

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



U.S. Citizenship
and Immigration
Services



115

Date: DEC 18 2012 Office: PROVIDENCE, RHODE ISLAND

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)

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Providence, Rhode Island, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native of Colombia and a citizen of Canada who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure a United States immigration benefit through fraud or the willful misrepresentation of a material fact. The record indicates that the applicant is married to a U.S. citizen and the mother of a U.S. citizen stepchild. She is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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 her spouse and stepchild.

The Acting Field Office Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting Field Office Director*, dated August 23, 2011.

On appeal the applicant, through counsel, claims that the applicant did not intend to "misrepresent or conceal a fact" during her adjustment of status interview. *See Counsel's Letter in Support of Motion to Reconsider and/or Appeal, attached to Form I-290B, Notice of Appeal or Motion*, dated September 19, 2011. Moreover, she timely retracted the misrepresentation. *Id.* However, if the applicant is determined to be inadmissible, she has established that her husband will suffer extreme hardship if she is not allowed to remain in the United States.

The record includes, but is not limited to, counsel's briefs; statements from the applicant, her husband, and in-laws; psychological documents for the applicant's husband; medical documents for the applicant; articles on mental-health disorders; financial documents; photographs; and documents pertaining to the applicant's attempted entry on October 4, 2008. The entire record was reviewed and considered in arriving at a decision on the appeal.

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.

....

- (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides, in pertinent part, that:

- (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 immigrant 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.

A waiver of inadmissibility under section 212(i) of the Act is dependent first on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or her stepchild can be considered only insofar as it results in hardship to a qualifying relative. The applicant's husband is the only qualifying relative in this case. 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-Moralez*, 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*, the Board of Immigration Appeals (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 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 v. INS*, 138 F.3d 1292, 1293 (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.

In the present case, the record indicates that on October 4, 2008, the applicant attempted to enter the United States from Calgary, Canada; however, she was denied entry as an intending immigrant. On March 24, 2009, the applicant entered the United States with her father and has remained since that time. During her adjustment of status interview on June 16, 2011, the applicant answered “No” when asked if she had ever been denied entry to the United States. At the end of the interview, the officer asked the applicant if she was refused entry on October 4, 2008, and she replied “Yes.” The officer asked why she failed to disclose that information when asked the first time, and she stated she did not hear the officer ask that question.

Counsel asserts that the applicant’s first answer to the officer’s question is not a material misrepresentation, because “the denial of entry is not an inadmissible offense.” Additionally, she did not intend to “conceal the denial of admission,” and she did not procure an immigration benefit through her misrepresentation. Moreover, she timely retracted her answer when asked about the attempted entry on October 4, 2008, only a “few seconds after the first question.”

In order for the applicant to be inadmissible under INA § 212(a)(6), the applicant’s misrepresentations not only must be willful, but they must be material. A misrepresentation is generally material only if by making it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, which is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys*, 495 U.S. at 771-72.

The Board has held that a misrepresentation made in connection with an application for visa or other documents, or for 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 have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

"It is not necessary that an 'intent to deceive' be established by proof, or that the officer believes and acts upon the false representation," but the principal elements of the willfulness and materiality of the stated misrepresentations must be established. 9 FAM 40.63 N3 (citing *Matter of S and B-C*, 9 I&N Dec. 436, 448-449 (A.G. 1961) and *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975)).

In regards to the willfulness of the applicant's stated misrepresentations, 9 FAM 40.63 N5, in pertinent part, states that:

The term "willfully" as used in INA 212(a)(6)(C)(i) is interpreted to mean knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately made an untrue statement.

Additionally, "materiality" is defined in 9 FAM 40.63 N6.1, which states, in pertinent part, that:

Materiality does not rest on the simple moral premise that an alien has lied, but must be measured pragmatically in the context of the individual case as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa. The Attorney General has declared the definition of "materiality" with respect to INA 212(a)(6)(C)(i) to be as follows: "A misrepresentation made in connection with an application for a visa or other documents, or with entry into the United States, is material if either: (1) The alien is inadmissible 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 have resulted in a proper determination that he or she be inadmissible." (*Matter of S- and B-C*, 9 I & N 436, at 447.)

Even though the applicant claims that she did not hear the officer ask the question regarding previous refusals of entry into the United States, the record establishes that the question was asked and she answered "No." Additionally, it does not have to be established that the applicant procured the benefit for which she was applying, in this case adjustment of status, only that the misrepresentation shuts off a line of inquiry relevant to her eligibility for the benefit. Further, in her affidavit dated July 18, 2011, the applicant claims that when she was refused entry on October 4, 2008, she was traveling with her father

as a minor, and he never told her why they were refused entry. However, the record establishes that the applicant was traveling alone that day, she was 20 years old at the time, she claimed her mother was in Colombia and her father was in Yemen, she was carrying excessive luggage and a one-way ticket, she was extremely uncooperative with the immigration officer, and she was refused entry as an intending immigrant.

Moreover, the record fails to establish that the applicant made a timely retraction. The AAO acknowledges that a timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground of ineligibility. 9 FAM 40.63 N4.6. Whether a retraction is timely depends on the circumstances of the particular case. *Id.* In general, it should be made at the first opportunity. *Id.* If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview. *Id.* In *Matter of R-R-*, 3 I&N 823 (BIA 1949), the Board was determining whether the alien in question had committed perjury, where an essential element of such offense was that “the offense must be otherwise complete,” for purposes of section 101(f)(6) of the Act, 8 U.S.C. § 1101(f)(6), which provides that an individual who has given false testimony cannot be found to be a person of good moral character. The Board found that the perjury was not complete in *Matter of R-R-* because the alien timely and voluntarily retracted his false statements before the immigration official became aware through other means of the falsity of his statement. In the present case, the applicant’s first opportunity to make a retraction was immediately after she answered “No” when asked about being refused entry into the United States. She did not admit to being previously refused entry until she was specifically questioned about the incident on October 4, 2008; therefore, she cannot be said to have been acting voluntarily and timely before the officer’s question regarding her refusal of entry in 2008. As the applicant did not retract her statement at her first opportunity to do so, and when she did retract her statement it was not voluntarily, her retraction was not timely. Therefore, the applicant’s misrepresentation was willful and material, and based on this misrepresentation, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

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

Describing the hardship he would suffer should he join the applicant in Canada, in his affidavit dated July 18, 2011, the applicant’s husband states he will suffer a “severe decline in [his] physical and mental health” should he join the applicant in Canada. He states he suffers from mood disorders and generalized anxiety disorder, and he is unable to perform activities of daily living. In his statement dated June 28, 2011, [REDACTED] diagnoses the applicant’s husband with mood disorder and generalized anxiety disorder. He states he has been treating the applicant’s husband for nine years, he sees him approximately once a month for individual therapy, and he has prescribed three medications that the applicant’s husband takes daily. The applicant’s husband claims that his doctor is “instrumental” in helping him deal with his mental health problems, he has a “close relationship” with him, he looks up to him as his mentor, and relocating to Canada would be an extreme hardship because he could not continue to receive treatment from his doctor. [REDACTED] indicates that “it would be

dangerous” for the applicant’s husband to move to Canada away from his family and therapeutic support. The applicant’s husband states he is very close with his family, and without his parents’ presence in his life, his mental health would be worse than it is right now. In their statement dated July 15, 2011, the applicant’s in-laws state they have never been separated from their son for more than a week, and they “cannot imagine the emotional devastation” they all will experience should a separation occur.

The applicant’s husband states he has a child from a previous relationship, and he and the applicant are expecting a daughter. Documentation establishes that the applicant was due with their child on December 11, 2011. He states he wants their daughter to have all the benefits of being an American and to be close to her grandparents. Further, he states that if he moves to Canada, he would be unable to see his son, with whom he is close, as often as he currently does, two to three days a week, and it would affect their relationship. The applicant’s in-laws state they have helped raise their grandson, but he primarily resides with his mother, and the applicant’s husband could not take him to Canada. The applicant’s in-laws state they cannot imagine their son and grandson separated and the emotional damage they would suffer if separated.

The applicant’s husband claims they will have to give up their home, which would be devastating because they made many sacrifices to buy it. He also states that he is currently unemployed and they are dependent on his parents financially. He plans to open a minimarket that his father will finance, and eventually, he would like to start an ambulance company, because he is a trained paramedic.

Based on the record as a whole, including the applicant’s husband severe mental-health issues and possible disruption of his treatment, his minimal ties to Canada, his separation from his family including his son and parents, the possible loss of their home, employment issues, and financial issues, the AAO finds that the applicant’s husband would suffer extreme hardship if he were to join the applicant in Canada.

Regarding the hardship caused by their separation, the applicant claims that her husband will suffer extreme hardship, as his physical and mental health will decline if they are separated. The applicant’s husband states it will be “impossible” for them to have a long-distance relationship, as he depends on the applicant to help him with his psychological conditions. As noted above, the applicant’s husband has been diagnosed with mood disorder and generalized anxiety disorder. He states he takes three medications daily and could not function normally without them. He claims that he sometimes hears voices and hallucinates. [REDACTED] states the applicant’s husband was initially treated for intermittent explosive disorder, but his symptoms intensified and now he is treated for mood disorder and generalized anxiety disorder. [REDACTED] states he sees the applicant’s husband for individual therapy once a month; however, it can be more frequent “during times of increased symptoms.” The applicant’s husband states his panic attacks and anxiety have worsened since knowing the applicant could be removed to Canada. [REDACTED] states the applicant’s husband’s condition has deteriorated because of his fear of separation from the applicant and their unborn child.

The applicant’s husband claims he has “difficulty doing anything” on his own, he is unable to care for himself, he feels “paralyzed,” and it will be difficult to live without the applicant’s assistance. He states

he will be “devastated” if he is separated from the applicant, as the applicant helps him feel safe. The applicant’s in-laws state the applicant has given their son “the motivation and determination to create a functional adult life.” The applicant’s husband states his doctor noted improvements in his mental health since the applicant has been caring for him; however, without the applicant, he is at “risk of psychiatric deterioration.” [REDACTED] states that the applicant is her husband’s primary support and without her, his condition will worsen. He will become “increasingly unstable and explosive,” he will be unable to function, and “more intensive intervention” may be required. He reports that the applicant’s husband has “unpredictable anger outbursts” and was “so abusive” to people he hired to work on their home that the contractor and crew quit. Additionally, he states that because of the applicant’s husband’s severe symptoms, he cannot work. [REDACTED] states that he has contemplated hospitalizing the applicant’s husband because of concerns about the safety of others; however, with his medications and support of his family, including the applicant, he has “been able to avoid” doing so.

The AAO finds that when the applicant’s spouse’s hardships are considered in the aggregate, specifically his incapacitating psychological issues, inability to maintain employment, and financial issues, the record establishes that the applicant’s husband would face extreme hardship if he remained in the United States in her absence. Accordingly, the applicant has established extreme hardship to a qualifying relative under section 212(i) of the Act.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. 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(h)(1)(B) 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-Morales, 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 factors in the present case include the applicant's misrepresentation and unlawful presence. The favorable and mitigating factors are the applicant's U.S. citizen husband and stepchild, the extreme hardship to her husband if she were refused admission, and the absence of a criminal record.

The AAO finds that although the immigration violations committed by the applicant are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(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. Here, the applicant has met that burden.

ORDER: The appeal is sustained.