warning for Somalia on August 19, 2011, which indicates assassinations, suicide bombings, and indiscriminate armed attacks in civilian populated areas are frequent in Somalia. The DOS adds that "there is no U.S. Embassy or other U.S. diplomatic presence in Somalia; consequently, the U.S. Government is not in a position to assist or effectively provide services to U.S. citizens in Somalia. In light of the serious security threats, the [DOS] recommends that U.S. citizens avoid all travel to Somalia."

When the specific hardship factors noted above and the hardships routinely created by the separation of families are considered in the aggregate, the AAO finds that the applicant has established that his qualifying relatives would face extreme hardship if the applicant's waiver request is denied. The applicant has established statutory eligibility for a waiver under section 212(i) of the Act.

In that the applicant has established that the bar to his admission would result in extreme hardship to a qualifying relative, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter 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, 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 factor in the present case is the applicant's material misrepresentation for which he now seeks a waiver. The mitigating factors include the applicant's age at the time of the misrepresentation; his refugee status in Kenya; his U.S. citizen father and legal permanent resident mother in the United States; the extreme hardship to his parents if the waiver application is denied; and his family ties to the United States.

The AAO finds that the immigration violation committed by the applicant was serious in nature and cannot be condoned. Nevertheless, when taken in the aggregate, the mitigating factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C)(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.