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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: SEP 24 2012

Office: NEW YORK (GARDEN CITY) 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 District Director, New York, New York and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application will be approved.

The record establishes that the applicant, a native and citizen of India, attempted to enter the United States at Los Angeles, California in June 1991 under an assumed name and later applied for asylum under this name. The District Director cited a sworn statement by the applicant that when attempting to enter the United States without documentation he had requested asylum using another name. The applicant was found to be inadmissible 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 attempting to procure admission to the United States through fraud or misrepresentation, specifically seeking asylum using a false name.¹ The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) and is seeking a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated September 15, 2009.

In appealing the Director's decision, counsel for the applicant asserts that the decision is "arbitrary, capricious and an abuse of administrative discretion." Counsel also asserts the decision is "contrary to the law and the fact of this case."

In support of the appeal the applicant submitted a brief by counsel with a copy of a lawful permanent resident card for the mother of the applicant's spouse; a copy of the naturalization certificate of the spouse's father plus copies of the birth certificates and naturalization certificates of her brothers and sister; copies of the birth certificates of the applicant's four U.S. citizen children; reports on conditions in India; a letter from a religious organization noting that the applicant was an 18-year member who had once served as treasurer; an affidavit from the applicant's spouse; and medical letters for the applicant's spouse and one child.

¹ The applicant was also 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. This finding was based on his accrual of unlawful presence from April 1997 until applying to Register Permanent Resident or Adjust Status (Form I-485) in July 2001, and subsequent departure with advanced parole. In *Matter of Arrabally and Yerrabally*, 25 I&N Dec. 771 (BIA 2012), the Board of Immigration Appeals (BIA) held that an alien who leaves the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act does not make a departure from the United States within the meaning of section 212(a)(9)(B)(i)(II) of the Act. Here, the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States pursuant to that grant of advance parole, and was paroled into the United States to pursue a pending application for adjustment of status. In accordance with the BIA's decision in *Matter of Arrabally*, the applicant did not make a departure from the United States for the purposes of section 212(a)(9)(B)(i)(II) of the Act. Accordingly, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

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

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)(1) of the Act provides:

The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [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 Attorney General [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 his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse 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.

In the brief counsel declares the facts of this case are agreed upon, but goes on to cite Board of Immigration Appeals decisions discussing that visa fraud must be material to admission to the benefit sought and that there must be evidence the applicant presented or intended to present fraudulent documents to a government official. Counsel also points to rulings, other AAO decisions, and Department of State Foreign Affairs Manual notes indicating that misrepresentation is only material if it shut off a line of inquiry relevant to the applicants' eligibility, and that misrepresentation would not be material if had the applicant presented the correct information he would not have been found inadmissible. Counsel contends that the applicant's "alleged" fraud occurred in relation to applying for entry through an application for asylum, and that prior to

applying for asylum the applicant had not submitted any application material or made any attempt to enter the country.

Counsel also challenges whether at age 17 the applicant could be found to have the requisite intent to commit fraud. Counsel asserts the applicant committed no fraud because he did not submit an application, his misrepresentation was not material, and he was only 17 years of age at the time. However, AAO notes that by using a name other than his true name he prevented a potential line of questioning from an immigration inspector which would have included records checks under the applicant's true name. Further, though the applicant was only 17 years old at the time he had, as detailed in his sworn statement, been issued a visa to Brazil, traveled to Brazil via Italy, remained there from January until June 1991 before traveling to the United States, destroying his passport en route, and then requested asylum. The AAO finds that, based on the applicant's testimony, he is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for having gained entry and sought to procure an immigration benefit through fraud or the willful misrepresentation of a material fact. Although the applicant was under 18 years of age when he entered the United States, the provisions of section 212(a)(6)(C)(i) of the Act, unlike those of section 212(a)(9)(B), offer no exception for minors.

In a statement the applicant's spouse states she and the applicant "cannot bear to be away from each other" and that the economic situation in India is not stable so she would have to support him if he were required to return there. She states that without her husband she would need to get a job to support the four children on a low income. She notes health problems currently prevent her from working and that a daughter has persistent asthma. The applicant's spouse contends that in India her husband would not have a good enough job to buy needed medication for their daughter. She points out that all her immediate family members are in the United States and that for her to support two households and four children would be an economic hardship. A letter from a doctor indicates the applicant's spouse is being treated for severe iron deficiency anemia, hyperlipidemia, and gastro esophageal reflux disease. A letter from another doctor states the applicant's daughter suffers from persistent asthma and requires medication.

An evaluation by a licensed clinical psychologist notes that the applicant's spouse was physically weakened by having four caesarian births within a four year period. He indicates that if the applicant returns to India his spouse would become depressed, noting that she had stated that if her spouse leaves she will be anxious and depressed. The evaluation cites studies of separation anxiety among children, and indicates that, "By virtue of having spent so much time in India, away from their parents . . . the two older children . . . do not have the same emotional security as the their younger siblings, who have always lived with their parents." In summary the doctor identified adjustment disorder with mixed anxiety and depressed mood in the applicant's spouse due to fear that the applicant may leave the United States.

The record reflects the cumulative effect of the emotional and financial hardships that the applicant's spouse would experience due to her husband's inadmissibility rises to the level of extreme hardship if she remained in the United States without the applicant due to his inadmissibility. Evidence submitted, including financial documents in support of prior applications, shows that the applicant's

spouse is dependent on the applicant for financial support of the family. The applicant is the sole source of income as the applicant's spouse cares for four children and, according to her statement, would have difficulty working due to health problems.

Counsel further asserts that the applicant's spouse would suffer extreme hardship if she were to relocate with the applicant to India. Information submitted by the applicant describes poor health conditions in India, particularly for women, who face a lack of access to medical care partly due to discrimination. Other reports submitted by the applicant indicate that U.S. citizens need to be aware of crime and the possibility of being terrorist targets, and that some regions of India experience instability. Further, the record establishes that the applicant's spouse came to the United States at age 19, becoming a U.S. citizen in 2001. Were she to accompany the applicant to India she would need to leave her family, most notably her parents and siblings, plus the community where she has lived the past 18 years. She would also be concerned about her health and safety and that of her daughter, who suffers from persistent asthma, as well as her financial well-being if she were to accompany the applicant to India. It has thus been established that the applicant's spouse would suffer extreme hardship if, due to the applicant's inadmissibility, she were to relocate to India to reside with the applicant.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. 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 . . . 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 favorable factors in this matter are the hardships the applicant’s U.S. citizen spouse and children would face if the applicant were to reside in India; gainful employment of the applicant in the United States; the payment of taxes; and the passage of more than 20 years since the applicant’s unlawful entry to the United States. The unfavorable factors in this matter are the applicant’s unlawful entry into the United States, unlawful presence, and 2004 misdemeanor criminal conviction for providing false written information on an application for a vehicle operator’s license. The AAO notes that the applicant has not been charged or convicted of any other crime.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary’s discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The waiver application is approved.