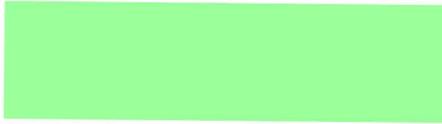




**U.S. Citizenship
and Immigration
Services**

(b)(6)



DATE: NOV 21 2014

Office: NEW YORK, NY

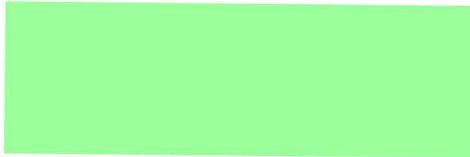
FILE: 

IN RE:

Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(i) of the Immigration and Nationality Act (the 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 Acting District Director, New York, New York, denied the waiver application and a subsequent appeal was denied by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the appeal sustained.

The applicant is a native and citizen of Nepal who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of 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.

In a decision, dated September 28, 2013, the acting district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly.

On appeal, counsel contended that the decision failed to consider the special circumstances in the applicant's case. Specifically, counsel asserted that the applicant's husband is an asylee from Nepal, that he is afraid to return to Nepal, and that the applicant used a false passport to enter the United States because of her fear of staying in Nepal.

In our decision, dated July 1, 2014, we stated that the record established that if the applicant's husband decided to return to Nepal, where he was born, to avoid the hardship of separation, he would suffer extreme hardship. However, we asserted, that the record did not establish that the applicant's spouse would suffer extreme hardship if he made the decision to separate from the applicant and stay in the United States because neither the applicant nor her husband discussed whether remaining in the United States would cause him extreme hardship in their appeal. Thus, we found that the record did not show the applicant qualified for a section 212(i) waiver and the appeal was dismissed.

On motion, counsel submits two new affidavits addressing hardship to the applicant's spouse upon separation.

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). The applicant's motion meets the requirements of a motion to reopen because counsel has submitted new evidence for consideration.

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) provides, in pertinent part:

(1) 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 the applicant had conceded, that she entered the United States in May 2003 using a fraudulent passport. Therefore, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for willful misrepresentation of 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 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.

On appeal, the record of hardship contained: a copy of the marriage certificate of the applicant and her husband indicating they were married on February [REDACTED] copies of the birth certificate of the couple’s U.S. citizen daughter; a letter from the applicant; a letter and an affidavit from the applicant’s husband; copies of tax returns and other financial documentation; a letter from the applicant’s husband’s employer; a copy of the U.S. Department of State’s Human Rights Report for Nepal and other background information; and an approved Petition for Alien Relative (Form I-130).

In our decision on appeal, we indicated that the applicant’s husband stated that his mother was granted asylum in 2001 and that he, his father, and his four siblings entered the United States in March 2003 as asylee relatives. The applicant’s spouse stated he met his wife in July 2006 and that they have a daughter together. The applicant’s husband stated that having experienced and witnessed the political situation in Nepal, his family would not be able to return to Nepal again due to their fear of being persecuted and tortured. He stated that he fears his wife would possibly get killed if she returned to Nepal.

As stated above, we found on appeal that if the applicant’s husband decided to return to Nepal, to avoid the hardship of separation, he would suffer extreme hardship. We recognized that the

applicant's husband entered the United States from Nepal as a result of an asylee relative petition, he has lived in the United States for his entire adult life, and he has been employed by the same employer for the past ten years. Considering all of these factors cumulatively, we found the record established that the hardship the applicant's husband would experience if he returned to Nepal to be with his wife was extreme, going well beyond those hardships ordinarily associated with inadmissibility or exclusion. However, we then found that the record did not establish extreme hardship to a qualifying family member in the event of separation. We recognized the emotional hardship the applicant's husband would suffer if he were separated from his wife, particularly considering she would return to the country from which his mother received asylum, but we stated that neither the applicant nor her husband discussed whether remaining in the United States would cause him extreme hardship. We indicated that although the applicant's husband stated that his wife takes care of their daughter, he did not address whether he would be able to care for their daughter or whether he would be able to get any help from his family, including his parents who also live in New York.

On motion, the applicant submits an affidavit from her mother-in-law stating that she and her husband would not be able to care for their granddaughter in the absence of the applicant and that the child would have to return to Nepal with the applicant. The affidavit indicates that the applicant's mother and father-in-law do odd jobs to earn a living and have three sons still living with them. In addition, the record includes an affidavit from the applicant's sister-in-law stating that she too would not be able to care for the applicant's child in the applicant's absence. We now find that the record establishes that the applicant's spouse will suffer extreme hardship as a result of separation because his child would have to return to Nepal with the applicant. Given the history of the applicant's spouse's family's experience in Nepal, that they entered the United States as asylees, and that removal would include permanent separation as the applicant's spouse would face extreme hardship as a result of relocation, it would also be extreme hardship for the applicant's spouse to separate from the applicant, having the applicant return to Nepal with their child. The record now indicates that there is no one to care for the applicant's child in the absence of the applicant. 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 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.

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.

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 applicant's family ties to the United States, the extreme hardship her spouse and child would face as a result of the applicant being

found inadmissible, the lack of any criminal record in the United States, and the applicant's role as a mother and wife. The unfavorable factors in the applicant's case are her entry into the United States with a fraudulent passport and her illegal residence since her entry.

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.