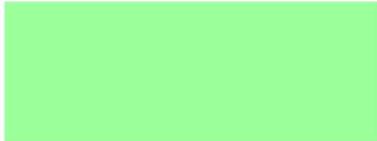


(b)(6)

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



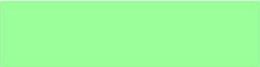
U.S. Citizenship
and Immigration
Services



DATE: JUN 10 2014

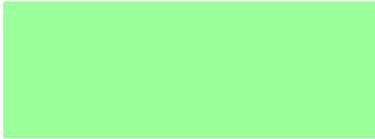
Office: FRESNO, CA

FILE: 

IN RE: 

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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 Acting Field Office Director, Fresno, California, and a subsequent appeal to the Administrative Appeals Office (AAO) was dismissed. Following the appeal, a motion to reopen or reconsider was granted and the appeal again dismissed. Then, a second motion to reopen or reconsider was granted and the appeal dismissed. The matter is now before the AAO on a third motion to reopen or reconsider. The motion will be granted and the appeal sustained.

The applicant is a native and citizen of India and a citizen of Canada. She was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for misrepresenting her intent to reside in the United States. She is married to a U.S. citizen. She seeks a waiver of inadmissibility pursuant to section 212(i) of the Act.

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

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

In a motion, dated March 21, 2013, counsel contested the AAO's findings and asserted that the evidence and testimony presented in the record were not properly examined. Counsel stated that proper interpretation of the relevant statutes and regulations would have resulted in a determination that the applicant's spouse was experiencing extreme hardship.

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

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

In his next motion, dated August 8, 2013, counsel asserted that: the charge of inadmissibility was inconsequential to the applicant's adjustment because she was married to a U.S. citizen; the determination of inadmissibility for a misrepresentation was incorrect and not supported by the record because it was not willful and deliberate; that the applicant is eligible for a waiver of inadmissibility under section 212(i) and 212(a)(9)(B)(v) of the Act; and that the applicant deserved discretionary relief.

In our decision, dated December 24, 2013, we found counsel's assertion regarding the charge of inadmissibility being inconsequential to the applicant's adjustment because she is married to a U.S. citizen, unpersuasive stating that the cases and regulations counsel cited to support his assertions were in reference to visa preferences and Alien Relative Petitions (Form I-130) and were not controlling in regards to an adjustment application, immigrant visa application, and/or findings of inadmissibility. We again found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for having misrepresented her resident intent upon entering the United States with her visitor's visa. Finally, we affirmed our previous decisions that the applicant had shown her spouse would suffer extreme hardship as a result of relocation, but not as a result of separation.

In his current motion, dated January 21, 2014, counsel again contests the findings concerning the applicant being inadmissible for misrepresentation and asserts that the applicant is deserving of discretionary relief.

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

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

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

The Department of State Foreign Affairs Manual states that, "in determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving

aliens in the United States who conduct themselves in a manner inconsistent with representations they made to the consular officers concerning their intentions at the time of visa application. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants, either: Apply for adjustment of status to permanent resident..." *DOS Foreign Affairs Manual*, § 40.63 N4.7(a)(1).

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

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

We acknowledge counsel's assertions regarding procedures outlined in the Foreign Affairs Manual that are to be followed by consular officers in the field, but USCIS is not bound by the Foreign Affairs Manual. However, we have consistently followed the 30/60-day rule in cases involving immigrant intent. Moreover, as stated in previous decisions, the documentation in the record overwhelming supports a finding of misrepresentation. The applicant in this case, not only applied for adjustment of status less than 30 days from her entry, she also had an approved Form I-130 when she entered and gave inconsistent testimony as to what was said to inspecting officers at the border. Thus, we affirm the previous findings that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

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

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

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

Extreme hardship is “not a definable term of fixed and inflexible content or meaning,” but “necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

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

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

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in

considering hardship in the aggregate. *Salcido-Salcido v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In regards to hardship, we affirm the previous findings that the record establishes extreme hardship upon relocation. In addition, the record also now shows that the applicant's spouse will suffer extreme hardship upon separation.

As stated in previous decisions, the applicant's spouse's length of residence in the United States; his strong family ties to the United States, including two children and one grandchild; as well as, his business ties to the United States indicate that it would be extreme hardship for the applicant's spouse to relocate. However, the record previously failed to support the applicant's spouse's assertions that he would suffer extreme hardship as a result of separation because the applicant and his spouse had lived separated for numerous years seemingly without hardship and the record did not indicate that their circumstances had changed.

On motion, counsel submits a second psychological evaluation, a 2012 tax return, and a statement from the applicant's spouse.

The applicant's spouse asserts that he would suffer extreme emotional and financial hardship without the applicant in the United States because he needs the applicant's help in caring for their daughter and grandson, and for his sick mother.

The record includes a letter from the psychologist who performed the applicant's spouse's initial psychological evaluation, dated January 21, 2014, which states that the applicant's spouse has returned for a reevaluation because his circumstances have changed and that being separated from the applicant would cause him extreme hardship. She states that without the applicant, the applicant's spouse would be left to manage his business alone, a business that he shared with a business partner, who died four years ago. The applicant's spouse states that while also providing care for his daughter and grandson, who recently left an abusive marriage, he is responsible for providing care for his elderly mother. The applicant's spouse states that the applicant entered the United States to help him with these additional stressors in his life. The letter indicates that the applicant's spouse has been stressed over the possibility of the applicant having to leave the United States and that he is having trouble eating, has lost weight, has disturbed sleep, and has had trouble going to work.

The current record establishes that the applicant's spouse will suffer hardship that rises to the level of extreme as a result of separation. The record establishes that the applicant's spouse owns and manages a business in the United States, which serves as the family's only source of income. The record also details the abusive relationship his daughter and grandson endured as well as the care and

attention they now require as a result. The record establishes that these stressors are causing the applicant's spouse extreme emotional hardship and that the applicant, as his wife and mother to his daughter, is in a unique position to help relieve this hardship. Thus, we find that the applicant's spouse's situation rises above the hardship that would normally be expected upon separation because he owns and manages a business which is the sole source of income for his family and he must also provide for the emotional support of his daughter and grandson. We note that the record does not include documentation to support the assertions regarding the applicant's mother-in-law and her need for care.

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

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-Morales*, 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-Morales at 300.

In *Matter of Mendez-Morales*, 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 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 favorable factors in the applicant's case include: the hardship the applicant's spouse, daughter, and grandson will face as a result of her inadmissibility; the lack of any criminal record in the United States; and, as attested to by the applicant's spouse, her role as a loving mother and wife. The unfavorable factors in the applicant's case include her misrepresentations to immigration officials in an attempt to gain a benefit under the Act.

Although the applicant's violations of immigration law are serious, 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. The motion will be granted and the appeal sustained.

ORDER: The motion is granted and the appeal sustained.