



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: MAR 25 2014 Office: HONOLULU, HI

IN RE:

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, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Honolulu, Hawaii. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native of Korea and a citizen of Japan 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 procuring a visa by fraud or willful misrepresentation. The applicant's spouse is a U.S. citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse.

The District Director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly. *Decision of the District Director*, dated June 6, 2013.

On appeal, counsel contests the finding of inadmissibility, asserting that the applicant did not make material misrepresentations. In the alternative counsel asserts that the District Director abused his discretion in not finding extreme hardship to the applicant's spouse. *Form I-290B, Notice of Appeal or Motion*, dated July 5, 2013.

The record includes, but is not limited to, statements from the applicant, her spouse, and family members; medical records for the applicant and her spouse; a psychological evaluation for the applicant's spouse; and information about the applicant's spouse's acupuncture clinic. 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 Secretary of the Department 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.

The record reflects that the applicant answered "no" on her November 16, 2005 nonimmigrant visa application to the following questions: "Has anyone ever filed an immigrant visa petition on your

behalf?" and "Are any of the following persons in the U.S., or do they have U.S. legal permanent residence or U.S. citizenship?" The latter question includes boxes for applicants to check, listing specific family members, including children, by relationship; the applicant marked the "no" box concerning sons or daughters. However, the record reflects that the applicant's prior spouse filed a Form I-130, Petition for Alien Relative, on her behalf on June 7, 2002 and the petition was terminated on July 11, 2005, because they divorced. In addition, the applicant's daughter was in the United States on a visitor visa when the applicant said she had no relatives in the United States on her application.

Counsel asserts that the applicant's statement concerning her daughter is not a material misrepresentation, because her daughter does not have legal permanent residence or U.S. citizenship and has only visited the United States temporarily as a tourist. Her daughter, therefore, could not confer an immigration benefit to the applicant.

A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* at 771-72. The BIA has held that a misrepresentation made in connection with an application for a visa or other documents, or for 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 proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

The AAO finds that the applicant's misrepresentation related to her daughter was not material, as there is no evidence that her daughter was in the United States in lawful permanent resident status or as a U.S. citizen. The applicant would not have been inadmissible, removable or ineligible on the true facts, nor did this misrepresentation cut off a line of inquiry, which would have been relevant to the applicant's eligibility and which might well have resulted in a proper determination that she was inadmissible.

Concerning the second misrepresentation on the applicant's visa application, counsel asserts that the applicant may have answered "no" to the question related to prior immigrant visa petitions due to the lapse of time or memory loss due to her age. The record indicates that the applicant is 88 years old and that an immigrant visa petition was filed on her behalf in 2002, three years before her nonimmigrant visa application. Counsel appears to assert that given her age and the passage of time, the applicant's misrepresentation was not willful. The term "willful" should be interpreted as

knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. *Matter of G-G-*, 7 I&N Dec. 161(BIA 1956).

Counsel has not provided supporting evidence to establish that the applicant's misrepresentation about her prior efforts to immigrate was not willful for the reasons she asserts. The AAO notes that without documentary evidence to support these claims, the assertions of counsel will not satisfy the applicant's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also asserts that this particular misrepresentation was not material; the District Director offered "mere conjecture and not a clear, unequivocal and convincing evidence [sic] which is predictably capable of affecting" the consular officer's decision to deny the applicant's nonimmigrant visa application; and the applicant lacked apparent immigrant intent, as she was no longer married to her ex-spouse and could no longer benefit from his immigrant-visa petition.

The AAO finds that the applicant's misrepresentations cut off a line of inquiry, which would have been relevant to her eligibility and which might well have resulted in a proper determination that she was inadmissible. Specifically, had the consular officer known about previous petitions filed on her behalf, he or she may have inquired about the applicant's prior immigration history and other applications filed in the United States to determine if she had, or continued to have, immigrant intent and, whether as a nonimmigrant, she could be inadmissible under section 212(a)(7) of the Act as an intending immigrant. The record indicates that the applicant at one time intended to immigrate to the United States. She filed Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), on June 7, 2002, related to her Form I-130, and it was terminated on July 11, 2005, approximately four months before she submitted her nonimmigrant visa application. Moreover, on her nonimmigrant visa application the applicant recalled and stated that she was issued another visitor visa on August 11, 1998, approximately seven years earlier. The misrepresentation related to her prior immigrant-visa petition cut off a line of inquiry into the applicant's intention to immigrate, and given her previous trips as a nonimmigrant, questions related to her periods of residence in the United States.¹ Her responses to these questions may well have resulted in a finding that she intended to immigrate. As such, the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for procuring a visa by willful misrepresentation of a material fact.

¹ The applicant listed her periods of stay in the United States as a visitor on a previously filed and denied Form I-601 as: January 18, 1999 through July 15, 1999; October 25, 2000 through October 23, 2001; December 3, 2001 through December 22, 2004; February 1, 2005 through July 11, 2006; and January 15, 2007 through present. The applicant applied for and was granted extensions of her nonimmigrant status at least twice and also did not accrue unlawful presence while her Form I-485 was pending between 2002 and 2005. The accuracy of some of her dates is questionable, however, because she filed her nonimmigrant visa application on November 16, 2005 in Japan, though according to her I-601, she was in the United States on that date.

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 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 (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. *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.

The AAO will first address hardship to the applicant's spouse upon relocation to Japan. The applicant states that her spouse, a native of Korea, has resided in the United States for about 25 years; his two children, grandchildren, cousins and brother are in the United States, and most of them live in Hawaii as lawful permanent residents or U.S. citizens; he does not have any family in or ties to Japan; and he does not speak Japanese. The record reflects that the applicant's spouse is 69 years old.

Counsel states that the applicant's spouse was diagnosed with a stroke in September 2012 and was taken to the hospital for emergency treatment; he was then hospitalized for a month to rehabilitate the left side of his body that was paralyzed; he has heart disease, hypertension and anxiety attacks; he has Medicare insurance that allows him to afford his medical care; and he could not afford to cover his medical costs in Japan without it.

The record includes evidence supporting counsel's statements about the applicant's spouse's stroke in September 2012, including hospital admission records and doctors' letters stating that he was diagnosed with a cerebrovascular accident with left-sided weakness. Other medical letters and records indicate that the applicant's spouse also has been diagnosed with heart disease, hypertension, insomnia, and anxiety attacks. Additionally, the record includes evidence that his left eye was lost in an accident and he loses his balance and has fallen multiple times. The record includes evidence of the applicant's spouse's prescription medications and Internet articles about two of his conditions—atrial fibrillation and cerebrovascular accident.

Counsel states that the applicant's spouse has started to work a few hours a week after his stroke in September 2012. The applicant states that her spouse is an acupuncturist and has owned his medical clinic for more than 20 years. She states that it will be nearly impossible for him to start a new clinic in Japan due to his age, language barrier and licensing issues. The record includes Internet evidence corroborating claims that the applicant's spouse owns and operates an acupuncture clinic.

The record reflects that the applicant's spouse has strong family and employment ties to the United States. He does not have any ties to Japan. The applicant's spouse also has serious medical issues that are particularly debilitating and could affect his livelihood and his ability to care for himself.

Moreover, he has medical insurance in the United States. Based on his age, medical issues and language issues, which would limit his ability to obtain a license to practice and to communicate with patients, it does not appear likely that the applicant's spouse could obtain employment in Japan. Considering the totality of the hardship factors presented, the AAO finds that the applicant's spouse would experience extreme hardship if he relocated to Japan.

The AAO will now address hardship to the applicant's spouse upon remaining in the United States. The applicant states that she has known her spouse for about 25 years. The applicant's spouse states that he was in despair after his second divorce; the applicant gave him a renewed reason to live; and he does not know how he could live without her. A psychologist diagnosed the applicant's spouse with major depressive disorder, single episode, moderate, and generalized anxiety disorder. The applicant's spouse reported to mental-health professionals that he feels sad most of the time, he fears living alone, and he would feel ashamed if his marriage to the applicant were to fail. He also reported sleep disturbance, including nightmares, and reduced appetite. The psychologist states that the applicant's spouse's test results indicate "intense anxiety," numbness and inability to relax. The record also includes similar notes from the applicant's spouse's psychiatrist.

Counsel states that the applicant's spouse is still being treated for his stroke; he needs some assistance in daily living; and he would not be able to travel to Japan to regularly visit the applicant due to his medical condition and on-going treatment. The applicant states that without her, her spouse would not have anyone to call 911 when he experiences health problems and he would not have her physical and emotional support at home. As mentioned, the record includes the applicant's spouse's September 2012 hospital admission records and doctors' letters stating that he was diagnosed with cerebrovascular accident with left-sided weakness, heart disease, hypertension, insomnia, and anxiety attacks; his left eye is artificial; and he loses his balance and has fallen multiple times.

Concerning the financial hardship her spouse would experience if he remained in the United States without her, the applicant states that it would be expensive for her spouse to visit her in Japan; and the expenses for two separate homes would be "extraordinary." She states that her spouse will suffer financial loss because he will work fewer hours due to his emotional and mental distress; he has been unable to focus on work, as he is suffering from psychological issues; and he also will lose income due to extended travel to Japan to see her. The applicant's spouse reported to his psychologist that his "nerves were so bad" that his work hours and income have been reduced.

The record reflects that the applicant's spouse is emotionally close to the applicant, and given their relationship and his past marital experiences, he would experience significant emotional and psychological hardship without her. In addition, he is elderly with serious medical issues, and the applicant has supported him by, for example, contacting emergency-service providers when he experienced his stroke. With respect to claims of financial hardship to her spouse, the record shows that he now works limited hours in part due to the emotional stress caused by the applicant's immigration issues. The applicant's spouse would also incur expenses in visiting the applicant in Japan and his absences would also affect the hours he works in his business. Therefore the record also supports concluding that he would experience financial hardship without her. Based on the

totality of the hardship factors presented, the AAO finds that the applicant's spouse would experience extreme hardship if he remained in the United States.

Considered in the aggregate, the applicant has established that her spouse would face extreme hardship if the applicant's waiver request is denied.

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 her 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 favorable factors include the applicant's U.S. citizen spouse, extreme hardship to her spouse and the lack of a criminal record. The unfavorable factors include the applicant's misrepresentation.

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.