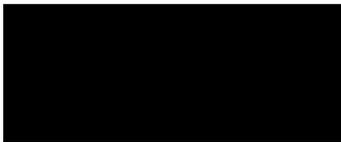


U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

H5



Date: OCT 25 2012

Office: FRANKFURT, GERMANY

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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,

A handwritten signature in cursive script that reads "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native of Iraq and citizen of Germany who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission to the United States through fraud or misrepresentation. The applicant is married to a U.S. citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and their daughter.

The Field Office Director found that the applicant failed to establish that her qualifying relative would experience extreme hardship if he relocated to Germany to live with her and their daughter. The application was denied accordingly. *See Decision of the Field Office Director*, dated August 31, 2010.

On appeal, the applicant's attorney asserts that new facts have arisen that establish the qualifying spouse would experience extreme hardship upon relocation to Germany. The applicant's attorney also contends that the applicant deserves an exercise of favorable discretion in this case.

The record contains an Application for Waiver of Grounds of Inadmissibility (Form I-601); a Notice of Appeal or Motion (Form I-290B); an appeal brief written on behalf of the applicant; relationship and identification documents for the qualifying spouse, the applicant and their daughter; sworn statements from the qualifying spouse and applicant; proof of the qualifying spouse's father's pending Application to Register Permanent Residence or Adjust Status (Form I-485); proof of the qualifying spouse's medical insurance; medical documentation regarding the qualifying spouse and applicant; documentation regarding the qualifying spouse's military service and character; photographs; documentation regarding the qualifying spouse's psychological issues; letters from the qualifying spouse's employers; a Nonimmigrant Visa Application (Form DS-156); and an approved Petition for Alien Fiancée (Form I-129F). 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, in pertinent part:

- (1) The Attorney General [now the Secretary of Homeland Security, "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.

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 her child 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-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*, 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, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record indicates that the applicant attempted to enter the United States under the visa waiver program on July 10, 2004, failing to disclose that she was married to a U.S. lawful permanent resident and that she had been refused a visitor's visa in Germany in May 2004. As a result of the applicant's misrepresentations, she is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act.

The applicant's attorney asserts that the applicant initially was questioned in English, that she was unable to explain her situation, and that she was also unaware that she could not enter the United States to visit her husband under the visa waiver program. The record contains an affidavit from the applicant stating that she did not understand the first officer questioning her and that she told the second officer the truth. However, the applicant's sworn statement clearly indicates that the applicant was questioned in German as to her marital status and that she stated that she was not married. When the applicant was further questioned in German as to why she did not disclose her marriage, the applicant stated that it was because her "papers [were] not finished." *See Record of Sworn Statement in Administrative Proceedings* (Form I-877), dated July 10, 2004. As such, it appears from the record that the applicant, even with an interpreter present, continued to misrepresent her marital status. When an applicant is seeking waiver of inadmissibility, the burden of proof is always on the applicant to establish by a preponderance of the evidence that she is not inadmissible. The burden never shifts to the government to prove admissibility during the adjudication of a benefit application, including an application for a waiver. Section 291 of the Act; *Matter of Arthur*, 16 I&N Dec. 558 (BIA 1976).

Further, the applicant's attorney indicates that she did not intend to immigrate to the United States and therefore did not make a willful material misrepresentation. The BIA has held that the term "fraud" in the Act "is used in the commonly accepted legal sense, that is, as consisting of false representations of a material fact made with knowledge of its falsity and with intent to deceive the other party." *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956). The "representations must be believed and acted upon by the party deceived to" the advantage of the deceiver. *Id.* However, intent to deceive is not a required element for a willful misrepresentation of a material fact. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The record contains evidence that the applicant failed to disclose that she was married and that she had been refused a visitors visa. It is incumbent upon her to resolve any

inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The applicant has not provided sufficient evidence to support her claim that she did not attempt to procure admission to the United States by misrepresenting her marital status or conceal her prior refusal for a visitor's visa. She is therefore inadmissible under section 212(a)(6)(C)(i) of the Act.

The Field Office Director found that the applicant established that her qualifying relative is suffering extreme hardship as a consequence of his separation from her, and the AAO concurs with that finding.

The applicant also has demonstrated that her qualifying spouse would suffer extreme hardship in the event that he relocated to Germany. The qualifying spouse has lived in the United States for over twenty years. His entire family either lives or intends to live in the United States. His brother currently lives in the United States and is a U.S. citizen. His daughter is a lawful permanent resident and his father, who he feels a cultural obligation to take care of as his elder, has a pending application for lawful permanent residency status. The qualifying spouse is not a German citizen, does not speak German and does not have any family in Germany, aside from the applicant and their daughter. According to the psychological report, the applicant has several psychological issues, including unresolved post-traumatic stress disorder and severe depression, and he has struggled with his conditions in the United States due to language and cultural barriers. The qualifying spouse states that he was granted refugee status and had to fight for his U.S. citizenship; he feels that his "entire life is a battle." The qualifying spouse notes that he is nervous about moving to Germany where he does not speak the language and fears that such a move would be "a major setback for [his] mental and physical well-being." Additionally, the qualifying spouse requires medical care for injuries resulting from his military service in Iraq and has sought treatment for them in the United States.

The applicant's attorney also indicates that the qualifying spouse is currently employed and provided supporting documentation from his employer to demonstrate his financial ties to the United States. The qualifying spouse stated that it has become financially burdensome and emotionally draining to travel back and forth to Germany with his daughter to ensure that she maintains her legal permanent resident status. As such, the record reflects that the cumulative effect of the hardships to the qualifying spouse, in light of his family ties to the United States, his length of stay, his financial considerations, and his medical and psychological conditions, rises to the level of extreme. The AAO thus concludes that the applicant's qualifying spouse would suffer extreme hardship if he relocated to Germany to be with her.

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.

In *Matter of Mendez-Morales*, 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 relief must bring forward to establish that she 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 in this matter are the extreme hardships the applicant's U.S. citizen spouse would face if the applicant is not granted this waiver, whether he accompanied the applicant or remained in the United States, and her lack of a criminal record. The unfavorable factors in this matter are the applicant's misrepresentations in an attempt to procure admission to the United States.

Although the applicant's violations of the 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.