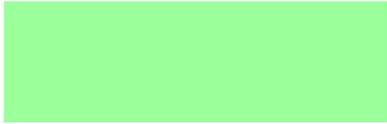


(b)(6)

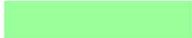


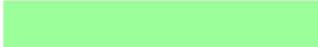
U.S. Citizenship
and Immigration
Services



Date: OCT 07 2014

Office: TUCSON

FILE: 

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,



Ron Rosenberg
Chief, Administrative Appeals Office

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

The record reflects that the applicant, a native and citizen of Mexico, was found to be inadmissible to the United States under 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 admission to the United States through fraud or misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), to reside in the United States with his U.S. citizen spouse and children.

The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director*, January 31, 2014.

On appeal, counsel contests the finding that the applicant is inadmissible for misrepresentation and submits further evidence of hardship to his qualifying relative.

The record includes, but is not limited to, the following documentation: briefs by counsel in support of the Form I-601 and Form I-290B, Notice of Appeal or Motion; statements by the applicant; a statement from the applicant's spouse; financial documentation; medical documentation for the applicant's spouse and stepdaughter; country-conditions information on Mexico; and letters of reference. 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:

- (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 indicates that the applicant was in possession of a Border Crossing Card (BCC) issued on July 16, 2009, and his most recent entries to the United States occurred on or about March 8, 2013 and March 14, 2013. To receive a BCC, the law requires the alien to have a residence abroad that he or she does not intend to abandon. During an interview at the U.S. Citizenship and Immigration Services (USCIS) Field Office in Tucson, Arizona on July 10, 2013, the applicant stated that he and his wife decided to wait until his wife became a U.S. citizen on January 4, 2013 before getting married and beginning the process of immigrating to the United States. The applicant married his U.S. citizen spouse on February 22, 2013, prior to the applicant's most recent entries into the United States.

Counsel states that the purpose of the applicant's entry to the United States on March 8, 2013 was to attend the wedding of a cousin in Phoenix, Arizona. The record indicates that the applicant applied for a Form I-94, Arrival/Departure Record at the Nogales Port of Entry in order to travel to Phoenix, Arizona. The applicant required a Form I-94 as Phoenix is located beyond the 75 mile border zone available to BCC users. On March 8, 2013, he underwent a medical examination with a Civil Surgeon for the purpose of adjusting his status and on April 9, 2013 he submitted the Form I-485, Application to Register Permanent Residence or Adjust Status, which had been signed by the applicant and the preparer on March 25, 2013. During the interview with the USCIS Field Office in Tucson, Arizona on July 10, 2013, the applicant stated that he did not declare to the Customs and Border Protection officer that he was in the process of immigrating to the United States as the officer would have denied his entry and cancelled his BCC. The Field Office Director therefore determined that the applicant made a willful misrepresentation in his responses to U.S. immigration officials in order to gain admission to the United States.

On appeal, counsel contends that the applicant did not intend to remain in the United States permanently at the time of his most recent entry to the United States, and therefore did not make a material misrepresentation rendering him inadmissible under section 212(a)(6)(C) of the Act. Counsel contends that subsequent to his entry, he was misadvised by a *notario* who told the applicant that he did not need to depart the United States to immigrate, but could adjust his status in the United States.

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. *See DOS Foreign Affairs Manual*, § 40.63 N5.2. Although we are not bound by the Foreign Affairs Manual, we find its analysis in these situations to be persuasive. In the matter at hand, the record shows that the applicant was intending to immigrate to the United States after his wife became a U.S. citizen. The applicant concealed this intent while continuing to use his BCC to enter the United States. Failure to depart the United States after being admitted under nonimmigrant status constitutes a willful act by the applicant, and there is no assertion or evidence to show that the applicant lacked the capacity to exercise judgment at that time.

We therefore concur with the Field Office Director that the applicant made a willful misrepresentation in his responses to U.S. immigration officials in order to gain admission to the United States.

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

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.

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. The applicant's U.S. citizen spouse is the only qualifying relative in this case. Under this provision of the law, children are not deemed to be qualifying relatives. However, although children are not qualifying relatives under this statute, USCIS does consider that a child's hardship can be a factor in the determination whether a qualifying relative experiences extreme hardship. 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. See *Salcido-Salcido v. INS*, 138 F.3d 1292, 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 record indicates that the applicant’s spouse has resided in the United States for over ten years and became a U.S. citizen in 2013. The Field Office Director determined that the applicant established that his qualifying relative would experience extreme hardship if she were to relocate to Mexico to be with the applicant, giving consideration to the separation from her family his spouse would experience, her educational goals, financial difficulties, medical care needed for herself and her children, and the country conditions and dangers of living in Mexico. Based on the evidence in the record, the applicant has established that the hardships to his spouse, considered in the aggregate, would result in hardship beyond the common results of removal if she were to relocate to Mexico to reside with the applicant.

With respect to the hardship that the applicant’s qualifying relative would experience were she to be separated from the applicant, counsel contends that the applicant’s spouse would suffer medical, emotional, and financial hardship if the applicant’s waiver application is not approved.

In a statement in support of the Form I-601, the applicant’s spouse states that she is being treated for a hemorrhagic cyst found in her right ovary, and she submits verifying documentation in the form of a report from a medical examination on July 18, 2013. On appeal, the applicant submits a subsequent medical report dated October 16, 2013, indicating the continuing nature of this condition. Counsel contends that the applicant’s spouse will lose the level of physical and emotional support that she has received from the applicant if he is separated from her.

In regard to financial hardship, the record includes a copy of the 2012 federal income tax return for the applicant's spouse indicating that she had an adjusted gross income of \$16,290.00. The applicant's spouse is employed as a clerk, earning \$9,785.00 in 2012, and also derived \$7,000 in business income selling purses. The applicant's spouse has three U.S. citizen children and would have to provide support for her children if she were to be separated from the applicant. She further states that she provides support to her parents. The evidence on the record indicates that the qualifying spouse would have difficulty meeting her financial obligations in the applicant's absence.

The record further indicates that the eldest daughter of the applicant's spouse suffers from attention deficit hyperactivity disorder and is receiving counseling for behavioral problems. As stated above, under section 212(i) of the Act, children are not deemed to be qualifying relatives, and a child's hardship will only be considered to be a factor if it affects whether a qualifying relative experiences extreme hardship. The applicant's spouse states that she is concerned about caring for the medical and psychological needs of this daughter in the absence of the applicant, further noting that her daughter's condition has improved since the applicant has been able to live with them and provide support.

The record establishes that if the waiver application were denied, the applicant's spouse would experience medical and financial hardship as a result of loss of the applicant's support, as well as concern for her daughter's medical condition without the applicant's support. These hardships, when considered in the aggregate, are beyond the common results of removal and would rise to the level of extreme hardship if she remained in the United States without the applicant.

Thus, the record establishes that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The favorable factors in this matter are the extreme hardships the U.S. citizen spouse and children would face if the applicant were returned to Mexico, regardless of whether they accompanied him or remained in the United States; the apparent lack of a criminal record, and letters of reference on his behalf. The unfavorable factor in this matter is his entry to the United States through fraud or misrepresentation.

The immigration violation committed by the applicant is serious in nature. Nonetheless, we find that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's 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.