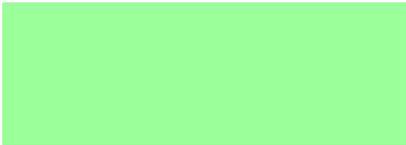


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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



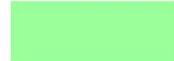
U.S. Citizenship  
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Services



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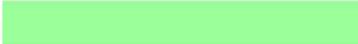
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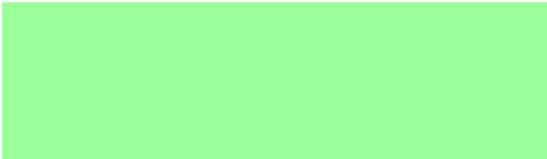
Applicant:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act (INA), 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, appearing to read "Ron Rosenberg".

Ron Rosenberg

Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Honolulu, Hawaii, and the Administrative Appeals Office (AAO) dismissed an appeal and a subsequent motion. The AAO will reopen the matter on its own motion and the underlying waiver application will be granted.

The record reflects that the applicant is a native and citizen of South Korea 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) for willful misrepresentation of a material fact in order to procure an immigration benefit. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act in order to reside with her husband and child in the United States.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the District Director*, dated April 10, 2007. The AAO dismissed the appeal, concluding that although the applicant established that her husband would suffer extreme hardship upon relocation to South Korea, the applicant did not establish that her husband would suffer extreme hardship if he decided to remain in the United States. *Decision of the AAO (Form I-601)*, dated March 24, 2010. In a separate decision, the AAO simultaneously rejected the applicant's appeal of the denial of her Application to Register Permanent Residence or Adjust Status (Form I-485) for lack of jurisdiction. *Decision of the AAO (Form I-485)*, dated March 24, 2010. On April 22, 2010, counsel timely filed a motion to reopen and reconsider which the AAO erroneously dismissed as untimely. *Decision of the AAO*, dated March 30, 2012. The AAO therefore reopens the matter on its own motion to consider the merits of counsel's April 22, 2010 motion.

On motion, counsel contends the AAO erred in finding that the applicant's misrepresentations that she previously overstayed her visit to Guam because she lost her passport and indicated on her visa application that she had never lost her passport were not material. Counsel also contends the applicant established extreme hardship to her husband, Mr. [REDACTED] if he decides to remain in the United States, particularly considering the couple now has a child together and Mr. [REDACTED], a full-time, active duty member of the [REDACTED] would be unable to care for their son. Counsel submits additional evidence in support of the applicant's waiver application.

A motion to reopen must state the new facts to be proved in the reopened proceeding 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). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, counsel has submitted a brief and additional documentary evidence to support the applicant's waiver application. The applicant's submission meets the requirements of a motion to reopen. Accordingly, the motion is granted.

In addition to the documents specified in the AAO's previous decision, the record also contains a letter from Mr. [REDACTED] mother, a letter from Mr. [REDACTED] father's physician, a letter from Mr. [REDACTED] grandmother's physician, and additional letters of support. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(6)(C)(i) of the Act provides:

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.

Section 212(i)(1) provides, in pertinent part:

The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 permanent resident spouse or parent of such an alien . . . .

The record shows, and counsel concedes, that the applicant gave three incorrect answers in her visa application and during her interview for adjustment of status. First, the applicant did not list her visit to Guam as a visit to the United States. Second, the applicant did not list Guam as a country she visited in the last ten years. And third, the applicant indicated she had never lost a passport. *Brief in Support of Motion to Reconsider/Reopen* at 5-6, dated April 14, 2010. According to counsel, "The first incorrect answer is not at issue as the AAO accepted that 'it was possibly not known that Guam is part of the United States.'" *Id.* at 6. Counsel asserts the applicant's second and third mistakes were inadvertent, that the applicant rushed through her visa application, and that the mistakes were merely careless errors and lapses of memory. Counsel further asserts that even if the applicant made a willful misrepresentation, the second and third incorrect answers were not material. Relying on *Kungys v. United States*, 485 U.S. 759 (1988), *Forbes v. INS.*, 48 F.3d 439 (9<sup>th</sup> Cir. 1995), and *Witter v. INS*, 113 F.3d 549 (5<sup>th</sup> Cir. 1997), counsel claims the applicant did not make a material misrepresentation because "the AAO did not present evidence that a statutory disqualifying fact actually existed in our case, and that Applicant was statutorily ineligible to obtain the visa." *Brief in Support of Motion to Reconsider/Reopen* at 12.

Regarding counsel's contentions that the applicant's mistakes were not material, the elements of a material misrepresentation are set forth in *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1960; AG 1961), as follows:

A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

See also *Matter of Ng*, 17 I. & N. Dec. 536, 537 (B.I.A.1980) ("The BIA has long considered a false statement in a visa application to be material 'if it tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded.'"). The U.S. Supreme Court's definition of a material misrepresentation in *Kungys v. United States*, 485 U.S. 759 (1988), is also, as counsel contends, applicable in this case. According to the Supreme Court, a concealment or misrepresentation is material when it is "predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision." *Kungys*, 485 U.S. at 771.

Here, the applicant told the immigration officer during her interview for adjustment of status that she had never previously been to the United States. On her visa application, she indicated she had never lost her passport or had one stolen, and she failed to list Guam as a country she had entered in the last ten years, despite contending she did not know Guam was part of the United States. By misrepresenting three facts, all of which produced the effect of hiding her previous overstay in the United States, Ms. [REDACTED] represented herself as an applicant who had never visited the United States. These misrepresentations shut off a line of inquiry that was relevant to Ms. [REDACTED] eligibility for a visa by preventing consular officials from inquiring into her previous travel history. Had consular officials known that she had previously overstayed her visa, the natural and predictable affect would have been to question whether she would abide by the terms of her tourist visa and return to South Korea when her visa expired. By misleading consular officials, consular officials did not have the opportunity to decide whether or not to discount her previous overstay because her passport had been stolen. The relevant inquiry is not whether officials would have denied her visa application had they known the truth, but rather, whether further investigation into Ms. [REDACTED] previous overstay would have had a natural tendency to affect the granting of her application. Because consular officials might well have denied her visitor's visa due to a previous visa overstay, the misrepresentations were material. Therefore, the record shows that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for misrepresenting a material fact in order to procure an immigration benefit.

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of

factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years).

Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

After a careful review of the entire record, including the additional documentation submitted with the motion, the AAO finds that the applicant's husband, Mr. [REDACTED] will suffer extreme hardship if the applicant's waiver application were denied. The AAO previously found that if Mr. [REDACTED] relocated to South Korea to be with his wife, he would experience extreme hardship. The AAO will not disturb that finding. The AAO also finds that if Mr. [REDACTED] remains in the United States without his wife, he would suffer extreme hardship. The record shows that the couple has a four-year old son and that the applicant is his primary caretaker. The record also shows that Mr. [REDACTED] is a sailor for the [REDACTED]. According to Mr. [REDACTED] if he remained in the United States without his wife, he would be unable to be deployed, jeopardizing his military career, because he has no one who could help care for his son. Letters from members of the [REDACTED] submitted with the motion corroborate this contention, contending that Mr. [REDACTED] would be unable to execute his duties simultaneously with raising his young son and stating that he would be forced to terminate his military career. In addition, a letter from Mr. [REDACTED] mother indicates she would be unable to help raise her grandchild because she is already caring for her husband, who has suffered from two strokes and has mobility problems, as well as her eighty-seven year old mother-in-law. Letters from Mr. [REDACTED] father's and grandmother's physician corroborate the contention that they both have medical problems and require care around the clock. Considering the new evidence submitted with the motion, in conjunction with the evidence already in the record, the AAO finds that the hardship Mr. [REDACTED] would suffer if he remains in the United States without his wife is extreme, going well beyond those hardships ordinarily associated with inadmissibility or exclusion. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that Mr. [REDACTED] faces extreme hardship if the applicant is refused admission.

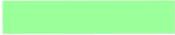
The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

The adverse factor in the present case includes the applicant's willful misrepresentation of a material fact in order to procure an immigration benefit. The favorable and mitigating factors in the present case include: the applicant's significant family ties to the United States, including her U.S. citizen husband and child; the extreme hardship to the applicant's entire family if she were refused admission; and the applicant's lack of any arrests or criminal convictions.

The AAO finds that, although the applicant's immigration violation is serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

(b)(6)



*NON-PRECEDENT DECISION*

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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 and the prior AAO decision dismissing the appeal is withdrawn. The waiver application is approved.