

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



U.S. Citizenship
and Immigration
Services

[REDACTED]

#5

DATE: **DEC 14 2012**

OFFICE: BANGKOK

FILE: [REDACTED]

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:
[REDACTED]

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,
Georgia Reyes

Ron Rosenberg
Acting 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 Bangladesh who was found to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission into the United States through willful misrepresentation of a material fact. The applicant was also found to be inadmissible under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the country for more than one year and seeking readmission within ten years of his departure from the United States. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130). He seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) and section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to live in the United States with his U.S. citizen spouse.

The District Director concluded that the applicant established that extreme hardship would be imposed on a qualifying relative, but denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on discretionary grounds. *See Decision of the District Director*, dated July 22, 2011.

On appeal, counsel contends that the Director made errors of fact and law in denying the applicant's waiver. *See Form I-290B, Notice of Appeal or Motion* (Form I-290B), received August 23, 2011.

The record contains, but is not limited to: Form I-290B and counsel's brief; Forms I-601 and counsel's brief; Forms I-130; financial documents; marriage, birth, and naturalization certificates; passport copies; airline tickets; letters from physicians; a psychological evaluation; and statements from the applicant, his wife, son and relatives. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant entered the United States with a nonimmigrant visa on April 30, 1994 using a fraudulent passport and visa. The applicant applied for asylum in September 1994, later withdrew his application and was granted voluntary departure by the immigration judge. The applicant departed from United States timely within the voluntary departure order on December 30, 1997. The applicant applied for and was issued a nonimmigrant visitor visa on September 27, 1998 under a different name and date of birth. The applicant entered the United States in October 1998 with an altered passport and this visa and returned to Bangladesh in 2001.

On appeal, counsel contends that any bar to admission would not be invoked because the applicant departed the United States within the allotted time per the voluntary departure order. While the statute states that the applicant would not need to apply for permission to seek admission to the United States under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), the applicant still is inadmissible for entering the United States with a fraudulent passport and visa under section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

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.

Counsel also asserts that the applicant did not commit fraud when he entered the United States using a different name and date of birth in 1998, because he hired an agent to complete the process; thus, fraud was committed by the agent and not the applicant. An applicant cannot disavow responsibility for any misrepresentation made on the advice of another unless the applicant is lacking the capacity to exercise judgment. *See Memorandum from Donald Neufeld, Act. Assoc. Dir., Dom. Ops., Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int. Ops., Pearl Chang, Act. Chief, Off. of Pol. and Stra., U.S. Citizenship and Immigration Serv., to Field Leadership, "Section 212(a)(6) of the Immigration and Nationality Act, Illegal Entrants and Immigration Violators,"* dated March 3, 2009, citing 9 FAM 40.63, N. 5.2. Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis to be persuasive. The record reflects that when questioned by the consular officer in Bangladesh, the applicant admitted to using a fake passport and visa to enter the United States in 1998. The record also contains the visa issued to the applicant on September 27, 1998, with a different name and date of birth. The record does not contain any evidence of lack of capacity on the part of the applicant, nor does it have evidence of an agent assisting the applicant to obtain his passport and visa. As the applicant falsified his identity to a U.S. government official in order to procure a visa and gain admission into the United States, the AAO concurs that the applicant is inadmissible under section 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i).

Section 212(a)(9)(B) of the Act provides in pertinent part:

- (i) [A]ny alien (other than an alien lawfully admitted for permanent residence) who-

...

- (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.

Counsel asserts that the applicant did not accrue unlawful presence during his time in the United States from 1998 to 2001 because he did not make a subsequent entry that triggered his unlawful presence. The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. *See Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006) (departure triggers bar because purpose of bar is to punish recidivists). The bar to admissibility that requires reentry without admission into the United States is section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C). However, section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C) does not apply to the applicant.

The record reflects that the applicant entered the United States in October 1998 and departed the United States in 2001. The applicant accrued unlawful presence in the United States for a period in excess of one year. Based on the foregoing, he was found to be inadmissible to the United States pursuant to 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.

An application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *See Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). There has been no final decision made on the applicant's immigrant visa application, so the applicant, as of today, is still seeking admission. The applicant's last departure occurred in 2001. It has now been more than ten years since the departure that made the applicant inadmissible pursuant to section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B). A clear reading of the law reveals that the applicant is no longer inadmissible. Based on the record, the AAO finds that the applicant is not inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The waiver filed pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) is therefore unnecessary.

However, the applicant still requires a waiver of inadmissibility under section 212(i) of the Act, which is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member, which includes the United States citizen or lawful permanent resident spouse or parent of the applicant. Hardship to the applicant and his child can be considered only insofar as it results in hardship to a qualifying relative. In the present case, the applicant's spouse is the only qualifying relative. 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-Morales*, 21 I&N Dec. 296, 301 (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*, 22 I&N Dec. 560, 565 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or U.S. 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 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).

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 v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (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 contains references to hardship the applicant's child would experience if the waiver application were 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 under sections 212(a)(9)(B)(v) and 212(i) of the Act. In the present case, the applicant's spouse is the only qualifying relative for the waiver under sections 212(i) and 212(a)(9)(B)(v) of the Act, and hardship to the applicant's child will not be separately considered, except as it may affect the applicant's spouse.

The AAO notes that although the Director found the applicant established that extreme hardship would be imposed on his qualifying relative, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d. Cir. 2004). The AAO concurs with the Director that the applicant established that the qualifying relative experiences extreme hardship. The question turns on discretionary grounds. 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 *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 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 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 Director determined that five adverse factors outweighed the favorable considerations in the applicant's case. Among the negative factors were entering the United States twice using fraudulent or altered documents, being unlawfully present for more than one year before departing in 2001, and concealing the applicant's entry and stay in the United States from 1998 to 2001 in various applications and interviews. While the AAO does not condone the applicant's immigration violations, especially where the applicant had ample opportunities to present his entry and stay from 1998 to 2001, the AAO finds that the favorable factors outweigh the adverse factors in balancing equities. The favorable considerations include the applicant's U.S. citizen wife and son, the extreme hardship to his wife if the applicant were refused admission, his sixteen-year marriage, his stable employment while in the United States, his family ties in the United States, and his absence of a criminal record.

The AAO finds that when taken together, the favorable factors in the present case outweigh the adverse factors; therefore, the AAO sustains the applicant's waiver application on discretionary grounds.

ORDER: *The appeal is sustained.*