



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

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF P-A-

DATE: NOV. 12, 2015

APPEAL OF NEWARK FIELD OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY

The Applicant, a native and citizen of India, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(i), 8 U.S.C. § 1182(i). The Newark Field Office Director, Newark Field Office, denied the application. The matter is now before us on appeal. The appeal will be dismissed.

The Applicant was found to be inadmissible to the United States pursuant to section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for misrepresenting a material fact. The Applicant is the beneficiary of an approved Form I-140 petition for an employment-based immigrant visa and seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen father and lawful permanent resident mother.

The Director determined that the Applicant had not established extreme hardship to her qualifying relatives if she were removed from the United States and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, the Applicant asserts that her misrepresentation was not material and, in the alternative, that she timely retracted it. She also asserts that her parents would experience extreme hardship if her application were not approved.

We issued a notice of intent to dismiss the application (NOID), because the Applicant had not established that she has a qualifying relative, as required for a waiver under section 212(i) of the Act. In response to the NOID, the Applicant provides a brief and additional evidence to establish she has a qualifying relationship.

The record includes, but is not limited to: declarations of the Applicant and her parents, identity and relationship documents, medical documentation, and financial records. The entire record was reviewed and considered in rendering a decision on the appeal.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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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.

Section 212(i) of the Act provides:

(1)The Attorney General [now the Secretary 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, her husband, and their two children arrived at the [REDACTED] on October 7, 1992, without travel documents. The Applicant stated that her name was [REDACTED]. Her husband claimed past persecution on account of his Sikh religion. The Applicant and her children were included on her husband's Form I-589, Request for Asylum in the United States, as dependents. On January 4, 1993, and again on August 31, 1993, the Applicant filed applications for an employment authorization document (EAD) using the name [REDACTED]. The asylum request was denied, and the Applicant and her family were ordered excluded on March 24, 1994. On August 18, 1994, the Applicant filed a Form I-589 as the principal alien, using the name [REDACTED] and listing her husband and two children as her dependents. She did not appear for an interview, and the application was administratively closed. The Applicant currently is the beneficiary of an approved Form I-140, Petition for Alien Worker.

In a decision denying the Applicant's Form I-485, Application to Register Permanent Residence or Adjust Status, the Director determined that the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for seeking to obtain benefits under the Act through fraud or misrepresentation. The Director noted that the Applicant misrepresented her identity as [REDACTED] at the port of entry and again when she twice applied for her EAD.

On appeal, the Applicant asserts that her misrepresentations were not material, because she would not be excludable on the true facts and they did not shut off a relevant line of inquiry. On appeal, the Applicant also asserts that she assumed the identity of [REDACTED] in order to escape India and to apply for asylum in the United States. She further asserts that she timely retracted her misrepresentation when she informed an immigration judge of her true name in immigration court.

A misrepresentation is generally material only if by it the individual received a benefit for which he or she 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

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(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*, 485 U.S. 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 Applicant asserts that her misrepresentation was not material, because she is not excludable on the true facts and the misrepresentation did not tend to shut off a line of inquiry that is relevant to her asylum application. The Applicant's misrepresentation is material, however, because it prevented a line of questioning concerning her identity. Her identity is relevant for purposes of the immigration benefits she has requested, not limited to her asylum application, in that she could have been found ineligible or inadmissible on other grounds, for example, as an intending immigrant, had her true identity been known. The Applicant has not provided authority to support her position that misrepresentations concerning identity are not material.

An individual's entry into the United States as a nonimmigrant under a false identity does not necessarily constitute a material misrepresentation within the meaning of section 212(a)(6)(C)(i) of the Act. In *Matter of Gilikevorkian*, 14 I&N Dec. 454, 455 (BIA 1973), the Board of Immigration Appeals (BIA) noted that:

The cases have distinguished between a false identity used to facilitate entry into the United States and one used for other reasons. In *Matter of Sarkissian*, [10 I&N Dec. 109 (1962)], on which the immigration judge relied, there was no indication that the alien used the false identity for any purpose other than to obtain a visa to enter the United States. Where a person uses a false identity long before, and for reasons unrelated to, obtaining admission to the United States, and over a long period of time, misrepresentation as to identity made when applying to enter the United States has been held not to be material, *U.S. ex rel. Leibowitz v. Schlotfeldt*, 94 F.2d 263 (7th Cir. 1938).

In the instant case, the Applicant has not shown she used her false identity for a prolonged period before she arrived in the United States or that using this identity helped her to escape from persecution. Consequently, she has not established that her misrepresentation was not material.

In the alternative, the Applicant asserts that she timely retracted her misrepresentation. She also asserts that her first opportunity to retract her misrepresentation was at her exclusion hearing. The record reflects that on September 26, 1992, upon arrival, the Applicant stated that her name was

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Approximately four months later, her spouse filed a Form I-589 in immigration court indicating that the Applicant's name was

The Foreign Affairs Manual (FAM) offers guidance regarding section 212(a)(6)(C) of the Act. According to 9 FAM 40.63 N4.6, a timely retraction will serve to purge a misrepresentation and remove it from further consideration as a ground for section 212(a)(6)(C)(i) ineligibility. Whether a retraction is timely depends on the circumstances of the particular case. *Id.* In general, it should be made at the first opportunity. *Id.* If the applicant has personally appeared and been interviewed, the retraction must have been made during that interview. *Id.*

The doctrine of timely recantation ameliorates what would otherwise be an unduly harsh result for some individuals, who, despite a momentary lapse, simply have humanity's usual failings, but are being truthful for all practical purposes. *See Llanos-Senarillos v. United States*, 177 F.2d 164, 165-66 (9th Cir. 1949). The BIA has recognized the virtue of applying that principle when an individual "voluntarily and prior to any exposure of the attempted fraud corrected his testimony that he was an alien lawfully residing in the United States." *Matter of M-*, 9 I&N Dec. 118, 119 (BIA 1960). In addition, for the retraction to be effective, it "must be voluntary and without delay." *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973) (recantation one year later when discovery of its falsity was imminent was neither voluntary nor timely). A retraction or recantation is timely only if it is made during the same examination in which the person gave false testimony. *Llanos-Senarillos v. United States*, 177 F.2d at 165.

The record reflects that the Applicant did not divulge her true identity until she appeared in immigration court, four months after her arrival. She therefore did not correct her testimony at the first opportunity or during the same examination in which she gave false testimony, which in her case would have been at the port of entry upon arrival. She has not established that she timely retracted her misrepresentation.

The Applicant, citing *Matter of M-*, 9 I&N Dec. 118 (BIA 1960), asserts that the length of time between making a misrepresentation and divulging the truth is not important, provided she did not wait until just before the falsity was about to be exposed. However, in *Matter of M-*, the BIA found a retraction was voluntary and timely where the individual corrected his misrepresentation before the conclusion of his full statement and before any exposure of the attempted fraud. The Applicant also cites *Matter of R-R-*, 3 I&N Dec. 823 (BIA 1940). The BIA in that case was determining whether the individual in question had committed an unlawful act of perjury, where an essential element of such offense was that "the offense must be otherwise complete," for purposes of section 101(f)(6) of the Act, 8 U.S.C. § 1101(f)(6), which provides that an individual who has given false testimony cannot be found to be a person of good moral character. The BIA found that the perjury was not complete in *Matter of R-R-*, because the individual timely and voluntarily retracted his false statements before the immigration official became aware through other means of the falsity of his statement. In the instant case, however, the Applicant has not been charged with perjury. Moreover, having waited several months before acknowledging her misrepresentation by using another name in her husband's asylum application, she cannot be said to have been acting "voluntarily and timely."

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The Applicant also states that she relied upon counsel's advice to use a false name when applying for her EAD. A person cannot deny responsibility for misrepresentation made on the advice of another, however, unless it is established that the person lacked the capacity to exercise judgment. See 9 FAM 40.63 Note 5.2.

The Applicant is eligible to apply for a waiver of inadmissibility pursuant to section 212(i) of the Act. The Applicant's only qualifying relatives are her U.S. citizen father and lawful permanent resident mother. In order to qualify for this waiver, she must first prove that the refusal of her admission to the United States would result in extreme hardship to her qualifying relatives. Hardship to the Applicant or the Applicant's children will not be separately considered, except as it is shown to affect the Applicant's parents. If extreme hardship to a qualifying relative is established, the Applicant is statutorily eligible for a waiver and U.S. Citizenship and Immigration Services 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 deportation, 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, 885 (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 1292, 1293 (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.

Concerning the hardship they would experience if they were to relocate with the Applicant to India, the Applicant states that both of her parents have serious medical conditions. According to the record, her father has hypertension, arthritis, and glaucoma; her mother has “multiple illnesses.” A joint statement from her parents and a doctor’s notes corroborate the Applicant’s claims. One of the doctor’s notes further specifies that the Applicant’s mother is being treated for diabetes, vision problems, and cataract surgery. The Applicant’s parents state that they do not believe that they can obtain adequate health care in India. The record lacks corroborative evidence addressing the availability and sufficiency of health care in India. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The Applicant’s parents also state that in India, they would continue to rely upon the Applicant for financial support, but she would not find “comparable employment” because the unemployment rate in India is above nine per cent. The Applicant submits no corroborative evidence describing labor and employment conditions in India.

In addition, the Applicant’s parents, natives of India, state that they have completely severed their ties to India, they have not returned for some time, and they have two other daughters living in the United States. They express concern about the psychological impact of separation from their other daughters should they relocate. The record includes evidence, however, showing that the Applicant’s parents have frequently traveled to India.

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The Applicant submits no additional evidence concerning the hardship that her parents would experience if they were to relocate to India. Although the Applicant's parents' emotional response to the prospect of being separated from their other daughters is understandable, the record lacks documentation that supports concluding that their emotional hardship, in addition to their medical and financial hardship, would amount to extreme hardship. We recognize the impact of separation on families, but the evidence in the record, when considered in the aggregate, does not indicate that the hardship is beyond that which is normally experienced by families dealing with removal or inadmissibility. See *Matter of O-J-O-*, 21 I&N Dec. at 383.

With respect to the hardship her parents would experience if they were to remain in the United States without her, the Applicant asserts that they are "totally financially dependent" upon her and that her two U.S. citizen sisters are unable to help them. She and her parents state that she is unlikely to find comparable employment in India due to poor economic conditions there. The record contains the Applicant's federal tax returns for the years 2008 through 2012. The Applicant and her spouse did not claim her parents as dependents in those years. The record contains no evidence of economic conditions in India or of the Applicant's financially supporting her parents.

The Applicant's parents assert that if they remain in the United States without the Applicant, they would become permanently separated from her, and the sociological and psychological impact would far surpass that of the effects of mere family separation. The Applicant does not provide corroborative evidence of emotional hardship, apart from her parents' declaration.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the Applicant's parents, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The Applicant has not established extreme hardship to a qualifying relative, as required under section 212(i) of the Act. As the Applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether she merits a waiver as a matter of discretion.

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 not been met.

ORDER: The appeal is dismissed

Cite as *Matter of P-A-*, ID# 12323 (AAO Nov. 12, 2015)