U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22669396

Date: SEP. 19, 2022

Appeal of Mount Laurel, New Jersey Field Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has applied to adjust status to that of a lawful permanent resident and seeks a waiver of inadmissibility under the Immigration and Nationality Act (the Act) section 212(i), 8 U.S.C. § 1182(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary 212(i) waiver if refusal of admission would result in extreme hardship to a qualifying relative or relatives.

The Director of the Mount Laurel, New Jersey Field Office denied the waiver application, concluding that the record established that the Applicant is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact. The Director further concluded that the record did not establish, as required, that denial of admission would result in extreme hardship to the Applicant's qualifying relative, his lawful permanent resident (LPR) spouse.

On appeal, the Applicant challenges the Director's finding of inadmissibility, submits new evidence, and asserts that his wife will experience extreme hardship in the event he is not granted a 212(i) waiver.

The Applicant bears the burden of proof in these proceedings to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LAW

A noncitizen 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, is inadmissible. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). There is a discretionary waiver of this inadmissibility if refusal of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent. Section 212(i) of the Act, 8 U.S.C. § 1182(i). If the noncitizen demonstrates the existence of the required hardship, then they must also show that USCIS should favorably exercise its discretion and grant the waiver. *Id.*

A. Materiality Within the Meaning of Section 212(a)(6)(C)(i) of the Act

We review all questions presented in this appeal, including the question of whether the Applicant's misrepresentation was material, *de novo*. *See United States v. Stelmokas*, 100 F.3d 302, 317 (3d Cir. 1996). In *Matter of D-R-*, 27 I&N Dec. 105 (BIA 2017), the Board reviewed the question of what constitutes materiality in the context of an inadmissibility finding, and it determined that we must apply the "natural tendency" definition of materiality from *Kungys v. United States*, 485 U.S. 759 (1988), but not the "fair inference" test, in the inadmissibility context. *Matter of D-R-* at 108-09. The Board also found misrepresentation is material when it shuts off a line of inquiry relevant to admissibility, which probably would have disclosed other facts relevant to eligibility for a visa. *Id.* at 113.

B. Extreme Hardship under Section 212(i) of the Act

A determination of whether denial of admission will result in extreme hardship depends on the facts and circumstances of each case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (citations omitted). We recognize that some degree of hardship to qualifying relatives is present in most cases; however, to be considered "extreme," the hardship must exceed that which is usual or expected. *See Matter of Pilch*, 21 I&N Dec. 627, 630-31 (BIA 1996) (finding that factors such as economic detriment, severing family and community ties, loss of current employment, and cultural readjustment were the "common result of deportation" and did not alone constitute extreme hardship). In determining whether extreme hardship exists, individual hardship factors that may not rise to the level of extreme must also be considered in the aggregate. *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted).

Only after the requisite extreme hardship to a qualifying relative(s) is established, must USCIS evaluate whether the foreign national merits the exercise of favorably discretion to grant the waiver. Section 212(i) of the Act.

II. ANALYSIS

The Director determined that the Applicant was inadmissible under section 212(a)(6)(C)(i) of the Act because at the time of his 1997 nonimmigrant visa interview at the U.S. consulate in his home country, he misrepresented the number of times he had previously been in the United States. There are two issues on appeal. The first issue is whether the Applicant's misrepresentation was "material" within the meaning of section 212(a)(6)(C)(i) of the Act. If that question is answered in the affirmative, the second issue to be addressed is whether he has established that his LPR spouse will experience extreme hardship if his inadmissibility is not waived.

A. Fraud or Willful Misrepresentation of a Material Fact

The Applicant, a native and citizen of Guatemala, was found inadmissible under section 212(a)(6)(C)(i) of the Act. On appeal, the Applicant contests this determination and argues that his misrepresentation was not material within the meaning of section 212(a)(6)(C)(i) of the Act because at the time of his misrepresentation, Congress had not enacted the three- and ten-year bars of inadmissibility for unlawful presence found at section 212(a)(9)(B) of the Act.

Given the severe consequences of finding an individual inadmissible, we are expected to "closely scrutinize" the factual basis for a possible finding of fraud or material misrepresentation. *Matter of Y-G-*, 20 I&N Dec. 794, 797 (BIA 1994). As such, we begin with a review of the relevant facts. In 1997, the Applicant attended an interview at the U.S. consulate in Guatemala in connection with his application for a nonimmigrant tourist visa. During his interview, he testified that he had never been to the United States, which he knew to be untrue. At his January 7, 2021 USCIS interview, the Applicant testified, under oath, that he did not tell the consular officer (CO) that he had been to the United States before because ". . . they were going to give me nothing. And I lied. I'm sorry."

On appeal, the Applicant argues that his lie was not material because it did not shut off a line of inquiry during his consular interview. He asserts that his prior unlawful entries to the United States were immaterial to the CO's determination of whether he was eligible for a nonimmigrant tourist visa because Congress had not yet passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208. IIRIRA created the three- and ten-year bars to reentry for unlawful presence, and the Applicant contends that the CO would not have considered his prior unlawful entries relevant to his eligibility for a tourist visa.

We do not agree with the Applicant's characterization for several reasons. First, section 401 of the Department of State's (DOS) Foreign Affairs Manual (FAM) covers the eligibility criteria used by COs to issue nonimmigrant visas. This section of the FAM makes clear that an applicant's intended length of stay and the activities he or she intends to carry out while in the United States are significant factors in a CO's determination of whether or not to issue a visa. As such, the CO's questions relating to the Applicant's prior entries and stays in the United States would have been for the purpose of determining his general eligibility for a tourist visa. A tourist visa, by definition, requires the CO to determine if the purpose of the Applicant's intended visit is tourism. The Applicant's misrepresentation shut off a line of questioning relating to his intended purpose upon entering the United States. Moreover, his misrepresentation would have likely had the "natural tendency" to convince the CO that the Applicant intended to visit the United States for tourism purposes. The Applicant acknowledges this in his own written statement and oral testimony.

As such, we affirm the Director's determination that the Applicant's misrepresentation at the time of his nonimmigrant visa interview was material within the meaning of section 212(a)(6)(C)(i) of the Act, and that he must seek a waiver of inadmissibility under section 212(i) of the Act in order to obtain permanent residence status in the United States.

B. Extreme Hardship to Qualifying Relative

The next issue is whether the Applicant has established extreme hardship to his qualifying relative spouse. An applicant may show extreme hardship in two scenarios: (1) if the qualifying relative remains in the United States separated from the applicant; and (2) if the qualifying relative relocates overseas with the applicant. Demonstrating extreme hardship under both of these scenarios is not required if the applicant's evidence demonstrates that one of these scenarios would result from the denial of the waiver. The applicant may meet this burden by submitting a statement from the qualifying relative certifying under penalty of perjury that the qualifying relative would relocate with the applicant, or would remain in the United States, if the applicant is denied admission. 9 *USCIS*

Policy Manual B.4, https://www.uscis.gov/policymanual. In this case, the record does not contain clear statements from the Applicant or his spouse indicating whether she intends to remain in the United States or relocate to Guatemala if the waiver application is not granted. The Applicant must therefore establish that if he is denied admission, his qualifying relative would experience extreme hardship both upon separation and relocation.

Having considered all the evidence in the record, including the documentation submitted on appeal, we conclude that the claimed hardships to the Applicant's spouse do not rise to the level of extreme hardship either individually or cumulatively. Our decision is based on a review of the record, which includes, but is not limited to, a legal brief, statements from the Applicant and his spouse, financial and employment documentation, reports regarding country conditions in the Applicant's home country, and biographic and civil documents.

The Applicant's spouse states that she will experience extreme emotional, and financial hardship if the Applicant is unable to reside in the United States with her. She married the Applicant in [redacted] 1994, when she was 17 years old and has three daughters (currently aged 11, 23, and 26 years old) with the Applicant. Their oldest and youngest daughters are U.S. citizens who were born in the United States; and their middle daughter was born in Guatemala but has Deferred Action for Childhood Arrivals (DACA) protection. According to their 2020 income tax return and the Applicant's spouse's statement, only their youngest child is wholly financially dependent on them, while their older two daughters are working in low wage jobs. The couple works together at a restaurant managed by the Applicant. The Applicant's spouse works part time and spends the rest of her time helping family and community members. In 2020, a close family member (the Applicant's sister-in-law) died from COVID-19, and the family is grieving her loss. The couple is part of a close-knit community with strong business and religious ties.

On appeal, the Applicant's spouse provides an updated statement describing how the family has had difficulty coping since the Applicant's adjustment of status application was denied. The family has faced the possibility of relocating to Guatemala, or remaining in the United States without the Applicant. The Applicant's spouse explains the concerns related to relocating to Guatemala because her family will be split. Her middle daughter has DACA protection, which does not permit travel abroad, except for urgent humanitarian purposes. She fears relocating to Guatemala with the Applicant and her youngest daughter because her middle daughter will not be able to visit them there. The splitting apart of her three daughters is of great concern for her, especially because her middle daughter will be unable to travel to see her family in Guatemala. In addition, she notes that her youngest daughter would lose the guidance and close relationship she currently shares with her siblings.

In her statement, she describes how the Applicant is an integral part of the family's life, and that he has always taken care of everyone. She contends that he has been a significant source of love and support to her and their three daughters. She explains that in 1997, the family attempted to live in Guatemala, which is why their middle daughter was born there, but that they came back to the United States because the family was not able to achieve financial stability there, and crime was an issue. She also explains that the stress of the situation has caused her migraines, insomnia, stomach problems, and back pain issues, and that her youngest daughter is experiencing negative changes in her personality. Her other daughter has had poor performance issues at work because she fears becoming head of the household.

While we are sympathetic to the Applicant's spouse emotional and physical distress regarding her husband's removal to Guatemala, the evidence falls short of demonstrating extreme emotional hardship upon separation. We do not take lightly that a family member's removal would cause disruptions to a family's routines; however, the Applicant's spouse explains that it is her husband's potential removal that has caused her stress. In other words, while we are sympathetic to the stress that this situation would cause, it does not appear to be such a permanent or debilitating stress such that the Applicant's spouse could not carry out her normal daily activities. *See Matter of Pilch*, 21 I&N Dec. 627, 630-31 (BIA 1996) (finding that factors such as economic detriment, severing family and community ties, loss of current employment, and cultural readjustment were the "common result of deportation" and did not alone constitute extreme hardship).

Regarding financial hardship, she states that she cannot survive on her income alone because she works part time. The family rents a home that costs $1,250 per month, and has additional expenses related to college tuition, schoolbooks, and household utilities. Her 2020 taxes showed that she earned $8,700, and that the Applicant earned $27,010. She asserts that if she were to stay in the United States without the Applicant, she would not be able to pay most of her household expenses on her limited income. The family's joint income in 2020 was $35,000. They claim the Applicant's dedication to growing the family's restaurant business is the main reason it has been successful, and that although she also helps him, the Applicant's full dedication to the business allows her to focus on their community ties, their daughters, and her family life.

The evidence presented on appeal shows that the Applicant's spouse's financial situation could be adversely affected by her separation from the Applicant, and the loss of his income and presence. However, the evidence of financial hardship does rise to the level of extreme hardship. The Applicant's two older children are adults and capable of working and contributing to the family's household expenses. In addition, although she explains that she could not carry out the duties that her husband currently performs, she does not provide specific reasons why she could not learn to carry these logistical, sales, payroll, scheduling, hiring, marketing, and other duties related to the development of the business. In addition, the evidence does not establish why one of her adult children could not help her keep the family's business afloat in the Applicant's absence.

The Applicant contends that country conditions in Guatemala are such that it would be unsafe for him and his family to relocate there. The Applicant's spouse describes the murder of a close family member (the Applicant's nephew) in a random act of violence. She fears taking her youngest daughter to a country where girls are mistreated and where acts of violence are common, and no one feels safe. She explains that her youngest daughter is entering an age where she needs more supervision and protection, but that in Guatemala, she will lose her two sisters, and have to adjust to life in a new school, community, and environment where she will stick out because she is a U.S. citizen, and because she has never lived there. In support of the contention that it is not safe to return to Guatemala, the Applicant submits country condition information related to the everyday violence experienced by Guatemalans. In particular, the Applicant points to the DOS travel warning for Guatemala, which designates the country as Level 3 (out of 4) and advises potential visitors to "reconsider travel" due to crime specifically violent crime, like armed robbery and murder. *See* https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/guatemala-travel-advisory.html (last visited Sept. 19, 2022).

We have carefully considered the evidence provided. However, government records indicate that the Applicant's spouse has traveled to Guatemala several times since becoming an LPR. No evidence was presented to explain why his wife would have been traveling to Guatemala if she were endangering her life by doing so. In addition, the Applicant's family is not obligated to permanently relocate to Guatemala with him, and several close family members, including his wife's mother and her sisters continue to live there. We are sympathetic to the loss of the Applicant's nephew, who was a victim of violence in Guatemala, however the Applicant has not shown any risk of individualized harm to him or his family if he were to return to Guatemala or if they were to visit him there.

Although we address each specific hardship factor identified on appeal separately, we have considered the issues in the aggregate, *Matter of Ige*, 20 I&N Dec. at 882, but find that they do not rise above the common results of removal.

III. CONCLUSION

For the foregoing reasons, upon consideration of the record in its entirety, the Applicant has not established by a preponderance of the evidence that denial of the waiver would result in extreme hardship to his spouse upon separation.

ORDER: The appeal is dismissed.