

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: APR 18 2014

Office: ORLANDO

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:  
[REDACTED]

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 waiver application was denied by the Field Office Director, Orlando, Florida. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Venezuela 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 adjustment of status by fraud or willful misrepresentation. The applicant's spouse and two children are U.S. citizens. She seeks a waiver of inadmissibility in order to reside in the United States with her family.

The Field Office Director found that the applicant established extreme hardship to a qualifying relative but denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, as a matter of discretion. *Decision of the Field Office Director*, dated September 19, 2012.

On appeal, counsel asserts that the Field Office Director failed "to equitably balance the social and humane considerations" in exercising discretion to deny the waiver; and the applicant's inability to provide the requested information concerning her fraudulent birth certificate was not a reasonable factor to be considered in the discretionary analysis. *Form I-290, Notice of Appeal or Motion*, dated October 18, 2013.

The record includes, but is not limited to, counsel's briefs,<sup>1</sup> country-conditions information about Venezuela, photographs, medical records for the applicant's children and financial records. 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, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result

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<sup>1</sup> Although counsel cites AAO decisions in his appeal brief, as non-precedent decisions these are not binding on the AAO in adjudicating the applicant's appeal.

in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The record reflects that in 2007, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), under Section 1 of the Cuban Adjustment Act, and she included a Cuban birth certificate with her application. She also testified at her interviews on October 24, 2007 and June 26, 2008 that she was born in Cuba. The record reflects that the applicant in fact was born in Venezuela. As such, the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for seeking to adjust her status by willful misrepresentation of a material fact. The applicant does not contest her inadmissibility on appeal.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or her children can be considered only insofar as it results in hardship to a qualifying relative, in this case the applicant's spouse. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and U.S. Citizenship and Immigration Services then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

The Field Office Director found that the applicant established that her spouse would experience extreme hardship. The AAO concurs with the Field Office Director and will not disturb this finding.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez* at 301. 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.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin*, *supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin*, *supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under

section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

*Matter of Mendez-Moralez* 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 (citation omitted).

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for 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.* at 301.

The Field Office Director denied the application as a matter of discretion. He found that the applicant's failure to provide truthful testimony regarding her birth in Cuba and her failure to provide specific information about how she obtained the fraudulent birth certificate were negative discretionary factors. Specifically, the applicant stated at her November 2, 2011 interview that she paid \$200 using a money order for the Cuban birth certificate; the birth certificate was mailed to her; she threw away her copy of the money order and the envelope that contained the birth certificate; she does not have the address to which she mailed the money order or the phone numbers of two women who helped her; and she would provide the two women's phone numbers. In response to a Request for Evidence, the applicant submitted an affidavit stating that she was unable to locate the requested information and documents. The Field Office Director did not find credible the applicant's

assertions that she threw away her money-order receipt and the envelope she received with the birth certificate.

Counsel asserts that the applicant provided “all the information she possesses”: the names of the individuals who assisted her, her method of payment, and the method of the birth certificate’s delivery. Counsel also claims that the Field Office Director failed to consider that it has been approximately five years since the applicant engaged in the activity in question, and “the average reasonable person” would not keep a money-order receipt or empty envelope for five years. Counsel states that the applicant attested that she never met the woman who mailed her the birth certificate; she only spoke to her once; and she has not maintained contact with her.

The AAO finds counsel’s claims regarding the applicant’s inability to provide the requested information and documents reasonable under these circumstances. Therefore, her inability to provide the information and documents is not a negative discretionary factor, given her attempt to comply with the terms of the request.

Moreover, the Field Office Director erred by not considering the applicant’s favorable factors in his decision. The favorable factors include the applicant’s ties to her U.S. citizen spouse and children; extreme hardship to her spouse; hardship to her children, who have serious medical conditions and need her assistance; evidence of her good moral character; and the lack of a criminal record. The unfavorable factors are the applicant’s misrepresentations: claiming that she was born in Cuba and presenting a fraudulent Cuban birth certificate with her Form I-485.

The AAO finds that the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

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 appeal is sustained.