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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals
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Washington, D.C. 20529-2090

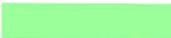


U.S. Citizenship
and Immigration
Services

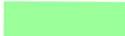


DATE: OCT 31 2013

OFFICE: NEW YORK, NEW YORK

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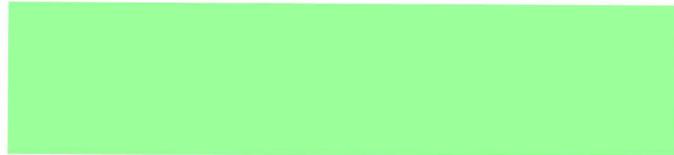
IN RE:

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 (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.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The District Director, New York, denied the waiver application. The applicant, through counsel, appealed the District Director's decision, and the Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on motion. The motion is granted, the prior AAO decision is withdrawn and the underlying appeal is sustained.

The record reflects the applicant is a native and citizen of the People's Republic of China (PRC) 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 seeking to procure admission to the United States through willful misrepresentation. The District Director concluded the applicant failed to establish extreme hardship would be imposed upon a qualifying relative and denied his Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The AAO dismissed the applicant's appeal and affirmed the District Director's decision.

On motion, counsel asserts the *Notice to Appear* (Form I-862) issued to the applicant upon attempting to enter the United States does not allege the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, and in the interest of justice, due process, and fundamental fairness, the U.S. government should not raise this inadmissibility as 15 years have passed since the applicant sought admission; the AAO's decision to dismiss the applicant's appeal is clearly erroneous as a matter of law and fact as the applicant did not physically present or attempt to present a fraudulent passport to a U.S. government official to enter the United States; the applicant, at that time a minor, was unable to make a "knowing and willful misrepresentation," as he lacked the legal capacity to do so; and, in the alternative, the AAO's conclusions concerning the applicant's spouse's hardship are erroneous, as evidenced by documentation already in the record and the additional evidence submitted to show the applicant's spouse's emotional, psychological, medical, and financial hardships.

A motion to reopen must state the new facts to be proved and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). As the applicant has submitted new documentary evidence to support his claim and asserted reasons for reconsideration, the motion to reopen and reconsider will be granted.

The record includes, but is not limited to: briefs and correspondence; letters of support; identity, psychological, medical, financial, and employment documents; photographs; and documents on conditions in the PRC. The entire record was reviewed and considered in rendering a decision.

The applicant, through counsel, contests the finding of inadmissibility. Pursuant to section 291 of the Act, the applicant bears the burden of demonstrating by a preponderance of the evidence he 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 his 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)).

Section 212(a)(6) of the Act provides, in pertinent part:

(C) Misrepresentation.-

(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 Act is inadmissible.

...

(iii) Waiver authorized.- For provision authorizing waiver of clause (i), see subsection (i).

The record reflects the applicant arrived at the Honolulu International Airport on October 13, 1997, unaccompanied by his parents; a friend and neighbors traveled with him. The record also reflects he then claimed he was almost 17 years old and upon arrival, a photo-substituted passport was presented to U.S. immigration officials on his behalf. The passport contained an I-551 stamp and was issued in another person's name. The applicant was referred to secondary inspection, where under oath he conceded the passport did not belong to him, he did not obtain the passport through the proper authority in the PRC, and he did not apply for permission to travel to the United States at an American Embassy or Consulate. He also testified about his true identity.

Counsel asserts the applicant did not physically present or attempt to present a fraudulent passport to U.S. immigration officials upon seeking entry into the United States. On January 29, 2009, the applicant testified during his adjustment of status interview that he did not give any documents to U.S. immigration officials upon arrival; someone else presented the passport that was in his possession.

The Adjudicators Field Manual § 40.6.2(c)(1)(B)(vi) provides:

If the misrepresentation is made by the applicant's attorney or agent, the applicant will be responsible for this misrepresentation, if it is established that the alien was aware of the action taken by the representative in furtherance of the alien's application. This includes oral misrepresentations made at the border upon entry by an aider of the alien's illegal entry.

See also 9 FAM 40.63 N4.5.

The record reflects the applicant knew he lacked the proper documents that would permit him to be admitted into the United States and that there was a proper procedure for obtaining a visa to enter the United States and he did not pursue this procedure. Accordingly, the record reflects the

applicant was aware of the action taken by the individual who presented a photo-substituted passport to a U.S. government official at a port of entry on his behalf to facilitate his admission.

Counsel also asserts the applicant lacked the legal capacity to make a willful misrepresentation because he was a minor. However, there is no statutory exception for minors to inadmissibility under section 212(a)(6)(C)(i) of the Act. Where a provision is included in one section of law but not in another, it is presumed that Congress acted intentionally and purposefully. *See In re Jung Tae Suh*, 23 I&N Dec. 626 (BIA 2003) (citing *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999)). Unlike section 212(a)(6)(C)(i), two other grounds of inadmissibility in section 212(a) contain express exceptions for minors. An exception is provided under section 212(a)(2)(A)(ii)(I) of the Act for individuals who, prior to turning 18 years of age, committed a single crime involving moral turpitude more than five years prior to applying for admission. Also, individuals who are under 18 years of age do not accrue unlawful presence pursuant to section 212(a)(9)(B)(iii)(I) of the Act. By comparison, section 212(a)(6)(C)(i) of the Act provides for the inadmissibility of “any alien” who commits fraud or willful misrepresentation of a material fact in an attempt to gain a benefit. The sub-clause does not include an age-based exception, and the AAO cannot assume such an exception was intended. For this reason, the fact that the applicant was 17 years of age when the material misrepresentation made on his behalf is not, by itself, enough to establish that he is not inadmissible.

Nor, however, is his age completely irrelevant. As the Supreme Court has noted, “A child’s age is far ‘more than a chronological fact.’ . . . It is a fact that ‘generates commonsense conclusions about behavior and perception.’” *J.D.B. v. N. Carolina*, 131 S. Ct. 2394, 2403 (2011) (internal citations omitted). Fraud consists of “false representations of a material fact made with knowledge of its falsity and with intent to deceive.” *See Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956). In the immigration context, a finding of fraud requires that an individual “know the falsity of his or her statement, intend to deceive the Government official, and succeed in this deception.” *In re Tijam*, 22 I&N Dec. 408, 424-25 (BIA 1998). Willful misrepresentation does not require an intent to deceive, but instead requires only the knowledge that the representation is false. *See Parlak v. Holder*, 57 F.3d 457 (6th Cir. 2009) (citing to *Witter v. INS*, 113 F.3d 549, 554 (5th Cir. 1997); *see also Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995); *In re Tijam, supra*. “The element of willfulness is satisfied by a finding that the misrepresentation was deliberate and voluntary.” *See Mwongera v. INS*, 187 F.3d 323, 330 (3d Cir. 1999).

Therefore, when assessing a claim that an applicant lacked capacity to incur inadmissibility due to his minor age at the time of the misrepresentation, the adjudicator must weigh the totality of the circumstances presented in the evidence of record and determine whether the applicant possessed the maturity and judgment to comprehend both the falsity, and the potential consequences of, a false statement. Based on this understanding, an evaluation of whether an applicant, who made a material misrepresentation while under the age of 18 years of age possessed, at the time, the legal capacity to make a willful misrepresentation of a material fact must be the result of an individualized inquiry into that particular applicant’s maturity level and ability to understand the nature and consequences of his false statement. The applicant bears the burden of demonstrating that he is not inadmissible under section 212(a)(6)(C)(i) of the Act. Section 291 of the Act, 8

U.S.C. § 1361. Therefore, he has the burden to prove that, when he or his agent made the material misrepresentation, he lacked capacity to willfully misrepresent a material fact.

In *Singh v. Gonzales*, the Sixth Circuit Court of Appeals found that the immigration fraud committed by the parents of a five-year-old child could not be imputed to the child because fraudulent conduct “necessarily includes both knowledge of falsity and an intent to deceive” and requires proof of such. 451 F.3d 400, 407 (6th Cir. 2006). The Sixth Circuit found that imputing fraud to a five-year-old child was “even further beyond the pale” than imputing a parent’s negligence to that child. *Id.* at 407. However, in *Malik v. Mukasey*, the Seventh Circuit Court of Appeals found that two 17-year-old brothers, whose father had misrepresented their identities, nationality, and religious affiliation when he listed them as derivatives on his asylum application, could be held accountable for that fraud. 546 F.3d 890, 892-893 (7th Cir. 2008). While the brothers contended that the immigration judge had erred by imputing their father’s fraud to them, the court concluded that the brothers, “given their ages at the time” as well as the fact that they had actively participated in perpetuating the false information, were accountable for the misrepresentations. The court also noted the Board of Immigration Appeals (BIA) had previously acknowledged that while the brothers were young at the time their father filed for asylum, “they were old enough to know better and to be held accountable for their actions.” *Id.* at 892.

The age of the applicant in the present case falls much closer to that of the 17-year-old brothers in *Malik* than to that of the five-year-old child in *Singh*. He was “old enough to know better and to be held accountable for [his] actions.” *Id.* The applicant certainly would have been considerably more cognizant of his or his agent’s misrepresentations than a five-year-old child whose parents had misrepresented her immigration status on her behalf. Notwithstanding his minority, the record establishes the applicant knew he or his agent would be presenting fraudulent documentation to enter the United States and that the presentation of this documentation was both voluntary and deliberate. His actions indicate he was sufficiently mature to understand there would be immigration-related consequences if it were revealed the passport did not belong to him. Accordingly, the applicant is subject to section 212(a)(6)(C)(i) of the Act despite the fact he was a minor at the time of his attempted entry and is inadmissible under section 212(a)(6)(C)(i) of the Act for having attempted to procure admission to the United States through fraud or misrepresentation.

The AAO will now address whether the applicant is eligible to apply for a waiver under section 212(i) of the Act.

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

- (1) The Attorney General [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.

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 or his child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only demonstrated 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-Morales*, 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 BIA 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 BIA 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 BIA 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 Id.* at 568; *In re 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 BIA 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. at 383 (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., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N

Dec. 45, 51 (BIA 2001) (distinguishing *In re 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 support of the applicant's motion, counsel refers to another decision in which the AAO found extreme hardship to an applicant's U.S. citizen spouse who suffered from a similar or less "dire" mental illness than the applicant's spouse in the instant case. Counsel, while noting the AAO decision is unpublished, submits a copy with the motion. Only AAO decisions that are published and designated as precedents in accordance with the requirements discussed in 8 C.F.R. § 103.3(c), however, are binding on U.S. Citizenship and Immigration Services officers. The decision submitted by counsel is unpublished and not designated as a precedent decision. The findings made in the other AAO decision, therefore, have no binding precedential value for purposes of the applicant's case.

Counsel also asserts the applicant's spouse would endure emotional, psychological, medical, and financial hardship because of the applicant's inadmissibility as she is suffering from major depression, with severe psychosis and impairment of occupational and social functions; she would be unable to care for herself and their son without the applicant; she has suffered from arthritis; and her family's sole means of financial support is the applicant's income as a salesman and part-time restaurant employee.

The record includes a psychiatric evaluation dated November 1, 2013, indicating the applicant's spouse is currently under treatment for major depression – recurrent and severe with psychosis related to the applicant's removal, and the applicant serves as their child's primary caretaker because of instability caused by his spouse's mental-health condition. The record also includes a psychological letter dated October 31, 2012, indicating the applicant's spouse was diagnosed with post-traumatic stress disorder (PTSD) that resulted after she witnessed a car accident in China, which causes her to be easily frightened and startled and interferes with her ability to function generally and as a mother. Additionally, the record includes a letter dated October 23, 2012, indicating the applicant has been a "stable force" for his spouse and child, as his spouse is unable to work because of her mental-health condition, and he helps to take care of their child.

Further, the record contains evidence corroborating claims that the applicant is his family's breadwinner and he works part-time at a restaurant. The record reflects the applicant is essential to his spouse's emotional and financial wellbeing. The AAO finds, considering the evidence of hardship in the aggregate, that the applicant's spouse would suffer extreme hardship upon separation from the applicant.

Counsel asserts the applicant's spouse would be unable to relocate to the PRC with the applicant, because her mental-health condition would worsen without the necessary treatment; she has lived in the United States for over a decade, most of her adult life; and she has strong family ties in the United States. The record does not include evidence about where the applicant's spouse's parents currently live, other than what she reported to her mental-health care providers. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). However, the record reflects the applicant's spouse has resided in the United States for over 10 years, where she continues to receive treatment for her mental-health conditions. Additionally, according to the U.S. Department of State, "The standards of medical care in China are not equivalent to those in the United States. . . . Mental health facilities or medications are not widely available." See *Country Specific Information, China*, at http://travel.state.gov/travel/cis_pa_tw/cis/cis_1089.html, issued September 5, 2013. The record reflects that the cumulative effect of the hardship the applicant's spouse would experience due to the applicant's inadmissibility rises to the level of extreme. The AAO thus concludes that, were the applicant's spouse to relocate to the PRC to be with the applicant, she would suffer extreme hardship.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 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-Moralez*, 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 stated 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 section 212(h)(1)(B) relief must bring forward to establish that he 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.*

The favorable factors in this case include extreme hardship to the applicant's U.S. citizen spouse, his U.S. citizen child, his steady employment, the filing of income taxes, and the absence of a criminal record. The unfavorable factors include the applicant's misrepresentation of his identity when seeking admission to the United States and an outstanding order of removal.

Although the applicant's violations of immigration laws cannot be condoned, the positive factors in this case outweigh the negative factors. Therefore, the AAO finds that a favorable exercise of discretion is warranted.

As noted above, an immigration judge ordered the applicant removed on November 5, 1999; the BIA summarily affirmed his decision on December 26, 2002. Accordingly, the applicant's order of removal became final on December 26, 2002. The record further reflects the applicant has remained in the United States to date. The applicant's removal order will therefore render him inadmissible pursuant to section 212(a)(9)(A)(i) of the Act upon his departure from the United States, and he will require permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. He may apply for conditional approval of *Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal* (Form I-212) under 8 C.F.R. § 212.2(j) before departing the United States, and the approval of the Form I-212 under these circumstances is conditioned upon the applicant's departure from the United States.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The motion is granted. The prior decision of the AAO is withdrawn, and the underlying appeal is sustained.