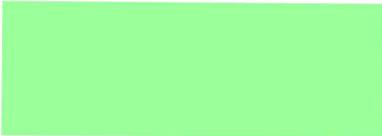


(b)(6)

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



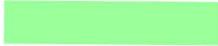
U.S. Citizenship
and Immigration
Services



DATE: **DEC 24 2013**

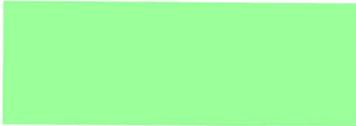
Office: FRESNO, CA

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. section 1182(a)(9)(B)(v), and 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in cursive script, appearing to read "Michael Shumway".

f/ Ron Rosenberg,
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Fresno, California, and a subsequent appeal to the Administrative Appeals Office (AAO) was dismissed. Following the appeal, a motion to reopen or reconsider was granted and the appeal again dismissed. The matter is now before the AAO on a second motion to reopen or reconsider. The motion will be granted but the previous decision of the AAO will be affirmed.

The applicant is a native and citizen of India and a citizen of Canada. She 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 misrepresenting her intent to reside in the United States. She is married to a U.S. citizen.¹ She seeks a waiver of inadmissibility pursuant to section 212(i) of the Act.

In a decision, dated March 6, 2012, the field office director concluded that the applicant was inadmissible pursuant to section 212(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more, and section 212(a)(6)(C)(i) of the Act for misrepresenting her intent to reside in the United States. He also found that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant subsequently appealed this decision to the AAO.

In a decision dated February 25, 2013, we affirmed the field office director's decisions regarding the applicant's inadmissibility, but in regards to extreme hardship we found that he applicant had established extreme hardship as a result of relocation, but not as a result of separation. Specifically, we found that as a result of the applicant's strong family and business ties to the United States, as well as his length of residence in the United States, he would suffer extreme hardship as a result of relocating. However, because the record failed to also show extreme hardship as a result of separation, the application was denied accordingly.

In a motion, dated March 21, 2013, counsel contested the AAO's findings and asserted that the evidence and testimony presented in the record were not properly examined. Counsel stated that proper interpretation of the relevant statutes and regulations would have resulted in a determination that the applicant's spouse was experiencing extreme hardship. Counsel submitted the following documentation with this motion: a brief; documents relating to the applicant's spouse's daughter's VAWA application; an additional statement from a psychologist, dated March 20, 2013; and a statement by the applicant.

In a decision, dated July 15, 2013, we affirmed the field office director's and our previous decision that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act because she misrepresented her immigrant intent upon entering the United States. We found counsel's assertions regarding the misrepresentation unpersuasive because a sworn statement in the record indicated that the applicant entered the United States as a visitor when she really intended to reside in the United States with her spouse. We noted inconsistencies in the applicant's testimony regarding this entry

¹ The applicant's spouse became a U.S. citizen on September 19, 2011.

and found that the sworn statement, in the record, was the most credible evidence of the applicant's intent upon entry as well as the fact that she filed an adjustment of status application within two weeks of entering.

In this decision we also found that the applicant was not inadmissible under section 212(a)(9)(B)(i)(II) of the Act because during her unauthorized stay in the United States she had a pending asylum application. Finally, we affirmed the previous decisions that the applicant failed to establish that her U.S. citizen spouse would suffer extreme hardship as a result of her inadmissibility, specifically, as a result of separation.

In his current motion, dated August 8, 2013, counsel asserts that: the charge of inadmissibility is inconsequential to the applicant's adjustment because she is married to a U.S. citizen; the determination of inadmissibility for a misrepresentation is incorrect and not supported by the record because it was not willful and deliberate; that the applicant is eligible for a waiver of inadmissibility under section 212(i) and 212(a)(9)(B)(v) of the Act; and that the applicant deserved discretionary relief. On motion, counsel submits a brief; the applicant's spouse's naturalization certificate; the receipt for an airline ticket; a statement from a psychologist; and statements from the applicant, her mother, her two children, and her spouse.

We find counsel's first assertion on motion, regarding the charge of inadmissibility being inconsequential to the applicant's adjustment because she is married to a U.S. citizen, to be unpersuasive. Counsel cites 8 C.F.R. § 204.2(i)(3) and *Matter of Ibrahim*, 18 I&N Dec. 55 (BIA 1981); *Matter of Cavazos*, 17 I&N Dec. 215 (BIA 1980) to support his assertions. 8 C.F.R. § 204.2(i)(3) and the cases cited are in reference to visa preferences and Alien Relative Petitions (Form I-130) and do not control in regards to an adjustment application, immigrant visa application, and/or findings of inadmissibility.

Next, we address the applicant's assertions regarding our finding of inadmissibility under 212(a)(6)(C) of the Act.

Section 212(a)(6)(C) of the Act 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 on September 19, 2009, the applicant's spouse's Form I-130, filed on the applicant's behalf, was approved. On September 8, 2010, the applicant entered the United States as a nonimmigrant visitor. On September 27, 2010, the applicant filed an adjustment application (Form I-485). The applicant was married to a lawful permanent resident at the time of her September 2010 entry.

The Department of State Foreign Affairs Manual states that, “in determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving aliens in the United States who conduct themselves in a manner inconsistent with representations they made to the consular officers concerning their intentions at the time of visa application. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants, either: Apply for adjustment of status to permanent resident...” *DOS Foreign Affairs Manual*, § 40.63 N4.7(a)(1).

The Department of State developed the 30/60-day rule which applies when, “an alien states on his or her application for a B-2 visa, or informs an immigration officer at the port of entry, that the purpose of his or her visit is tourism, or to visit relatives, etc., and then violates such status by ...Marrying and takes [sic] up permanent residence.” *Id.* at § 40.63 N4.7-1(3).

Under this rule, “If an alien violates his or her nonimmigrant status ...within 30 days of entry, you may presume that the applicant misrepresented his or her intention in seeking a visa or entry.” *Id.* at § 40.63 N4.7-2.

Although USCIS is not bound by the Foreign Affairs Manual, we have consistently followed the 30/60-day rule. Moreover, the documentation in the record overwhelming supports a finding of misrepresentation. The applicant in this case, not only applied for adjustment of status less than 30 days from her entry, she also had an approved Form I-130 when she entered. In addition, the affidavits in the record contain inconsistent testimony as to what was said to inspecting officers at the border. Thus, we find counsel’s assertions regarding the applicant’s statements upon entry being not willful or deliberate because of the applicant’s lack of English language skills to be unpersuasive and we affirm the previous findings that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

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 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 any children can be considered only insofar as it results in hardship to a qualifying relative. The applicant’s 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. *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.

In regards to hardship, we affirm the previous findings that the record establishes extreme hardship upon relocation, but does not establish extreme hardship upon separation. The applicant's length of residence in the United States; his strong family ties to the United States, including two children and one grandchild; as well as, his business ties to the United States indicate that it would be extreme hardship for the applicant's spouse to relocate.

However, the record fails to support the applicant's spouse's assertions that he would suffer extreme hardship as a result of separation because the applicant and her spouse have spent their entire married life living separately and the record does not indicate that circumstances have significantly changed to cause extreme hardship as a result of this separation. We acknowledge the circumstances surrounding the applicant's daughter and grandson, but the record fails to show that the applicant's spouse, daughter, and son are not capable of providing the support they need to move through this situation. The record indicates that the applicant's spouse married the applicant while she was living in India and he was living unlawfully in the United States. The record indicates that the applicant's spouse first entered the United States in 1981. The applicant and her spouse were married in India on March 30, 1985. This marriage was terminated in Las Vegas, Nevada on September 13, 2001. The applicant married a Canadian citizen on September 27, 2002, divorcing this spouse in 2005 and remarrying her current spouse on October 16, 2005. We acknowledge the letters submitted by Dr. [REDACTED]. However, these letters fail to indicate the nature of the doctor's connection to the applicant's spouse. Her latest letter, dated August 5, 2013, indicates that the applicant's spouse should seek outpatient mental health services and that he requires the help of the applicant with his grandchild. This letter fails to indicate how the applicant's symptoms and/or ability to access treatment are affecting his daily functioning. The record does indicate that the applicant's spouse continues to be a business owner in the United States and provides for his family.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *also cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme

hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative(s) in this case.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to her U.S. Citizen spouse as required under section 212(i) of the Act. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the motion is granted, but the prior decision of the AAO to dismiss the appeal is affirmed.

ORDER: The prior decision of the AAO is affirmed.