U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24534445

Date: MAR. 30, 2023

Appeal of Honolulu, Hawaii Field Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant, a native and citizen of Kenya currently residing in the United States, has applied to adjust status to that of a lawful permanent resident (LPR). A noncitizen seeking to be admitted to the United States as an immigrant or to adjust status must be "admissible" or receive a waiver of inadmissibility. The Applicant has been found inadmissible for fraud or misrepresentation and seeks a waiver of that inadmissibility. *See* 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 waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Director of the Honolulu, Hawaii Field Office denied the Form I-601, Application to Waive Inadmissibility Grounds (waiver application), concluding that the Applicant did not establish that this qualifying relative, his U.S. citizen spouse, would experience extreme hardship if he were denied the waiver.

The matter is now before us on appeal. On appeal, the Applicant submits additional evidence and contends that he is not inadmissible for fraud or willful misrepresentation, or in the alternative, his U.S. citizen spouse would experience extreme hardship if his waiver were denied. The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *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

Any 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. This ground of inadmissibility may be waived as a matter of discretion if refusal of admission would result in extreme hardship to the United States citizen or lawful permanent resident (LPR) spouse or parent of the noncitizen. 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).

II. ANALYSIS

The issues on appeal are whether the record establishes that the Applicant is inadmissible for fraud or misrepresentation and if so, whether the Applicant has demonstrated his U.S. citizen spouse, his sole qualifying relative, would experience extreme hardship upon denial of the waiver. In support of the application, the Applicant submitted affidavits from himself, his qualifying relative spouse, and her mother, medical records, educational records, financial records, family identification documentation, letters of support, and country conditions information.

A. Inadmissibility

As stated above, the Applicant has been found inadmissible for fraud or willful misrepresentation for falsifying his true marital status when he applied for a nonimmigrant visa in February 2016. Specifically, he claimed he was married and resided with his spouse in Kenya, when in fact they were divorced in [redacted] 2014. In [redacted] 2018, the Applicant married a U.S. citizen, his qualifying relative in this case. The Applicant's spouse subsequently filed a Form I-130, Petition for Alien Relative, on his behalf, which was later approved, and the Applicant filed an accompanying Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), on the same date. Contrary to his statements on his 2016 nonimmigrant visa application, and at his consular interview, that he was married at that time, he submitted documentation of the dissolution of his previous marriage in Kenya in [redacted] 2014 and provided testimony during his 2018 adjustment of status proceedings establishing that he had already been divorced from his prior spouse at the time of nonimmigrant visa application and consular interview.

On appeal, the Applicant contends that he is not inadmissible for fraud or willful misrepresentation because, although his first marriage had formally ended before his nonimmigrant visa interview, he had a good faith belief that his connection to his former spouse continued on account of their customary traditions, such as his continued financial support of his former spouse and their children.[1] He explains that any misrepresentation he made was not intentional or deliberate for he did not realize that stating his cultural understanding of his marital status would affect his nonimmigrant visa application. Further, the Applicant asserts that he was at all times eligible for the nonimmigrant visa he sought and any misrepresentation of his marital status did not relate to his eligibility for said

[1] The Applicant submits a letter from his former spouse on appeal, indicating that he continues to provide financial support to his children in Kenya.

nonimmigrant visa. The Applicant cites to *Matter of S- and B-C-*, 9 I&N Dec. 436, 448-49 (A.G. 1961) and *Matter of Taijam*, 22 I&N Dec. 408 (BIA 1998), in support of his assertion that a misrepresentation is generally material only if, by making it, the applicant receives a benefit for which they would not otherwise have been eligible.

In making a finding of inadmissibility under section 212(a)(6)(C)(i) of the Act, there must be evidence in the record showing that a reasonable person would find that an applicant used fraud or that they willfully misrepresented a material fact in an attempt to obtain a visa, other documentation, admission into the United States, or any other immigration benefit. 8 *USCIS Policy Manual* J.3(A)(1), https://www.uscis.gov/policymanual.

A willful misrepresentation does not require an intent to deceive, but instead requires only the knowledge that the representation is false. *Parlak v. Holder*, 578 F.3d 457 (6th Cir. 2009). For a misrepresentation to be found 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. *Matter of G-G-,* 7 I&N Dec. 161 (BIA 1956). The misrepresentation must be made with knowledge of its falsity. *Id.* 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); *Matter of Tijam,* 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28-29 (BIA 1979).

A misrepresentation is "material" if it tends to shut off a line of inquiry that is relevant to the noncitizen's admissibility and that would predictably have disclosed other facts relevant to their eligibility for a visa, other documentation, or admission to the United States. *Matter of D-R-*, 27 I&N Dec. 105, 113 (BIA 2017). The applicant has the burden to demonstrate that any line of inquiry shut off by the misrepresentation was irrelevant to the original eligibility determination. *See* 8 *USCIS Policy Manual, supra,* at J.3(E)(4).

Additionally, to be issued a nonimmigrant visa to the United States, foreign nationals must overcome the statutory presumption found in section 214(b) of the Act, 8 U.S.C. § 1184(b), that they are intending immigrants. Therefore, in seeking nonimmigrant admission to the United States, a visa applicant must establish to the satisfaction of a DOS consular officer that they have no intention of abandoning their foreign residence. *See* 9 FAM§ 401.1-3(E).

The record demonstrates that the Applicant willfully misrepresented his marital status on his nonimmigrant visa application as well as during his interview with the Consular Officer in March 2016. In his statement on appeal, he explains that in his mind, he was not lying because, although separated from his former spouse through a customary process, they did not have a legal divorce similar to those in the United States. However, the record contains a [redacted] 2014 copy of the Applicant's marriage dissolution that he provided and clearly stating that their customary marriage was dissolved in [redacted] 2014, that the couple are no longer husband and wife, that they shall not interfere in each other's life or affairs, and specifying details relating to custody, care, and access to their children. Further, in a 2019 statement to the Director, the Applicant specifically recalled that he and his former spouse signed a document in [redacted] 2014 stating that their marriage was traditionally

dissolved, which allowed them to be with other people while also not wrecking their relationships with each other's families. He also recalled that they had been living separately before the dissolution. Therefore, contrary to his assertions on appeal, the record reflects that the Applicant had actual knowledge that his first marriage had been legally dissolved in 2014 and that he and his former spouse were no longer residing together at the time of the 2016 visa application. Nevertheless, the Applicant asserted his marital status as married and indicated on his visa application that he and his former spouse were residing at the same address at the time. Furthermore, the Applicant electronically signed his nonimmigrant visa application certifying under penalty of perjury that he had read and understood the questions therein and that his answers were true and correct to the best of his knowledge and belief. Consequently, the record establishes that the Applicant intentionally made a false representation on his visa application with respect to his marital status.

In addition, the Applicant's misrepresentation in falsifying his true marital status is material. The Applicant claimed on his nonimmigrant visa application and at his interview that he was married and residing with his spouse in Kenya, when he was not. This misrepresentation shut off a line of inquiry regarding his ties to his foreign residence that may have resulted in a determination that he was an intending immigrant. As such, the record establishes that the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for procuring admission to the United States by willful misrepresentation of a material fact.

B. Extreme Hardship

In order to establish eligibility for a waiver pursuant to section 212(i) of the Act, the Applicant must demonstrate that denial of the application would result in extreme hardship to a qualifying relative or relatives, in this case his U.S. citizen spouse. Section 212(i) of the Act. An applicant may show extreme hardship in two scenarios: 1) if the qualifying relatives remain in the United States separated from the applicant and 2) if the qualifying relatives relocate overseas with the applicant. *See* 9 *USCIS Policy Manual, supra* at B.4(B) (providing, as guidance, the scenarios to consider in making extreme hardship determinations). 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. *See id.* (citing to *Matter of Calderon-Hernandez*, 25 I&N Dec. 885 (BIA 2012) and *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002)). 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. *See id.* In the present case, the Applicant's spouse does not clarify whether she intends to remain in the United States or relocate to Kenya if the Applicant's waiver application is denied. Therefore, the Applicant must establish that if he is denied admission, his qualifying relative would experience extreme hardship both upon separation and relocation.

With the waiver application, the Applicant submitted statements from himself, his qualifying relative spouse, his spouse's mother, and several friends. He also submitted copies of his spouse's medical records, a letter from a fertility clinic, copies of his pay records, copies of his spouse's paystubs, copies

of bank statements for their shared account, a summary of the closing transaction for their home, and country conditions information for Kenya.

In denying the waiver application, the Director outlined and detailed all of the evidence submitted by the Applicant and determined that it was not sufficient to establish that his spouse would experience hardship that rises to the level of "extreme," as required.

On appeal, the Applicant submits additional evidence and asserts that the record contains ample evidence of the extreme hardship his qualifying relative spouse would suffer if separated from the Applicant or relocated to Kenya following him. The Applicant submits new statements from himself and his qualifying relative spouse; letters from several friends attesting to his character and their support of his remaining in the United States; additional copies of his spouse's medical records showing fertility treatments she has undergone, as well as her reported acute back pain; copies of his spouse's mother's medical records indicating that she had cardiac surgery in 2014 and was seen for hypertension in March 2022; additional copies of his spouse's pay stubs; copies of mortgage statements; copies of bank statements for an unidentified business; and copies of several online articles regarding mental health and infertility, mental health and healthcare workers during the COVID-19 pandemic, and country conditions in Kenya. The Applicant contends that his spouse would experience medical, financial, and emotional hardship upon separation. The Applicant asserts that his spouse's mother would also suffer upon separation. We may consider the hardship to the Applicant's mother-in-law only as it affects his qualifying relative spouse. *See* 9 *USCIS Policy Manual*, *supra*, at B.4(D)(2). The Applicant also argues that the Director's failure to issue a request for evidence (RFE) if and when the evidence presented was not persuasive is an abuse of discretion.

As a preliminary matter, we acknowledge the Applicant's argument that the Director denied the waiver application without first issuing an RFE to afford the Applicant and his qualifying relative an opportunity to provide additional evidence in support of a showing of extreme hardship in either or both separation and relocation. However, neither the statute and regulations, nor relevant USCIS policy require the issuance of an RFE where eligibility was not established at the time of filing. *See* 8 C.F.R. § 103.2(b)(8)(ii) (stating that,"[i]f all required initial evidence is not submitted with the benefit request or does not demonstrate eligibility, USCIS in its discretion may deny the benefit request for lack of initial evidence or for ineligibility . . . ."); *see also 1 USCIS Policy Manual, supra,* E.6(F), (providing guidance as to when and if to issue an RFE, but nowhere relieving the petitioner from the burden of providing initial evidence, as required under the regulations). Accordingly, the Director properly exercised discretion and denied the waiver application without first issuing an RFE.

Next, our review indicates that the Director properly considered all the relevant evidence of extreme hardship upon separation in the aggregate in concluding that the extreme hardship requirement was not met. Further, contrary to the Applicant's assertions, the record before us, including the evidence on appeal does not establish that the Applicant's spouse would experience extreme hardship upon separation. In her statements before the Director and on appeal, the Applicant's spouse states that she has been unable to get pregnant during their marriage and has been undergoing fertility treatments for several years, which has been a very emotional process for her. She explains that she needs the Applicant in the United States for emotional support and in order for them to continue with the fertility treatments to have a child, or in the alternative, go through the process of adopting a child in the United States. She also reports that doctors recently found fibroids and a cyst on her right ovary, for which a

treatment plan is still being developed and doctors are still investigating whether she may need medical intervention. In his statements before the Director and on appeal, the Applicant generally asserts that a lot would change for his spouse in the United States if his waiver application is denied. He explains that his spouse has been sad about not getting pregnant and he has comforted her throughout this time. He indicates that she really wants to be a mother and if he is not in the United States, she would not have that possibility, which would devastate her. He also discusses his spouse's recent medical condition, which he states has caused her to isolate herself, and indicates that he thinks his spouse would become depressed and more isolated if he is not in the United States because he is her only source of support and companionship and the only person she trusts enough to discuss these issues with. Additionally, both the Applicant and his spouse recall that while she was physically and emotionally stressed working as a nurse during the COVID-19 pandemic, the Applicant provided her with emotional support, which she needed in order to maintain her mental health.

Further, in her statements, the Applicant's spouse recounts that she has struggled with back pain for many years, making her job as a nurse more difficult, which is why she and the Applicant decided to open an adult home care facility within their home. The Applicant indicates, in his statements, that he has studied to become a certified nursing assistant to support his spouse in this endeavor and they are in the process of turning their home into an adult home care facility, but have run out of money to complete renovations. They assert that if they were separated, the spouse would suffer extreme financial stress and difficulty as she would be unable to pay off the debt they have accrued in making the renovations thus far or complete and open the adult home care facility, which has been their shared goal, and that she may have to sell their house in order to pay off all their debts. The Applicant also explains that they have a trucking business that he works on a daily basis and if he were separated from his spouse, she would be forced to close the trucking business because she is not a truck driver and it is a demanding job. Finally, the Applicant's spouse also asserts that she takes care of her 70-year-old U.S. citizen mother, who had open heart surgery about 10 years ago, and that she is the only one that can do so. She indicates that her mother does not have any other family in the United States, and depends on her to provide financial support, for which she needs the Applicant to remain the United States to financially assist her.

Although we are sympathetic to the family's circumstances and do not diminish the emotional and medical hardships to the spouse upon separation, including hardship arising from her infertility and inability to continue fertility treatments in the United States in the Applicant's absence, the Applicant has not established that the claimed hardship as described would rise beyond the common results of removal or inadmissibility to the level of extreme hardship. Likewise, we acknowledge the evidence of a recently discovered fibroid and cyst on the spouse's right ovary and the spouse's reporting of acute back pain; however, the record does not establish the severity or frequency of these medical conditions and any related symptoms, her prognoses, any prescribed treatments, and the need, if any, for the Applicant's assistance in managing her medical care.

We further acknowledge the couple's statements regarding financial hardship based in part on their claims that the Applicant's spouse would be unable to pay off the debts they accrued to purchase and renovate their home in order to open an adult home care facility there. However, the record indicates that the Applicant's spouse works full-time, making about $43 per hour, as a nurse, which provides health and retirement benefits. The record does not show that his spouse would be unable to continue working or that her income is not sufficient to pay back her debt, which they indicated could be paid

back by selling the home. Additionally, while both the Applicant and his spouse's statements on appeal briefly mention that the Applicant has a trucking business in the United States and they submit two months of bank statements, the statements relate to an unidentified business account and they do not provide any explanation of the business, the income it provides, or even evidence that the business belongs to the Applicant. Furthermore, while the Applicant's spouse also asserts that she would be unable to provide financial support to her mother in the United States, the record does not show what her financial obligations for her mother are or that she would not be able to meet those financial obligations without a financial contribution from the Applicant. Accordingly, while we acknowledge the financial hardship claimed by his spouse, the Applicant has not established that the financial hardship to his spouse upon separation would rise beyond the common results of removal or inadmissibility to the level of extreme hardship.

Further, even considering all of the evidence in its totality, the record remains insufficient to show that the Applicant's spouse's claimed medical, emotional, and financial hardships would be unique or atypical, rising to the level of extreme hardship, if she remains in the United States while the Applicant returns to live abroad due to his inadmissibility.

As noted above, because the Applicant's spouse does not clarify whether she intends to remain in the United States or relocate to Kenya if the Applicant's waiver application is denied, the Applicant must establish that denial of the waiver application would result in extreme hardship to his spouse both upon separation and relocation to Kenya, where both he and his spouse were born and raised. As the Applicant has not established extreme hardship to his spouse in the event of separation, we cannot conclude he has met this requirement. Because the Applicant has not demonstrated extreme hardship to a qualifying relative if he is denied admission, we need not consider whether he merits a waiver in the exercise of discretion. The waiver application will therefore remain denied.

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 application would result in extreme hardship to his qualifying relative spouse upon separation. He therefore has not established his eligibility for a waiver of inadmissibility under section 212(i) of the Act.

ORDER: The appeal is dismissed.