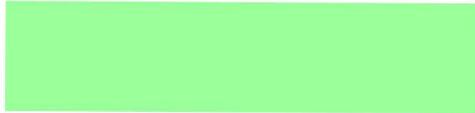


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U.S. Citizenship
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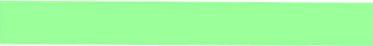


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Office: CHICAGO

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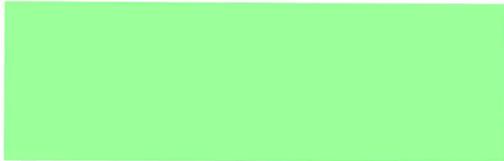
IN RE:

Applicant: 

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 Field Office Director, Chicago, Illinois. 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 Lithuania 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 an immigration benefit by fraud or willful misrepresentation of material facts. The applicant is the beneficiary of an approved Form I-360, Petition for Amerasian, Widower, or Special Immigrant (Form I-360). He seeks a waiver of inadmissibility in order to reside in the United States.

The Field Office Director found that the applicant failed to establish extreme hardship to himself and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly. *Decision of the Field Office Director*, dated December 26, 2013.

On appeal, counsel contests the finding of inadmissibility, asserting that the applicant did not willfully misrepresent material facts. In the alternative, counsel asserts that the Field Office Director erred in law and in fact by finding that the applicant would not experience extreme hardship if his waiver application is denied. *Brief accompanying Form I-290B, Notice of Appeal or Motion*, dated January 13, 2014.

The record includes, but is not limited to, counsel's brief, statements from the applicant, financial records, medical records, psychiatric and psychosocial evaluations of the applicant, and country-conditions information about Lithuania. 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.

The record reflects that when the applicant applied for a nonimmigrant visa in [redacted] Lithuania, on July 12, 2000, he stated on his Optional Form 156 (OF-156) that he was working as an attorney. However, at his adjustment of status interview in the United States, he stated that after the collapse of the Soviet Union, he was left without a job for eight years, so he came to the United States.

Counsel asserts that the Field Office Director improperly raised this particular misrepresentation for the first time in the decision denying Form I-601; this prevented the applicant from responding to the charge; and this allegation may not be used as a basis for denying the waiver. Moreover, counsel cites to *Matter of Tahsir*, 16 I&N Dec. 56 (BIA 1976) as support for her assertion that the applicant was entitled to review the documents that formed the basis of the applicant's inadmissibility.

The relevant regulation at 8 C.F.R. § 103.2(b)(16)(i) states:

Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered..."

The applicant states that an agent prepared the OF-156 for him; the agent asked him about his last place of work, and he responded, "lawyer/prosecutor"; he was actually unemployed at the time; and he would have told the agent that he did not have steady, full-time employment if he had been asked about his current job. The applicant asserts that he was unaware of the misrepresentation made concerning his employment.

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).

Moreover, according to the Department of State's Foreign Affairs Manual (FAM),

An alien who acts on the advice of another is considered to be exercising the faculty of conscious and deliberate will in accepting or rejecting such advice. It is no defense for an alien to say that the misrepresentation was made because someone else advised the action unless it is found that the alien lacked the capacity to exercise judgment.

9 FAM 40.63 N.5.2.

The applicant signed the OF-156, which was printed and filled out in Lithuanian. His signature was required as certification that he read and understood the form's questions and that the answers to those questions are true and correct to the best of his knowledge and belief. The record does not include evidence establishing his incapacity to exercise judgment or to review his completed OF-156. The applicant submits no evidence corroborating claims that someone assisted him in completing the form, asked him a question that does not appear on the form, then failed to review the form's contents with him or show him the completed form. The derogatory information concerning the misrepresentation about his employment therefore appears to have been known to the applicant, because though he claims he did not prepare the form, he signed the OF-156 before submitting it to U.S. consular officers.

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).

We find that the applicant's misrepresentation cut off a line of inquiry that would have been relevant to his eligibility and might well have resulted in a proper determination that he was inadmissible. Specifically, had the U.S. consular officer known that the applicant was unemployed, the officer may have focused his or her inquiries on the applicant's ties to Lithuania and whether he intended to only visit, rather than immigrate to, the United States. His responses to these questions may well have resulted in a finding that he intended to immigrate to the United States. 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.

The Field Office Director also found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act because of a Form I-140, Petition for Alien Worker (Form I-140), that was electronically filed for the applicant as a multinational executive or manager. The petitioning company subsequently was found to be a sham company that existed only on paper; the Form I-140 contained accurate, personally identifiable information about the applicant; and the applicant filed an accompanying Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), with supporting documents.

Counsel asserts that the Field Office Director did not provide the underlying documents upon which the employment-based misrepresentation was found; any misrepresentation in the Form I-140 or the unidentified supporting documents was made without the applicant's knowledge; the applicant stated that he did not understand the process of applying for adjustment of status; and he trusted the people he consulted for immigration assistance. The applicant states that he paid an individual who told him he would help him get a green card; this individual asked for his personal information and documents and told him to obtain a medical examination. The applicant states that he did not file any applications for immigration benefits himself and that he signed mostly blank forms.

The record reflects that the Form I-140 in question lists no company by name; it lists the petitioner as "employer" instead of "self"; and the printed name next to the signature line is [REDACTED]. Other records reflect that the petitioner was [REDACTED]. On November 7, 2005, U.S. Citizenship and Immigration Services (USCIS) issued an Intent to Deny the Form I-140 and requested supporting evidence. The petitioner did not respond to the Intent to Deny and the petition

was denied on January 3, 2006 due to abandonment. The Form I-485, signed by the applicant on October 28, 2004, included a Form G-325A, Biographic Information, signed by the applicant on November 23, 2004. The Form G-325A lists his employment with [REDACTED] as a gemologist as of January 1998. He lists his occupation as general manager on the Form I-485. The Form I-485 was denied on January 3, 2006.

Although the Form I-140 does not include supporting documentation that could be attributed to the applicant, he submitted a signed Form I-485 based on an employment petition filed on his behalf by a nonexistent company. The applicant signed the Form I-485 under penalty of perjury that the application was true and correct, and he also signed the Form G-325A in which he listed employment with the sham petitioner.

As mentioned, the applicant asserts that he was unaware of the misrepresentations made and that another individual filed the forms. The applicant provides no evidence to corroborate his assertions that his misrepresentations concerning his Form I-140 and the related applications and forms were not willful. The applicant signed the Forms I-485 and G-325A to attest that he was aware of the forms' contents, one of which referred to employment with a sham company that filed the underlying petition on which the Form I-485 was based. As such, the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for seeking to procure adjustment to lawful permanent resident status by willful misrepresentation of a material fact.

Section 212(i) of the Act provides that:

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 or, in the case of an alien granted classification under clause (iii) or (iv) of section 204(a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B), the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

Sec. 204(a)(1)(A) of the Act provides:

(iii) (I) An alien who is described in subclause (II) may file a petition with the [Secretary] under this clause for classification of the alien (and any child of the alien) if the alien demonstrates to the [Secretary] that--

(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and

(bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse.

(II) For purposes of subclause (I), an alien described in this subclause is an alien--

(aa)(AA) who is the spouse of a citizen of the United States.

The applicant filed his Form I-360 as the abused spouse of a U.S. citizen under section 204(a)(1)(A)(iii) of the Act. Section 212(i) authorizes the Secretary to waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien granted classification under clause (iii) of section 204(a)(1)(A) if the alien demonstrates extreme hardship to the alien or the alien's U.S. citizen, lawful permanent resident, or qualified parent or child. Accordingly, as the beneficiary of an approved Form I-360, the applicant is permitted to demonstrate extreme hardship to himself. If extreme hardship 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-Moralez*, 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.

Asserting the applicant would experience extreme hardship if he returns to Lithuania, counsel states that the applicant lacks significant ties to Lithuania; the applicant fears becoming a victim of violence and discrimination because he worked as a prosecutor during the Soviet era; his physical and psychological well-being would be harmed by departing the United States; and he would have difficulty finding employment there given his age, the depressed economy and his lack of professional connections. Counsel also refers to adverse country conditions, such as documented human rights problems, a high murder rate, an unstable economy, and trafficking issues.

The applicant states that he has resided in the United States for about 13 years; most of his family, except for his adult son, has left Lithuania; his chances of finding work are slim in Lithuania; he has an established career as a truck driver; nobody there would hire him as a truck driver as he is 60 years old; and without employment he would not be covered by health insurance. The applicant also states that he worked as a prosecutor in Lithuania when it was part of the Soviet Union; after gaining independence from the Soviet Union, local Lithuanian nationalists persecuted those who worked in Soviet ministries; he was part of the Ministry of Justice; he was fired from his job; he feared “being lynched by the mob” looking for former Soviet officers; no government or legal offices now would hire him due to his work during the Soviet era; the unemployment rate is very high; he is 60 years old; and he would have no way to pay for his medical care and other necessary expenses there.

The applicant was evaluated by a psychiatrist who states that the applicant experienced traumatic events in Lithuania, including physical violence after he refused to pay a bribe to customs officials and threats of violence to his ex-wife for talking about corruption and dishonesty. He states that the applicant has exhibited signs of a mental disorder on and off for several years; he suffers from posttraumatic stress disorder as a result of "extreme and repetitive traumatic" stressors in Lithuania from 1993 to 2000; his condition worsened owing to the abuse he suffered at the hands of his ex-wife in the United States; and his mental condition would deteriorate in Lithuania. The record includes a 1994 newspaper article detailing a border official's assault of the applicant.

The financial evidence in the record includes mortgage statements, business expenses, remittances to Lithuania, U.S. federal tax returns, and a list of his monthly expenses and income. An economist in Lithuania states that the applicant's employment prospects there are difficult due to the high national unemployment level, his many years of exclusion from the labor force, and his age. The record includes evidence that the unemployment rate currently is over 13 per cent.

The record includes a letter stating that the applicant regularly attends church services and statements from friends of the applicant describing his good moral character.

The record also includes medical records reflecting that the applicant has hypertension, allergic rhinitis, hypertriglyceridemia, hypercalcemia, tinea corporis, and nodular prostrate. The severity of his conditions is not clear from the record. The applicant also submits evidence of his medical insurance.

The record reflects that the applicant has few ties to Lithuania compared with those he has established in the United States; he likely would have difficulty finding employment and experience financial hardship. In addition, the evidence supports concluding that he would experience serious psychological issues upon returning to Lithuania after a lengthy absence, particularly when he lacks strong familial or community support there. Considering the totality of the hardship factors presented, we find that the applicant would experience extreme hardship if he relocated to Lithuania.

Considered in the aggregate, the evidence establishes that the applicant would face extreme hardship if his 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-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 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.

We note 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 extreme hardship, his apparent lack of a criminal record, his payment of taxes, and his good character as indicated in statements his friends and co-workers have submitted on his behalf. The unfavorable factors include the applicant's misrepresentations, unauthorized employment and unauthorized periods of stay.

We find 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.