



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

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

MATTER OF G-D-

DATE: JULY 19, 2016

APPEAL OF PHILADELPHIA, PENNSYLVANIA FIELD OFFICE DECISION

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

The Applicant, a native of India and citizen of Canada, seeks a waiver of inadmissibility for unlawful presence, fraud or misrepresentation, and a crime involving moral turpitude. *See* Immigration and Nationality Act (the Act) §§ 212(a)(9)(B)(v), 212(h), and 212(i), 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(h), and 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 USCIS Director, Philadelphia, Pennsylvania Field Office, denied the application. The Director concluded that the record contained insufficient evidence of hardship to the Applicant's qualifying relatives.

The matter is now before us on appeal. In the appeal, the Applicant submits additional evidence and states that if his application is denied, his U.S. citizen spouse will suffer extreme hardship.

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 unlawful presence, specifically, for his unlawful presence between June 2002 and October 2003. Section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), provides that a foreign national who has been unlawfully present in the United States for one year or more, and seeking admission within 10 years of the date of departure or removal from the United States, is inadmissible.

The Applicant also was found inadmissible for fraud or misrepresentation, specifically, telling a U.S. immigration inspector that he had not previously been refused entry into the United States, denying that he resided in California, and misrepresenting the purpose of his visit. 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 a visa (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.

He was also found inadmissible for his conviction for a crime involving moral turpitude, specifically, possession of stolen property, under section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A).

Individuals found inadmissible under section 212(a)(2)(A) of the Act may seek a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). Section 212(h) of the Act provides for a discretionary waiver if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter.

Sections 212(a)(9)(B)(v), and 212(i) and of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i), provide for a waiver of the inadmissibility of unlawful presence and fraud or misrepresentation 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 Applicant contests the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for one year or more, asserting that it is inapplicable to him because he had been admitted into the United States for duration of status and

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was outside of the country when a U.S. government official found he had violated his status. The Applicant contests the finding of inadmissibility under section 212(a)(6)(C)(i), for fraud or misrepresentation, asserting that he timely retracted his misrepresentations. The Applicant concedes that he is inadmissible for his conviction for a crime involving moral turpitude, a finding supported by the record.¹ The record also establishes that the Applicant is inadmissible for fraud or misrepresentation.

The next issue to be addressed is whether the Applicant's U.S. citizen spouse would experience extreme hardship if the waiver is denied, whether she remained in the United States without him or accompanied him to Canada. 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 primarily of financial hardship, emotional hardship resulting from the Applicant's absence and his spouse's difficulties caring for their two young children and her elderly and infirm mother alone, and medical hardship related to her emotional state. The claimed hardship from relocation consists primarily of emotional hardship related to the Applicant's spouse's separation from their family in the United States, in particular her mother, who needs her assistance; and emotional and financial hardship related to her inability to pursue her chosen profession and to the Applicant's inability to find suitable employment.

The evidence, considered cumulatively, establishes that the Applicant's spouse would experience extreme hardship. The record contains sufficient evidence to establish much of the hardship claimed, and for the hardship demonstrated, the record shows that it rises above the common consequences of removal or refusal of admission to the level of extreme hardship.

A. Inadmissibility

As stated above, the Applicant does not contest his inadmissibility for his conviction of a crime involving moral turpitude. The Applicant, however, contests the finding of inadmissibility for fraud or misrepresentation and for unlawful presence.

1. Fraud or Misrepresentation

The Director determined that the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for misrepresenting his intentions to immigrate and his prior refusal of entry. On June 10, 2002, the Applicant was refused admission into the United States from Canada. On October 18, 2003, again coming from Canada, the Applicant informed a U.S. immigration inspector that he wished to enter the United States to drop his brother-in-law off at a [REDACTED] hotel, when in fact the Applicant had arranged to fly from [REDACTED] to California, where he had lived as a student between 2001 and 2002. The Applicant was referred to secondary inspection, where he denied having been previously refused

¹ The Applicant was convicted of a violation of section 354(1)(a) of the Canadian Criminal Code, possession of stolen property, in the [REDACTED] on [REDACTED] 2007. He completed a 9-month conditional sentence and paid restitution.

admission into the United States. He told the U.S. immigration inspector that he did not reside in California and did not possess a California driver's license or identification card. He then disclosed the truth about his California residence and prior refusal.

The Applicant admits that he misrepresented these facts and his intent to immigration inspectors but asserts that he timely retracted those misrepresentations. An applicant makes a timely recantation or retraction when the applicant "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); *see also Matter of R- R-*, 3 I&N Dec. 823, 827 (BIA 1949) and *Llanos-Senarillos v. United States*, 177 F.2d 164, 165-66 (9th Cir. 1949). In addition, the Board of Immigration Appeals has found "recantation must be voluntary and without delay." *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973). Moreover, when the alleged retraction "was not made until it appeared that the disclosure of the falsity of the statements was imminent [, it] is evident that the recantation was neither voluntary nor timely." *Id.* In accordance with *Matter of Namio, supra*, the USCIS Policy Manual states that for a retraction to be effective, the applicant must correct his or her representation before being exposed by the officer or U.S. government official or before the conclusion of the proceeding during which he or she gave false testimony. 8 USCIS Policy Manual J.3(D)(6), <https://www.uscis.gov/policymanual>.

Here, the Applicant did not recant his misrepresentations until the disclosure of the falsity of his statements was imminent. The Applicant retracted his misrepresentations after he had been referred to secondary inspection and then only after he had repeated his misrepresentations in secondary inspection. We concur with the Director's finding that the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

2. Unlawful Presence

The record reflects that the Applicant initially entered the United States in 2001 as a nonimmigrant student for "duration of status." He was denied entry from Canada into the United States in June 2002, because he claimed he was attending school in California but had authorization to attend school in Michigan. In October 2003, the Applicant was ordered removed as an intending immigrant without proper documentation, and a U.S. immigration officer formally determined that the Applicant had violated his student status. The Applicant obtained a nonimmigrant visa and waiver and entered the United States as a visitor in 2010.

The Director determined that the Applicant was unlawfully present in the United States from June 10, 2002, until he left on October 16, 2003. By departing, he triggered the unlawful presence bar, which renders him inadmissible under section 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for one year or more. The Applicant challenges this finding of inadmissibility by asserting that later on the same day he was refused entry in June 2002, he reentered lawfully. The Applicant, however, he does not submit evidence of a lawful reentry. Moreover, the Applicant asserts that he was outside of the United States when it was determined that he had violated his student status, and therefore unlawful presence began to accrue only after the

formal determination of his status violation. The Applicant further asserts that he was presumably admitted to the United States in June 2002 as a Canadian visitor for duration of status. The Applicant does not submit evidence that he was admitted for duration of status between June 2002 and October 2003. Alternatively, he asserts that even if he had accrued unlawful presence, more than 10 years have lapsed since his 2003 departure, so he is no longer inadmissible under section 212(a)(9)(B)(i)(II) of the Act. We need not reach a conclusion concerning the Applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act for having accrued one year or more of unlawful presence, because the Applicant remains inadmissible for having been convicted of a crime involving moral turpitude and for fraud or misrepresentation.

B. Waiver

The Applicant is eligible to apply for a waiver of inadmissibility under sections 212(h) and 212(i) of the Act. A waiver under section 212(h) is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the Applicant. However, a waiver under section 212(i) cannot be based on extreme hardship to the Applicant's children. Because the Applicant requires a waiver under both sections, we will determine the Applicant's eligibility for a waiver under the more restrictive section, 212(i). Therefore, the Applicant's U.S. citizen spouse and parents are the only qualifying relatives in this case. Hardship to the Applicant's children will be considered only to the extent that it results in hardship to his spouse or parents.

C. Hardship

The Applicant must demonstrate that refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives, in this case the Applicant's spouse. The Applicant does not indicate whether his spouse intends to remain in the United States or relocate with him to Canada should he depart or be removed from the United States, but the Applicant claims his spouse would experience extreme hardship under either scenario.

In support of the claim of hardship to his spouse, the Applicant submitted the following evidence with his Forms I-601²: declarations from the Applicant, his spouse, and parents; medical records of the Applicant's spouse and her mother; a psychological evaluation of the Applicant's spouse; the Applicant's spouse's school records; court records; financial documents; and information about average wages and cost of living in Canada. On appeal, the Applicant submits two briefs, an additional declaration, medical records of his spouse and her mother, an updated psychological evaluation of his spouse, documentation on Canadian licensing requirements for mental health providers and obtaining a Canadian work permit, and letters attesting to the Applicant's rehabilitation. We have considered all the evidence in the record in rendering our decision.

² The record includes a previously filed Form I-601 that was denied in 2011; we dismissed an appeal of that application in 2013.

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The Applicant claims that if his spouse remains in the United States without him, she will suffer emotional, medical, and financial hardship. The Applicant, her spouse, and his mother-in-law assert that his spouse relies heavily upon him for emotional support and for help in caring for their two young children and his ailing widowed mother-in-law, with whom they live. The evidence shows that the Applicant's mother-in-law is suffering from diabetes, arthritis, and early macular degeneration and that she requires the assistance of a family member for certain daily needs. The Applicant corroborates his claims with his mother-in-law's medical records. In her statement, the Applicant's spouse expresses distress concerning her 71 year-old mother's declining health and her own abilities to provide her with adequate care; she claims she is overwhelmed and experiencing panic attacks, and no other family member, other than the Applicant, is nearby and able to assist her with her mother.

The record includes psychological evaluations, the most recent dated 2015, in which the psychologist concludes that the Applicant's spouse is suffering from severe major depressive disorder and has a history of recurrent panic attacks and issues relating to postpartum depression. The Applicant's spouse reports symptoms of frequent crying, difficulty sleeping, fatigue, loss of appetite, difficulty concentrating, indecisiveness, guilt, heart racing, hyperventilating, shortness of breath, shaking, fear of dying, feelings of worthlessness, and migraine headaches. The psychologist states that the Applicant's spouse's fears regarding their potential separation have exacerbated her psychiatric issues. The psychologist asserts that the Applicant's spouse would experience anxieties that are far more severe than a normative reaction to separation.

In addition, the Applicant's spouse states that she and the Applicant strongly believe in a two-parent household and worry about the effect of separation upon their sons. She further asserts that the emotional effects of separation would her own psychological state to deteriorate further.

The Applicant also asserts his spouse would experience emotional hardship related to her inability to complete her studies, if he were to be removed and she remained in the United States. He submits his spouse's academic records, showing she is pursuing her doctoral studies to become a therapist. The Applicant's spouse indicates that without the Applicant's help in caring for their children and mother, she would be unable to pursue her studies.

As to financial hardship, the Applicant asserts that if he returns to Canada, he would be unable to support his family in the United States, because as a line cook, he could not earn a sufficient wage. He submits reports describing wages and the cost of living in [REDACTED] including the average cost of rent in that city. The Applicant submits evidence of his spouse's student loans in excess of \$150,000. The record also reflects that she has been unemployed since 2010. Moreover, the Applicant's spouse states that she cannot manage the real estate company she and the Applicant started without the Applicant's help, and therefore she could not generate income for the family. The record contains evidence that the Applicant and his spouse established a real estate company that carries a \$30,000 mortgage and that operated at a loss, according to the Applicant's business tax forms for 2011. The Applicant indicates that his spouse's involvement with the business has been peripheral. The Applicant and his spouse are carrying a significant amount of debt. The record

contains evidence that the Applicant and his spouse have \$40,000 in car loans and \$28,000 in credit card debt.

The record contains sufficient evidence to establish the hardships claimed rise to the level of extreme hardship when considered in the aggregate. The Applicant's spouse is in a precarious emotional state as a result of her concerns about his immigration status and their future together. She relies heavily upon the Applicant for help in caring for her mother and their young children, which enables her to pursue her educational and professional goals. The record also supports her assertions that she and their family have accrued significant debt over a period of many years. If the application is denied, the Applicant and his spouse will struggle to pay off their debt and keep their business afloat. Taking into account the country reports in the record, it is reasonable to conclude that the Applicant would have difficulty meeting his own expenses in Canada, and he would be unable to financially contribute to his family's household in the United States. The evidence establishes that the Applicant's spouse would suffer significant financial hardship given her high level of debt and the Applicant's limited prospects for earning a sufficient wage in Canada. We conclude that the evidence, considered in the aggregate, establishes denial of the Applicant's waiver would result in extreme hardship to the Applicant's spouse.

D. 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. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996). We must balance the adverse factors evidencing the Applicant's undesirability as a lawful permanent resident with the social and humane considerations presented 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 adverse factors include the nature and underlying circumstances of the inadmissibility ground(s) at issue, the presence of additional significant violations of immigration laws, the existence of a criminal record, and if so, its nature, recency and seriousness, and the presence of other evidence indicative of bad character or undesirability. *Id.* at 301. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where residency began at a young age), evidence of hardship to the foreign national and his or her family, service in the U.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 good character. *Id.*

The favorable factors in this case are the hardship to the Applicant's spouse and children if the waiver application is denied, hardship to his mother-in-law, the Applicant's long residence in the United States, his community and family ties, his business ties, the passage of 9 years since his criminal conviction, and his remorse for his conviction. The adverse factors are the Applicant's misrepresentation, his period of unlawful presence, and his criminal conviction. When considered together, the favorable factors outweigh the adverse 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. The record establishes that the Applicant's spouse would suffer extreme hardship if the application is denied.

ORDER: The appeal is sustained.

Cite as *Matter of G-D-*, ID# 16798 (AAO July 19, 2016)