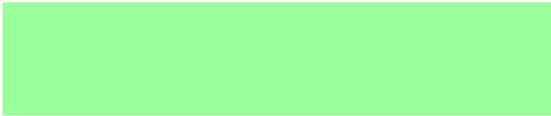




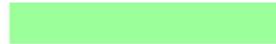
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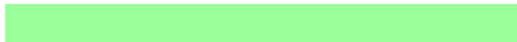


DATE: JUN 20 2013

Office: SPOKANE, WA

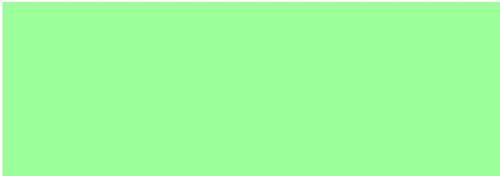


IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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 black ink that reads "Michael Shumway".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States 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 having attempted to procure admission to the United States through fraud or misrepresentation. She seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her lawful permanent resident mother.

The field office director concluded that the applicant had failed to demonstrate extreme hardship to her mother and denied the application accordingly. *See Decision of Field Office Director*, dated September 25, 2012.

On appeal, counsel for the applicant asserts that the applicant is not inadmissible because she made a timely retraction of her misrepresentation. Additionally, counsel contends that the applicant's mother would experience extreme hardship if the waiver application were denied.

The record includes, but is not limited to: a letter and an affidavit from the applicant; a sworn statement by the applicant; medical records regarding the applicant's mother; and documentation of the applicant's mother's travel to the applicant's home. 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.

The applicant contests the finding of inadmissibility on appeal. Pursuant to section 291 of the Act, the applicant bears the burden of demonstrating by a preponderance of the evidence that she is not inadmissible. *See also Matter of Arthur*, 16 I&N Dec. 558, 560 (BIA 1978). Where the evidence for and against admissibility "is of equal probative weight," the applicant cannot meet her burden of proof. *Matter of Rivero-Diaz*, 12 I&N Dec. 475, 476 (BIA 1967) (citing *Matter of M--*, 3 I&N Dec. 777, 781 (BIA 1949)).

In the present case, the record reflects that on September 8, 1991, the applicant presented the permanent resident card of her sister in an attempt to gain entry into the United States. On appeal, counsel claims that the applicant made a timely retraction of her misrepresentation and therefore is not inadmissible under section 212(a)(6)(C)(i) of the Act. Counsel alleges that on September 8, 1991, the applicant was a passenger in a car at the San Ysidro border crossing.

When the border patrol official asked the occupants of the vehicle to present their identification, the applicant showed a lawful permanent resident card that did not belong to her. According to counsel, the border patrol official asked, "Is this you?" and the applicant replied, "No." The applicant was then briefly detained before being returned to Mexico. Counsel notes that officials did not question the applicant further and that she was not referred to an immigration judge. Counsel alleges that the applicant retracted her misrepresentation at the first opportunity and was permitted to withdraw her application for admission. Counsel asserts that pursuant to the applicable regulations in place in 1991, 8 C.F.R. §§ 235.3 and 235.6, "if an alien appeared to an inspecting officer presenting a document which related to another person, the officer was required to detain the alien and refer the case to the immigration judge."

In a sworn statement before an immigration officer dated August 4, 2010, the applicant testified that in 1992, she and her children were attempting to cross the border in a car when they were stopped by a border patrol agent. She stated that while in the car, she presented her sister's green card in an attempt to gain entry into the United States. The applicant also stated that after being stopped, she and her children were "separated and questioned" and were returned to Mexico after a few hours. When asked why the agent did not believe the document belonged to her, the applicant stated, "I don't know. I don't know how they found out." During her sworn statement, the applicant was also asked, "Do you remember having a conversation with the agents about your sister's greencard [sic], and if so, did you admit that it was not your card or did you continue to claim that it was yours?" The applicant responded, "To be honest I don't remember a lot of things except being terrified. I think I expected to be returned to Mexico and I think I just wanted to get out of there."

In an affidavit executed a few days after her sworn statement, on August 9, 2010, the applicant stated that she had "been thinking back on what happened that night and would like to add more information." She clarified that she thought the border stop had occurred in 1992, but that the immigration officer informed her that it had occurred on September 8, 1991. She stated that she was seated in the back seat of a vehicle as it arrived at a border checkpoint. When a border patrol agent requested identification, the applicant showed a green card that did not belong to her. She alleged that the agent ordered the driver of the car to pull over and then asked the applicant, in reference to the green card she had presented, "Is this you?" According to the applicant, she replied, "No." She asserted that she was then taken to a room where she was fingerprinted, photographed, and held for approximately three hours before reentering Mexico on foot. She contended that she was not questioned further about the permanent resident card she had presented.

The AAO finds that the applicant has failed to meet her burden of demonstrating by a preponderance of the evidence that she is not inadmissible. Aside from the applicant's affidavit of August 9, 2010, the record lacks evidence to support her claim that she timely retracted her misrepresentation. The applicant did not make such a claim in her sworn statement; instead, she stated that she did not know how the border patrol agent discovered that the permanent resident card she had presented did not belong to her. Her sworn statement also indicates that she has

struggled to remember the circumstances of her attempted entry, as she believed it had occurred in 1992 rather than 1991 and could not recall whether she had a conversation with border patrol agents about the validity of the documentation she presented. Based on the applicant's statements, it is clear that she presented as her own a permanent resident card that did not belong to her in an attempt to gain entry into the United States. There is sufficient evidence, therefore, to support inadmissibility under section 212(a)(6)(C) of the Act. The only issue to resolve is whether the applicant retracted the fraud/misrepresentation in a timely manner, that is, prior to its discovery by the inspecting officers. However, because of the inconsistency in the applicant's testimony, we find that the applicant has not met her burden on that point.

Citing 8 C.F.R. §§ 235.3 and 235.6, counsel avers that if the applicant were found to have been inadmissible for making a material misrepresentation, border patrol agents would have been required to detain the applicant and to refer her to an immigration judge. However, the regulations themselves do not establish that the applicant made a timely retraction.

At the time of the applicant's attempted entry in 1991, 8 C.F.R. § 235.3 stated, in pertinent part:

(b) Aliens with no documentation or false documentation. Any alien who appears to the inspecting officer to be inadmissible, and who arrives without documents (except an alien for whom documentary requirements are waived under s 211.1(b) (3) or s 212.1 of this chapter) or who arrives with documentation which appears on its face to be false, altered, or to relate to another person, or who arrives at a place other than a designated port of entry, shall be detained in accordance with section 235(b) of the Act. Parole of such aliens shall only be considered in accordance with s 212.5(a) of this chapter.

8 C.F.R. § 235.6 stated, in pertinent part:

(a) Notice. If, in accordance with the provisions of section 235(b) of the Act, the examining immigration officer detains an alien for further inquiry before an immigration judge, he shall immediately sign and deliver to the alien a Notice to Alien Detained for Hearing by an Immigration Judge (Form I-122). If the alien is unable to read or understand the notice, it shall be read and explained to him by an employee of the Service, through an interpreter, if necessary, prior to such further inquiry. In addition, the alien shall be advised of his right to representation by counsel of his choice at no expense to the Government, and of the availability of free legal services programs qualified under Part 292a of this chapter and organizations recognized pursuant to s 292.2 of this chapter, located in the district where the alien is being detained. He shall also be furnished with a list of such programs.

However, immigration officials have long exercised discretion to allow an alien to withdraw her application for admission rather than detaining the alien under section 235(b) of the Act. The current regulation at 8 C.F.R. § 235.4 provides that:

The Attorney General may, in his or her discretion, permit any alien applicant for admission to withdraw his or her application for admission in lieu of removal proceedings under section 240 of the Act or expedited removal under section 235(b)(1) of the Act. The alien's decision to withdraw his or her application for admission must be made voluntarily, but nothing in this section shall be construed as to give an alien the right to withdraw his or her application for admission. Permission to withdraw an application for admission should not normally be granted unless the alien intends and is able to depart the United States immediately. An alien permitted to withdraw his or her application for admission shall normally remain in carrier or Service custody pending departure, unless the district director determines that parole of the alien is warranted in accordance with § 212.5(b) of this chapter.

While the current version of 8 C.F.R. § 235.4 was not enacted until 1997, the purpose was explained in the proposed rule as

to implement the *longstanding practice used by the Service to permit applicants for admission to voluntarily withdraw their application for admission to the United States in lieu of removal proceedings*, now included in section 235(a)(4) of the Act. The withdrawal provisions in the proposed rule were written to conform with rulings of the BIA on withdrawal and with standard practice in many jurisdictions. . . . Permission to withdraw an application for admission is solely at the discretion of the Attorney General and is not a right of the alien, a premise that has been consistently upheld by the BIA. Only the Attorney General may decide whether to pursue removal charges against an alien who has violated the immigration laws.

62 Fed. Reg. 10312-01 (Mar. 6, 1997) (emphasis added). The Board of Immigration Appeals (Board) has long noted the availability of withdrawal of an application for admission as a discretionary measure. It has observed:

[I]t sometimes happens that during the hearing—usually one held at a land border port—the applicant decides to withdraw his application for entry, in order to avoid an order of exclusion or to enable him to assemble documents or meet other preliminary requirements. Such withdrawal ordinarily will be permitted.

*Matter of Estrada-Tena*, 12 I&N Dec. 429 (BIA 1967); see also *Matter of Sanchez-Avila*, 21 I&N Dec. 444 (BIA 1996) (mentioning the “practice of voluntary withdrawals of applications for admission” at the border); *Matter of Vargas-Molina*, 13 I&N Dec. 651 (BIA 1971) (noting the

“past practice in which the Service permitted withdrawals in some cases and not in others.”) Furthermore, whether or not an alien is first placed into proceedings under section 235(b) of the Act is not necessarily dispositive of her inadmissibility, as certain aliens who have been placed into proceedings have been permitted to withdraw their applications for admission at a later time. *See, e.g., Matter of Sanchez-Avila, supra.; Matter of Gutierrez*, 19 I&N Dec. 562 (BIA 1988). In light of the possibility that the applicant could have been permitted to withdraw her application for admission at the discretion of border patrol agents, the AAO finds that the applicant has not shown that the regulations required that she be detained and placed in proceedings if she had made a misrepresentation of material fact. Therefore, the AAO cannot presume that the applicant made a timely retraction of her fraud/misrepresentation based on the regulatory language. Given the inconsistencies in the applicant’s testimony, we find no reason to disturb the finding that she is inadmissible under section 212(a)(6)(C)(i) of the Act. She is eligible to apply for a waiver under section 212(i) of the Act as the daughter of a lawful permanent resident.

Section 212(i) of the Act provides:

- (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 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.

Section 212(i) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Hardship to the applicant herself can only be considered insofar as it causes extreme hardship to her mother, who is the only qualifying relative in this case. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (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 U.S. 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. I.N.S.*, 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.

Counsel claims that the applicant's mother would experience extreme hardship if the waiver application were denied. Counsel states that the applicant's mother, who is 75 years old, is

clinically depressed and has been suffering abuse at the hands of her husband, so the applicant must provide her a safe living environment. According to counsel, the applicant's mother has attempted suicide and the applicant "is her main source of emotional support and has provided her mother with the stability that she needs, monitoring her medications and general well-being to remain in control of her mental health." Counsel also notes that the applicant's mother suffers from "chronic pain, obesity, high blood pressure, fibromyalgia, gallstones, diabetes, osteopenia, and gastritis," that she has had a heart attack and "underwent several heart related surgeries," and that her health has been declining. *Id.* Additionally, counsel notes that the applicant is able to help her mother because she is a "trained nursing assistant." *Id.*

Furthermore, counsel alleges that the applicant's mother is in a violent and abusive marriage. Counsel states that the applicant's mother's husband punches holes in the walls of their home, has hidden her mail including notification of eligibility for a work permit and Social Security card, and threatens that she will be deported or jailed if she seeks help. Additionally, counsel contends that the applicant's mother's husband has sexually abused and assaulted her grandchildren and her other daughter. Counsel alleges that the applicant's mother has recently sought refuge in the applicant's home, but that if the applicant is removed her mother will have no housing or source of income and therefore will be forced to return to live with her abusive husband. Counsel states that the applicant would be unable to earn sufficient income in Mexico to support her mother. Finally, counsel asserts that the lack of family ties in Mexico and the difficulty of travel would make relocation very difficult for the applicant's mother.

In a letter, the applicant states that her mother has endured difficult events in her life, including the sudden deaths of three young daughters, the death of two adult children, and a difficult relationship with the applicant's father which eventually ended in divorce. The applicant asserts that her "mother can't be well with all that loss and sorrow." Additionally, the applicant states that her mother's "mental and physical health has been declining" and she believes her mother will become unable to care for herself. The applicant notes that her mother was hospitalized for depression in 2010 and that she currently "has angina pectoris, arthritis, fibromyalgia, and has a chronic deep depression" as well as a loss of over sixty percent of her hearing. The applicant also states that when her mother stays with her in Oregon, she "is very stressed" due to frequent calls from her husband in California as well as the possibility that the applicant will be removed. The applicant fears that her mother "is very unstable and getting wors[e]." She states that she hopes to remain in the United States in order to care for her mother.

The applicant's mother has submitted a letter in an effort to explain her situation. The letter is difficult to understand but it conveys the challenges the applicant's mother has experienced and is currently facing. *See Letter from* [REDACTED] *dated* October 5, 2010. She notes "the torture that followed [her] marriage" to her current husband in 1995 or 1996 and states that she "was devastated" when she began discovering holes that her husband had created in the walls

and doors of bedrooms and bathrooms of her home.<sup>1</sup> She states that she had nowhere else to go because she could not support herself financially and notes that she was attempting to provide housing to some of her children and grandchildren who were in need. Additionally, she asserts that her husband touched her grandchild inappropriately and exposed himself to her daughter and granddaughter. Furthermore, she contends that in 1996 her husband received notification that she was eligible for a work permit and a Social Security card, but that he hid the notification and she did not find it until 2002. Additionally, her husband told her that if she pursued her own immigration applications she would go to jail.

The applicant's mother further states that since living in the applicant's home, she has "known another life full of tranquility and well-being . . . ." She asserts that the only place she could live is with the applicant, "since she is the best of all [her] children and because of all her years of experience working with older and sick people . . . ." She states that she does not want to return to living with her husband. Additionally, she claims that she has been "diagnosed with deep depression and attempted suicide" and that she "was getting lost" while carrying out daily errands. Furthermore, the applicant's mother alleges that she would be unable to relocate to Mexico with the applicant because during one return visit to Mexico after a long absence, she quickly became ill and had to return to the United States. She also asserts that the applicant would be unable to work in Mexico.

The AAO finds that the applicant's mother would experience extreme hardship if she were separated from the applicant. The record contains medical records which indicate that the applicant's mother has been diagnosed with fibromyalgia, "diffuse aches and pains," diabetes, high blood pressure, high lipids, "chest wall pain," osteopenia, gallstones, degenerative disease in the spine, and diverticulitis. The record also indicates that the applicant's mother suffers from mental health problems. Medical documentation in the record states that she has been diagnosed with "Major Depressive Disorder Recurre[nt]" and has been prescribed medication as well as psychiatric treatment. The documentation indicates that her "Anticipated Course of Recovery" is "Fair, provided you take medications as prescribed, follow up with your psychiatric treatment, and remain in a stable living environment." *Patient Aftercare Plan, Case Management Behavioral Health Unit*, [REDACTED] dated January 18, 2010. The applicant's mother states that the applicant provides proper care for her and that her other children are unable to do so. In light of the medical records as well as the written statements of the applicant and her mother, the AAO finds that the applicant's mother is in need of the applicant's assistance to manage her physical and mental illnesses and would struggle to properly address those issues on her own if the applicant were removed.

Additionally, we note that the applicant has provided a stable home in Oregon which has allowed her mother to escape her abusive marriage. The record contains copies of airline tickets to show

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<sup>1</sup> Counsel states that the applicant's mother's husband acted violently, punching holes in the walls. The applicant's mother's letter does not make clear the reasons for the holes but does convey that the holes were the result of some sort of abusive behavior on the part of her husband.

that the applicant's mother has traveled frequently between her home in California and the applicant's home in Oregon. Furthermore, the applicant's mother confirms in her letter that she has been in an abusive relationship with her husband and that she has found safety in the applicant's home, but that she would be forced to return to her husband if the applicant were no longer present to provide her with housing.

The AAO also finds that the applicant's mother would suffer extreme hardship if she were to relocate to Mexico with the applicant. The applicant's mother has an existing relationship with her healthcare providers in order to manage her numerous medical conditions. If she were to relocate, her necessary medical treatments would likely be interrupted and she may be unable to obtain the same level of care. Additionally, the record indicates that the applicant's mother suffers from severe depression for which she requires psychiatric care, medication, and a stable living environment. Relocation to Mexico would likely cause further stress and trauma for the applicant's mother, potentially leading to additional problems with her mental health. In the aggregate, the AAO finds that the applicant's mother's severe mental health problems, numerous physical health conditions, abusive marriage, history of trauma, and need for a stable living environment would result in extreme hardship for her if the applicant's waiver application were denied. *See Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996); *see also Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 566 (BIA 1999).

In that the applicant has established that the bars to her admission would result in extreme hardship to a qualifying relative, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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).

*Matter of Mendez*, 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).

A favorable factor in this case is the extreme hardship the applicant's mother would suffer if the applicant were removed. Additionally, the applicant has close family ties in the United States, including her son and her sister, and she has been living in the United States since January 2000. The unfavorable factor is the applicant's attempt to gain admission to the United States through misrepresentation of a material fact.

Although the applicant's violation of 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.