



U.S. Citizenship
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Services

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DATE: JUN 06 2012 Office: KENDALL, FL

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,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and a citizen of Cuba 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 having sought a benefit under the Act through fraud or willful misrepresentation. She is the daughter of a Lawful Permanent Resident (LPR) and is seeking a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her LPR mother, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on February 26, 2010.

On appeal, counsel for the applicant asserts that the Field Office Director erred in his findings and that the record establishes that the applicant's LPR mother would experience hardship whether she remains in the United States or relocates to Cuba. *Form I-290B*, received March 26, 2010. The Form I-290B indicates that additional evidence will be submitted within 30 days. As of this date, no additional evidence has been received and the record will be considered complete.

Section 212(a)(6)(C)(i) states in pertinent part:

- (i) In general. 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 chapter is inadmissible.

The record indicates that the applicant arrived in the United States on November 19, 1996 under the Transit Without Visa (TWOV) Program using a fraudulently obtained Colombian passport. When approached by an immigration officer, the applicant immediately stated that she was a Cuban citizen and requested asylum. She later indicated in a sworn statement taken on November 19, 1996 that although she arrived under the TWOV Program, her purpose was to reside in the United States.

In *Matter of Shirdel*, 19 I&N Dec. 33 (BIA 1984), the Board of Immigration Appeals (BIA) held that two Afghani citizens who posed as Turkish nationals were excludable under the second clause of section 212(a)(19) of the former Act, for seeking to enter the United States by fraud or material misrepresentation. The decision specifically states that, "[t]he fraud was their flying to the United States posing as TRWOV [TWOV] aliens in order to submit applications for asylum." *Matter of Shirdel*, at 36.

The AAO also notes that the U.S. First Circuit Court of Appeals held in *Ymeri v. Ashcroft*, 387 F.3d 12, FN 4 (1st Cir. 2004) that:

[t]he transit without visa privilege is a benefit provided under the Immigration laws. An alien who transits through this country as a transit without visa participant has attained one of the benefits listed in section 1182 [212] (a)(6)(C)(i) [of the Act], regardless of whether the alien effects an “entry.”

U.S. v. Kavazanjian, 623 F.2d 730, 732 (1st Cir. 1980) held that:

[T]he actions of an alien who adopts TWOV status solely for the purpose of reaching this country’s border, without any intention of pursuing his journey, constitute a circumvention of the TWOV program and a fraud on the United States.

....

[W]e think an alien’s assumption of TWOV status by itself constitutes an implicit representation that he intends merely to transit through the United States before again departing. *See Reyes v. Neely*, 228 F.2d 609, 611 (5th Cir. 1956), (“A misrepresentation may be made as effectively by conduct as by words”) *Id.* at FN15.

In the present matter, the applicant traveled to the United States under the TWOV program, although it was her intention to remain in the United States. Based on this misrepresentation, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.¹

The record contains, but is not limited to, the following evidence: counsel’s brief in support of the waiver application; a statement from the applicant’s mother; medical records pertaining to the applicant’s mother; a statement from [REDACTED], dated March 24, 2010, pertaining to the applicant’s mother; an employment verification letter for the applicant; copies of the applicant’s tax returns; documents filed in relation to the applicant’s request for asylum, including country condition materials; and copies of birth certificates for the applicant and her mother.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

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

- (1) The Attorney General may, in the discretion of the Attorney General, 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

¹ The AAO notes that the applicant was ordered excluded and deported by an immigration judge on February 2, 1998 but that she has remained in the United States under an order of supervision. Accordingly, she is inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Act as an alien previously ordered removed and must file an Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212).

an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General 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 or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

A waiver of inadmissibility under section 212(i) of the Act is dependent 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 other family members can be considered only insofar as it results in hardship to a qualifying relative. The applicant's LPR mother 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 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*, 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, the AAO considers the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

Counsel asserts on appeal that the applicant’s mother would experience emotional hardship if the applicant were removed. *Form I-290B*, received March 26, 2010. Counsel explains that the applicant’s mother suffers from depression, and depends on the applicant emotionally, financially and physically.

The applicant’s mother submits a statement in which she outlines her history of depression and hypertension, and asserts that her daughter provides for her financially and assists her physically by transporting her to doctors’ appointments and helping her meet her medical needs. *Statement of the Applicant’s Spouse’s Mother*, dated February 10, 2010.

In support of the claim of emotional hardship, the record contains extensive medical documentation relating to the applicant’s mother, including monthly mental health progress reports from 2007, as well as medical reports indicating that she may be vulnerable to glaucoma and is suffering from hypertension. Also found in the record is a statement from [REDACTED], who reports that the applicant’s mother is suffering from Major Depressive Disorder, Recurrent, a condition that requires continued psychiatric follow-up and psychotropic medication. He further states that the applicant is her mother’s caregiver and that she provides the support her mother’s condition requires. To establish that her mother would experience financial hardship in her absence,

the applicant has submitted her tax returns for 2007 and 2008, which reflect that her mother is her dependent.

When the AAO considers the applicant's mother's mental health status, her dependence on the applicant for her care, her financial dependence on the applicant and the other hardships normally created by separation, the AAO concludes that the applicant has established that her LPR mother would experience extreme hardship if the waiver application is denied and she remains in the United States without the applicant.

Counsel asserts on appeal that the applicant's mother would experience extreme hardship upon relocation to Cuba, stating that she would not be able to obtain appropriate medical treatment for her conditions and would be subject to human rights abuses. *Form I-290B*, received March 10, 2009.

While the record does not include country conditions information that establishes the applicant's mother would be unable to obtain medical treatment in Cuba, the AAO notes that the applicant's mother is suffering from a long-term depressive disorder that requires continuing follow-up and acknowledges that a return to Cuba would terminate her current mental health treatment and remove her from the care of doctors who are familiar with her history and medical needs. When the impact of such a disruption on the applicant's mental health and the difficulties and disruptions normally created as a result of relocation are considered in the aggregate, the AAO finds the record to establish that returning to Cuba would result in extreme hardship for the applicant's mother. Accordingly, the applicant has established extreme hardship under section 212(i) of the Act.

Although the applicant has established that a qualifying relative would experience extreme hardship upon relocation or separation, it must still be determined whether she warrants a waiver 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-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300 (Citations omitted).

The AAO finds that the unfavorable factor in this case is the applicant's misrepresentation for which she seeks a waiver. The favorable factors in this case include the applicant's LPR mother, the extreme hardship her mother would experience if the waiver application is denied; and the absence of any criminal record in the United States. Although the applicant's misrepresentation is a serious immigration violation, the favorable factors in this case outweigh the negative factors. Therefore, favorable discretion will be exercised.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.