



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

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

MATTER OF F-A-

DATE: JUNE 20, 2016

APPEAL OF DETROIT, MICHIGAN FIELD OFFICE DECISION

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

The Applicant, a native of Iraq and citizen of Canada, seeks a waiver of inadmissibility for fraud or misrepresentation. *See* Immigration and Nationality Act (the Act) § 212(i), 8 U.S.C. § 1182(i). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Field Office Director, Detroit, Michigan denied the application. The Director concluded that the Applicant had not established extreme hardship to a qualifying relative.

The matter is now before us on appeal. In the appeal, the Applicant submits a brief and additional evidence. He claims that the Director erred in finding him inadmissible under section 212(a)(6)(C)(i) of the Act, because he did not willfully misrepresent his Canadian immigration status to U.S. immigration authorities. Alternatively, he asserts that his U.S. citizen spouse would suffer extreme hardship if his application is denied.

Upon *de novo* review, we will sustain the appeal.

I. LAW

The Applicant is seeking to adjust status to lawful permanent resident and has been found inadmissible for misrepresentation, specifically, seeking entry into the United States by falsely claiming to be a Canadian citizen.

Section 212(a)(6)(C)(i) of the Act renders inadmissible any foreign national 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 the Act.

Section 212(i) of the Act, 8 U.S.C. § 1182(i), provides for a waiver of this inadmissibility [if refusal of admission would result in extreme hardship to the United States citizen or lawful permanent resident spouse or parent of the foreign national

Decades of case law have contributed to the meaning of extreme hardship. The definition of extreme hardship “is not . . . fixed and inflexible, and the elements to establish extreme hardship are dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (citation omitted). Extreme hardship exists “only in cases of great actual and prospective injury.” *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (BIA 1984). An applicant must demonstrate that claimed hardship is realistic and foreseeable. *Id.*; see also *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968) (finding that the respondent had not demonstrated extreme hardship where there was “no showing of either present hardship or any hardship . . . in the foreseeable future to the respondent's parents by reason of their alleged physical defects”). The common consequences of removal or refusal of admission, which include “economic detriment . . . [,] loss of current employment, the inability to maintain one’s standard of living or to pursue a chosen profession, separation from a family member, [and] cultural readjustment,” are insufficient alone to constitute extreme hardship. *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (citations omitted); but see *Matter of Kao and Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* 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 the qualifying relatives would relocate). Nevertheless, all “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted). Hardship to the Applicant or others can be considered only insofar as it results in hardship to a qualifying relative. *Matter of Gonzalez Recinas*, 23 I&N Dec. 467, 471 (BIA 2002).

II. ANALYSIS

The first issue to be addressed is whether the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The Applicant asserts that he did not intentionally misrepresent his immigration status and that a U.S. Customs and Border Patrol (CBP) officer misunderstood him as saying he was a citizen, instead of a resident, of Canada. He further asserts that he should not be found inadmissible as an immigrant because he subsequently received multiple waivers to enter the United States as a nonimmigrant. The Applicant states that he relied on his former counsel’s advice to admit to misrepresenting his Canadian status. The evidence in the record establishes that the Applicant willfully made a material misrepresentation to gain an immigration benefit. His nonimmigrant waivers, reviewed and approved under a different legal standard and by a different agency, are not relevant to his immigrant waiver application. He is inadmissible under section 212(a)(6)(C)(i) of the Act.

The next issue to be addressed is whether the Applicant has established that his spouse will suffer extreme hardship if his waiver application is denied. Were he to depart or be removed from the United States, the Applicant does not indicate whether his spouse intends to remain in the United States or relocate with him to Canada, but he claims she would experience extreme hardship under

either scenario. The claimed hardship to the Applicant's spouse from separation consists of emotional, medical and financial hardship. The claimed hardship from relocation consists primarily of emotional hardship of separation from family in the United States. The evidence in the record, considered both individually and cumulatively, establishes that the Applicant's spouse would experience extreme hardship upon relocation.

A. Willfulness

We will first address the issue of willfulness. The Applicant asserts that he is not inadmissible, because he did not willfully misrepresent his Canadian immigration status to gain an immigration benefit, specifically, admission into the United States.

For a misrepresentation to be willful, it must be determined that the applicant was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. *See generally Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956). To be willful, a misrepresentation must be made with knowledge of its falsity. 7 I&N Dec. at 164. To determine whether a misrepresentation was willful, we examine the circumstances as they existed at the time of the misrepresentation, and we "closely scrutinize the factual basis" of a finding of inadmissibility for fraud or misrepresentation because such a finding "perpetually bars an alien from admission." *Matter of Y-G-*, 20 I&N Dec. 794, 796-97 (BIA 1994); *see also Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998) and *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28-29 (BIA 1979).

According to the record, the Applicant sought admission into the United States in 1998 by falsely claiming to be a Canadian citizen. The Applicant did not become a Canadian citizen until 2000. In his October 2014 sworn statement, the Applicant testified that he presented himself as a Canadian citizen in 1998 because he did not know the difference between being a Canadian citizen and a permanent resident. In a December 2014 sworn statement, the Applicant affirmed that when he applied for admission into the United States in 1998, he claimed he was a Canadian citizen. In an affidavit dated April 2015, however, the Applicant states that that the CBP officer misunderstood his answer to the officer's question and that he correctly had stated that he was a Canadian permanent resident.

On appeal, the Applicant asserts that he told his former counsel that he had not misrepresented his citizenship to U.S. immigration officials at the border, but counsel advised him to admit to making this misrepresentation. The record includes a declaration from the Applicant, in which he states that he claimed to be a Canadian citizen when seeking admission into the United States. On appeal, the Applicant asserts that he signed this declaration without reading it and that the paralegal who prepared the admission was responsible for this statement.

It appears that the Applicant is asserting ineffective assistance of his former counsel. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations

counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Here, the Applicant does not submit an affidavit or evidence that he gave his former counsel an opportunity to respond or that he contacted the appropriate disciplinary authorities. The Applicant submits a copy of a notice indicating that his former counsel was disciplined on October 3, 2008, but he does not establish that he initiated a complaint against him. Further, it appears that the Applicant retained this attorney in 2014, more than six years after the attorney was disciplined.

Moreover, an individual cannot deny responsibility for misrepresentations made on the advice of another, unless it is established that the Applicant lacked the capacity to exercise judgment. 8 USCIS Policy Manual J.3(D)(4), <https://www.uscis.gov/policymanual>. The Applicant does not allege, nor does the record indicate, that he lacked the capacity to understand his former counsel's advice and the declaration he signed.

The Applicant's inconsistent testimony calls into question the statements he made during his attempt to enter the United States in 1998. It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In this matter the Applicant has not provided sufficient objective evidence to establish his testimony concerning his Canadian immigration status to the U.S. immigration officer in 1998. The Applicant, therefore, has not met his burden of proving that he did not misrepresent a material fact when seeking admission into the United States and that he is admissible.

B. Materiality

The next issue we address is whether the Applicant's misrepresentation was material. A misrepresentation is generally material only if by it the foreign national 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 the official decision in order to be considered material. *Kungys*, 485 U.S. at 771-72. The Board has held that a misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, is material if either:

1. the foreign national is excludable on the true facts, or

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2. the misrepresentation tends to shut off a line of inquiry which is relevant to the foreign national'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).

In applying for admission into the United States as a nonimmigrant, the Applicant asserted that he was a Canadian citizen when in fact he was an Iraqi citizen and Canadian permanent resident. This misrepresentation was capable of affecting the CBP officer's decision to admit the Applicant to the United States. Generally, Canadian citizens traveling to the United States do not require a nonimmigrant visa, whereas Canadian permanent residents do.¹ This misrepresentation shut off a line of inquiry that was relevant to the Applicant's eligibility for admission into the United States. Had the CBP officer known that the Applicant was a Canadian permanent resident, he or she would have pursued a different line of inquiry, including questioning whether the Applicant had obtained, or been refused, the required visa. The misrepresentation was material because, had the truth been known, the officer would have either denied the Applicant admission or required a visa or other relevant documentation from him. Therefore, the record supports the Director's finding that the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for misrepresenting a material fact in order to procure an immigration benefit.

C. Effect of Approved Nonimmigrant Waivers

The Applicant also asserts that he is not inadmissible because he received multiple nonimmigrant waivers for his inadmissibility under section 212(a)(6)(C) of the Act. The Applicant's nonimmigrant waivers, however, were issued for a limited duration. Moreover, the requirements for a nonimmigrant waiver differ significantly from those for an immigrant waiver. When evaluating an application for a nonimmigrant waiver, the agency evaluates the risk of harm to society if the applicant is admitted, the seriousness of the applicant's criminal or immigration law violation, and the applicant's reason for seeking entry. *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978). In contrast, to establish eligibility for an immigrant waiver, applicants must establish that a qualifying relative will suffer extreme hardship if the application is denied and that they warrant approval as a matter of discretion. The Applicant cites no legal authority to support his assertion that approval of his nonimmigrant waiver applications requires approval of his immigrant waiver application.

D. Hardship

The Applicant must demonstrate that denial of the application would result in extreme hardship to a qualifying relative or qualifying relatives, in this case, his U.S. citizen spouse. In support of his claims, the Applicant submitted the following evidence: With the Form I-601, he submitted identity

¹ Department of State, Bureau of Consular Affairs at <https://travel.state.gov/content/visas/en/visit/canada-bermuda.html> [accessed April 8, 2016].

and relationship documents; financial records; medical records for his spouse and her family members; school records for his spouse; and declarations from the Applicant, his spouse, their family members, employers, and friends. On appeal, the Applicant submits a brief, additional statements, and financial records.

The record contains references to hardship the Applicant's brother and his wife's family would experience if the waiver application were denied. Congress did not include hardship to an Applicant's siblings or in-laws as factors to be considered in assessing extreme hardship under section 212(i) of the Act. In the present case, the Applicant's spouse is the only qualifying relative for the waiver under section 212(i) of the Act, and hardship to the Applicant's brother and his wife's family will not be separately considered, except as it may affect the Applicant's spouse.

The Applicant states that if his spouse relocates with him to Canada, she will suffer emotional hardship related to the separation from her family members, with whom she is very close. The Applicant's spouse states that she has never lived far from her family; her parents and five siblings live within walking distance of their home. The Applicant's spouse also states that she helps her father by taking him to doctor's appointments after his heart attack in 2013 and that she also helps care for her younger sister, who has multiple sclerosis. In support of these claims, the Applicant submits a letter from a psychologist, who states that the Applicant's spouse fears that if she moves to Canada with the Applicant, it would impose hardship not just to her but also to her parents. The Applicant submits a physician's letter stating that his spouse's sister was diagnosed with multiple sclerosis, and an undated letter from a heart and vascular specialist, stating that his father-in-law is suffering from coronary artery disease and myocardial infarction. The letter states that the Applicant's spouse helps her father with transportation and care.

The Applicant also asserts that his immigration issues have caused his spouse to develop depression and anxiety. In support of his assertions, the Applicant submits a letter from a neurologist, who states that the Applicant's spouse has severe progressive depression and anxiety syndrome, which could improve with the resolution of the Applicant's immigration status. The Applicant also submits a letter from a psychologist, who states that as the result of the Applicant's denied application, the Applicant's spouse has developed serious emotional problems. In addition, he submits a physician's letter stating that the Applicant's spouse has been prescribed antidepressant medication and that the physician believes her condition will improve after the Applicant receives his U.S. residency. The Applicant also submits an April 2015 psychosocial assessment, in which a licensed clinical social worker (LCSW) diagnoses his spouse with major depressive disorder, recurrent with psychotic features; generalized anxiety disorder; separation anxiety disorder; and agoraphobia. The LCSW states that the Applicant's spouse has struggled with attachment issues since she was 10 years old and that she endured trauma in Iraq related to the war. The LCSW states that the Applicant's spouse is overly dependent on and extremely close to her family, and that she has developed feelings of depression, anxiety, panic, nightmares, decline in concentration, agitation, fatigue, irritability, frequent uncontrolled anger outbursts, fluctuations in appetite, uncontrolled crying spells, and diminished interest in social interaction, owing to the Applicant's unresolved immigration issues.

The Applicant asserts that his spouse is financially dependent on him, because she is not employed. Evidence in the record establishes that the Applicant's spouse stopped working because of her emotional and physical problems. The Applicant provides their 2014 federal income tax Form 1040, showing their combined wages that year were \$16,935, with each contributing approximately half of the total. He also provides evidence of credit-card debt amounting to several thousand dollars, with minimal payments made. The Applicant finally asserts that he has no ties to Canada that would be useful in his efforts to find employment there, were he required to return.

Upon review, the cumulative evidence in the record sufficiently establishes that the Applicant's spouse would experience hardship beyond that normally experienced upon inadmissibility of a family member if she relocates with the Applicant. The evidence demonstrates that the Applicant's spouse suffers from major depressive disorder, recurrent with psychotic features; generalized anxiety disorder; separation anxiety disorder; and agoraphobia. The Applicant's spouse also has experienced trauma from war and the Applicant has played a vital role in helping her emotionally, particularly by supporting her in her efforts to care for her family. In addition, it is reasonable to conclude that her emotional hardship would contribute to a degree of financial hardship upon relocation, if she were unable to maintain steady employment, as has been her experience in the United States, and that the Applicant himself would face challenges in securing employment to support his spouse in Canada. Considering the evidence of hardship in the aggregate, the Applicant has demonstrated that the cumulative effect of the hardships that his spouse would experience if she relocates rises to the level of extreme hardship.

E. Discretion

We now consider whether the Applicant merits a waiver of inadmissibility as a matter of discretion. The burden is on the Applicant to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996). We must "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). In evaluating whether to favorably exercise 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, recency 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).

Id. at 301 (citations omitted). We must also consider “[t]he underlying significance of the adverse and favorable factors.” *Id.* at 302. For example, we assess the “quality” of relationships to family, and “the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of [removal] proceedings, with knowledge that the alien might be [removed].” *Id.* (citation omitted).

The unfavorable factors in this case are the Applicant’s attempt to gain admission to the United States through willful misrepresentation of a material fact. The favorable factors include the extreme hardship that the Applicant’s U.S. citizen spouse would face if his waiver application is denied, the length of time since his misrepresentation (17 years), the absence of a criminal record, the presence of extended family in the United States, a history of paying taxes, and his good moral character, as described in letters of support from family and friends. Upon review, the positive factors in this case outweigh the negative factors, such that a favorable exercise of discretion is warranted.

III. CONCLUSION

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has met that burden. Accordingly, we sustain the appeal.

ORDER: The appeal is sustained.

Cite as *Matter of F-A-*, ID# 14219 (AAO June 20, 2016)