



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

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

In Re: 27464062

Date: Sept. 20, 2023

Appeal of Nebraska Service Center Decision

Form I-601, Application for Waiver of Grounds of Inadmissibility

The Applicant, a native and citizen of China, has applied for an immigrant visa and seeks a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v) and 1182(i), for unlawful presence and fraud or willful misrepresentation.

The Director of the Nebraska Service Center denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (waiver application), concluding that the record did not establish that the Applicant merited a favorable exercise of discretion, although he had established extreme hardship to a qualifying relative, his U.S. citizen spouse. On appeal, the Applicant asserts that he has established that he merits a favorable exercise of a discretion.

The matter is now before us on appeal. On appeal, the Applicant submits a brief together with a transcript of his asylum termination interview and asserts that the Director's discretionary decision was erroneous. The Administrative Appeals Office reviews 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 remand the matter to the Director for the entry of a new decision.

I. LAW

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, is inadmissible. Section 212(a)(6)(C)(i) of the Act. U.S. Citizenship and Immigration Services (USCIS) may waive this inadmissibility if refusal of admission would result in extreme hardship to the U.S. citizen or lawful permanent resident spouse or parent of the foreign national. If the foreign national demonstrates the existence of the required hardship, then they must also show that USCIS should favorably exercise its discretion and grant the waiver. Section 212(i) of the Act.

The burden is on the Applicant to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Moralez*, 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 burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010); section 291 of the Act, 8 U.S.C. § 1361.

II. ANALYSIS

The Director of the Nebraska Service Center denied the waiver application, concluding that, although the Applicant had established extreme hardship to his U.S. citizen spouse would result from his continued inadmissibility, he did not merit a waiver as a matter of discretion. The Director found the following favorable factors: (1) evidence that the Applicant's qualifying relative spouse (and by extension, his children) are experiencing extreme hardship due to the Applicant's visa refusal; (2) family ties in the United States including the Applicant's immediate and extended family; and (3) absence of a criminal record. The Director found three unfavorable factors:

- The Applicant's "material misrepresentation about his date of entry into the United States so that he appeared eligible to file for asylum within the one-year deadline"
- His "patently fraudulent application for asylum"
- His entry without inspection and unlawful presence

On appeal, the Applicant does not contest his inadmissibility, a finding the record supports. He asserts that he merits a discretionary waiver. He specifically contends that the Director overlooked or "accorded minimal weight" to the numerous positive factors in his case and disproportionately weighted the negative factors.

A. Unfavorable Discretionary Factors

The Applicant contends that the Director erred in characterizing the Applicant's asylum-related misrepresentation as two distinct unfavorable factors instead of one unfavorable factor. The Director listed two asylum-related unfavorable factors: "material misrepresentation about his date of entry into

the United States so that he appeared eligible to file for asylum within the one-year deadline” and “patently fraudulent application for asylum.”

The Director correctly observed that the record does not indicate that the immigration judge in the Applicant's case made a finding that the Applicant filed a frivolous asylum claim, therefore the Applicant is eligible for the waiver.¹ However, we agree with the Applicant that the asylum-related misrepresentation is one unfavorable factor, not two separate unfavorable factors. The Applicant's misrepresentation of his date of entry in order to appear eligible to file for asylum is encompassed in the unfavorable factor of “patently fraudulent application for asylum.” We note that the Applicant filed one fraudulent asylum application. The totality of the circumstances involves the weight, not the quantity, of favorable and unfavorable factors.

B. Favorable Discretionary Factors

On appeal, the Applicant states that the Director overlooked or “accorded minimal weight” to the following list of asserted favorable factors:

- (a) [L]ength of residence in the United States (16 years).
- (b) [Lawful permanent resident (LPR)] sister, [U.S. citizen (USC)] brother-in-law, and two USC nephews.
- (c) USC spouse and two USC children.
- (d) Voluntary (sic) provided information to Asylum Officer about how Attorney [redacted] (sic) her assistant prepare fraudulent asylum applications for innocent new arrivals like me.²
- (e) NTA [Notice to Appear in Immigration Court] does not charge [the Applicant] of fraud or misrepresentation.
- (f) ownership of marital home located in [redacted] Massachusetts.
- (g) faithful filing of federal and state income tax returns.
- (h) fully complied with the IJ's Order on Voluntary Departure.
- (i) no criminal records.
- (j) difficulties the USC spouse has faced in the past three years and continuing.
- (k) USC spouse's significant health conditions.
- (l) hardship the USC spouse would continue to endure.
- (m) finding of "extreme hardship".

We find that some of the Applicant's asserted favorable factors were considered by the Director and some factors were overlooked or not addressed with adequate analysis. We reject the Applicant's characterization of certain asserted factors as “favorable”.

¹ The Applicant is eligible to apply for immigration benefits because no final order by an immigration judge or the Board of Immigration Appeals found that he filed a “frivolous” asylum application pursuant to 8 C.F.R. § 208.20. Matter of Y-L-, 24 I&N Dec. 151 (BIA 2007).

² The Applicant asserts that providing information in his Asylum Termination Interview constituted a “timely retraction” of his prior misrepresentation.

The Director did not fully consider certain favorable factors. For example, the Director stated they considered family ties, but the decision did not note the presence of extended family such as the Applicant's sister and her family. The Director noted the lack of a criminal record and the "finding" of "extreme hardship." However, with respect to noting extreme hardship on the Applicant's wife as a favorable factor, the Director did not weigh the "evidence" of extreme hardship. The evidence of extreme hardship includes the nature, extent and severity of the extreme hardship, including the Applicant's spouse's health conditions, the Applicant's spouse's hardship in connection with raising two children with significant developmental delays, the fact that the Applicant's spouse is an asylee from China, and nonviability of the Applicant's spouse and children visiting the Applicant in China. Regarding the non-viability of the Applicant's asylee-spouse and their children visiting the Applicant in China, we take administrative notice of the current 2022 U.S. Department of State Country Report for Human Rights for China (Country Report), <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/china/>, and the current U.S. State Department China Travel Advisory (Travel Advisory), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/china-travel-advisory.html>, which note that Chinese authorities arbitrarily impose exit bans on U.S. citizens and that visiting U.S. citizens risk prolonged interrogations and extended detention without due process of law.

We further agree that the decision does not reflect that the Director considered the Applicant's residence of long duration (16 years), ownership of a home, filing of tax returns, and full compliance with the IJ's order of voluntary departure. Full compliance with the IJ's order of voluntary departure is relevant to respect for the law and reformation of character and rehabilitation, which are factors noted at 9 USCIS Policy Manual 5.A. <https://www.uscis.gov/policy-manual/volume-9-part-a-chapter-5>.

We reject two of the Applicant's asserted favorable factors. First, the fact that the NTA did not include a fraud charge is not a favorable factor, because there is no requirement to list every charge against the noncitizen, and the government may add or substitute charges at any time during a proceeding. 8 C.F.R. § 1240.10(e).

Second, we reject the Applicant's assertion that he made a "timely retraction" of his fraud which constitutes a positive factor. Though the Applicant did provide information about the fraud after USCIS was apprised of the fraud and scheduled a Termination of Asylum interview, that conduct does not constitute the "timely retraction". A timely retraction requires that a person voluntarily retracts the fraud or misrepresentation prior to any exposure. *Matter of M—*, 9 I&N Dec. 118, 119 (BIA 1960) (holding that attempted fraud must be corrected "voluntarily and prior to any exposure"); *Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973) (holding that where an 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"). The USCIS Policy Manual states that for a retraction to be timely and effectively vitiate a fraud, an 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>. The Foreign Affairs Manual also specifies that “[i]f the applicant has personally appeared and been interviewed, the retraction must have been made during that interview.” 9 FAM § 302.9-4(B)(3)(f). Accordingly, the Applicant’s retraction is not timely because it took place after he was granted the benefit of asylum, at an interview convened to investigate termination of his asylum benefit.

To the extent that the Applicant was truthful at the Termination of Asylum interview, it is relevant to the Applicant’s respect for the law and reformation of character and rehabilitation as a favorable factor, but the Applicant did not make a timely retraction.

C. A Remand is Warranted for the Director to weigh all the favorable and unfavorable discretionary factors.

As discussed above, while we do not agree that all the Applicant’s proffered favorable factors are correct, we do find that in denying the waiver application based on discretion, the Director did not provide sufficient analysis for the determination, nor did the Director list all the positive and negative factors and then consider whether all the Applicant’s positive factors outweigh the negative factors. All factors must be considered in making a discretionary determination. See 1 USCIS Policy Manual E.8, <https://www.uscis.gov/policymanual> (“The act of exercising discretion involves weighing both positive and negative factors and considering the totality of the circumstances in the case before making a decision”).

On remand, the Director should consider, in the totality of the circumstances, the proper negative factors mentioned above against the positive factors related to discretion, including but not limited to, the severity and type of extreme hardship on the Applicant’s spouse, family ties, length of residence in the United States, home ownership, payment of taxes, evidence of respect for the law and rehabilitation, and lack of a criminal record. Although the applicant’s violations of the immigration law cannot be condoned, the Director must consider the totality of the circumstances in deciding whether the positive factors in this case outweigh the negative factors.

III. CONCLUSION

The Director did not provide sufficient analysis to support their decision regarding discretion, as the decision lacks complete analysis of the positive and negative factors and does not reflect that the Director weighed them in the totality of the circumstances. Thus, we are remanding the matter to the Director for a full consideration of these and other claimed positive factors in adjudicating the discretionary waiver.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.