CHAPTER 11

WAIVER FOR FRAUD OR MISREPRESENTATION—INA §212(I)

Who Is Covered?

Section 212(i) of the Immigration and Nationality Act (INA)[1] provides a discretionary waiver for immigrants who are subject to the §212(a)(6)(C)(i) ground of inadmissibility based on fraud or misrepresentation in procuring or attempting to procure an immigration benefit. INA §212(a)(6)(C)(i) states:

> *Misrepresentation.—*
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> In general.—Any alien 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 this Act is inadmissible.

It is important to note that only foreign nationals who make misrepresentations or use fraud to secure a visa, admission, or some other benefit under the INA are excludable under this section. Those who make misrepresentations in other contexts, such as to obtain employment or Social Security cards, would not be excludable pursuant to this section of the statute.

The §212(i) waiver is not available to immigrants who are subject to the §212(a)(6)(C)(ii) ground of inadmissibility for false claims to U.S. citizenship, unless the false claim was made before September 30, 1996, when the ground of inadmissibility came into effect. It is also unavailable to waive inadmissibility under INA §212(a)(6)(F) due to a final order for document fraud in violation of INA §274C. The §212(i) waiver covers only the first clause of §212(a)(6)(C).

Statutory Requirements and Standard for Exercise of Discretion

Applicants for a waiver pursuant to §212(i) must have a qualifying relative. They must convince a U.S. Citizenship and Immigration Services (USCIS) adjudicator that denial of their admission to the United States would result in extreme hardship to a U.S. citizen or lawful permanent resident (LPR) spouse or parent. This waiver does not allow for consideration of hardship to children, unless the applicant qualifies for immigrant status as a battered spouse or child. In such cases, the applicant may qualify for the waiver by showing extreme hardship to the applicant him- or herself, or to a U.S. citizen or LPR parent or child.[2]

Extreme Hardship

The leading case on extreme hardship in the context of §212(i) waivers is *Matter of Cervantes*,[3] decided by the Board of Immigration Appeals (BIA) in 1999. *Cervantes* involved a 24-year-old citizen of Mexico who had been in the United States since 1989. In 1995, he married an LPR who naturalized shortly thereafter. The respondent was placed in removal proceedings, and he filed a request for adjustment of status based on an approved visa petition filed by his U.S. citizen spouse. Because he had been convicted of possessing false

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[1] Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §1101 *et seq.*).

[2] INA §212(i)(1).

[3] *Matter of Cervantes*, 22 I&N Dec. 560 (1999).

identification documents, he also filed a request for a waiver of inadmissibility pursuant to INA §212(i). The immigration judge denied the waiver request, holding that the respondent had failed to establish that his spouse would suffer extreme hardship in the event he was deported. The respondent appealed and the BIA affirmed, noting, among other things, that the couple did not have strong financial ties to the United States. The U.S. citizen spouse knew her husband was in deportation proceedings when she married him. She had many relatives residing in Mexico and she did not suggest at any time during the hearing that she would suffer extreme hardship if they were to move to Mexico. The BIA found that, under these circumstances, she would not suffer any particular hardship in relocating to her native country. The facts did not warrant a waiver.

In so holding, the BIA recognized that extreme hardship is not "a definable term of fixed and inflexible meaning." The elements to establish extreme hardship are dependent on the facts and circumstances of each case. While it cautioned against cross-application of principals and standards between different types of relief, the Board effectively sanctioned analysis of factors relevant to the issue of extreme hardship in decisions involving types of relief other than a §212(i) waiver. Specifically, the BIA drew on cases involving suspension of deportation and waivers under §§212(c) and 212(h) to identify the following factors as relevant in assessing extreme hardship to a qualifying relative:

- Qualifying family member's ties to the United States;
- Qualifying family member's ties outside the United States;
- Political and economic conditions in the country of return;
- Financial impact of departure on the qualifying family member;
- Health conditions of qualifying family and of applicant, particularly if suitable medical care is unavailable in the country of return.

In a recent nonprecedent decision, the Administrative Appeals Office (AAO) applied the factors set forth in *Matter of Cervantes* to overturn the denial of an INA §212(i) waiver application by the consular officer-in-charge in Athens, Greece.[4] The AAO found that the applicant's spouse would experience extreme emotional hardship, both if she were forced to remain in the United States and care for their son alone, and if she were forced to return to Lebanon to be with the applicant. The record contained evidence that the applicant's wife suffered from major depression, as well as symptoms of panic attack and anxiety disorder. She was at risk of recurrence because her mother also suffered from depression and she lost her father at an early age. She suffered from hair loss and was unable to stay in the house alone because she was too depressed, lonely, and scared. Her son suffered from asthma and required frequent medical attention. He often required all-night surveillance and hospitalization. All of these pressures and concerns about her son's health placed the applicant's spouse under additional extreme stress. The record also included statements from the applicant's spouse, their son's doctor, and medical reports showing that while in Lebanon and/or while traveling home the son required medical care. The son's medication is not available in Lebanon, and the family would not have health insurance there to cover medical treatment. The record also contained country condition reports showing that the Department of State had advised U.S. citizens against traveling to Lebanon, as well as reports of dire economic conditions and high unemployment. Given this evidence, and in light of *Matter of*

[4] *Matter of [name and A-number redacted]* (AAO Jan. 9, 2008), *published on* AILA InfoNet at Doc. No. 08011562 (*posted* Jan. 15, 2008).

Cervantes, the AAO found that the applicant had established that his spouse would experience extreme hardship if his waiver of inadmissibility were denied.

Over the years, the BIA and the federal courts have developed a long list of factors relevant to a showing of extreme hardship. Not all factors are applicable to every case. However, whether applied in the context of suspension of deportation or a waiver of inadmissibility, the factors to be considered in determining extreme hardship are the same. The one factor that changes is the issue of whose hardship can be considered for the particular application being filed. Appendix G discusses the factors and case law relevant to finding extreme hardship in suspension, cancellation of removal, §212(h), and §212(i) cases. Of course, the facts of a particular case may present hardship factors that do not appear on any list and that have not previously been considered by the courts. Counsel should use their imagination and encourage their clients to present hardships that do not fit neatly into any of the aforementioned categories.

Exercise of Discretion

Even if an applicant makes a showing of extreme hardship to a qualifying relative, the adjudicator may decide to grant or deny the waiver as a matter of discretion. Such a discretionary analysis requires balancing all factors bearing on discretion, including the fraud that necessitated the waiver.[5] Counsel should include affidavits and declarations from the applicant's friends, colleagues, and other family members attesting to the applicant's good moral character. Counsel also should advise the applicant to express remorse, ask for forgiveness, and demonstrate rehabilitation. In addition, counsel should work into this analysis hardship to non-qualifying family members, such as children, and all other possible hardship factors. A list of factors and case law regarding discretionary analysis is included at Appendix A.

Application Procedure

There are three venues in which a §212(i) waiver application may be presented: (1) in connection with an adjustment of status application; (2) in connection with an application for an immigrant visa at a consulate abroad; and (3) in immigration court proceedings.

Adjustment of Status

When filing an application for adjustment of status where there is a known ground of inadmissibility, counsel should submit Form I-601, Application for Waiver of Grounds of Inadmissibility, and all supporting documentation, concurrently with the adjustment application.[6] Form I-601 should list all grounds of inadmissibility and the supporting documents should establish the qualifying relationship and extreme hardship. The supporting documents generally should include an affidavit or declaration from the applicant and from the qualifying relative. The qualifying relative must set forth in detail the hardship he or she will face in the event the applicant is removed from the United States. Specifically, the relative should describe the hardship that he or she would experience both if the relative were to remain in the United States after the applicant is removed, as well as if he or she were to relocate with the applicant to the country of return. Appendix I contains a list of documents that may be used to support a hardship waiver application.

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[5] *Matter of Cervantes*, 22 I&N Dec. at 568–69; *Hernandez v. Chertoff*, 368 F. Supp. 2d 896 (E.D. Wis. 2005) (the Attorney General, through immigration judges, has discretion to consider any factor he deems appropriate, including the underlying fraud, when deciding whether to grant a waiver of inadmissibility).

[6] 8 CFR§§212.7(a)(1)(ii), 1212.7(a)(1)(ii).

Consular Processing

When the applicant is applying for an immigrant visa abroad, and there is an issue of inadmissibility due to fraud or misrepresentation, the applicant must submit Form I-601 and the supporting documents to the consulate with jurisdiction over the applicant's case. Typically, the consular officer will make a finding of inadmissibility and ask the applicant to make another appointment for presentation of the waiver application. Consulates can be very particular about how and when the waiver application must be presented. Counsel should advise clients to listen very carefully to the instructions provided by the consulate and to communicate all details to counsel. Upon acceptance of the waiver packet, the consular officer will review and forward the packet with a consular recommendation to the appropriate overseas USCIS office for final adjudication.[7]

Immigration Court Proceedings

Foreign nationals may be eligible to adjust or re-adjust their status with a §212(i) waiver as a defense in removal proceedings. In such cases, a copy of Form I-601, with the appropriate fee, must first be filed with the Texas Service Center for processing of biometric and biographic information. Appendix B contains the instructions for submitting applications in immigration court. Supporting documents should not be submitted to the Texas Service Center. Rather, Form I-601, the filing receipt, and the supporting documents should be filed with the court for adjudication. The applicant and the qualifying relative should be prepared to testify in accordance with their previously submitted affidavits or declarations. In addition, they may wish to call other witnesses to testify regarding the applicant's good moral character. If evidence of medical or psychological hardship was included with the supporting documents, the applicant may wish to call as a witness the treating physician or psychiatrist.

Administrative and Judicial Review

A denial of a §212(i) waiver application, whether from an overseas USCIS office, or a local district office, may be appealed to the Administrative Appeals Office (AAO). The appeal should be filed on Form I-290B, with the USCIS office that issued the unfavorable decision.

Denials of adjustment of status in court, based on the denial of an INA §212(i) waiver application, are appealable to the BIA. The BIA has jurisdiction to review discretionary matters *de novo*. In other words, while the BIA may have to give deference to an immigration judge's factual findings, it has authority to review the immigration judge's exercise of discretion. In this way, applicants for waivers in removal proceedings have a second opportunity to present the equities in their case.

[7] Appendix D contains a list of U.S. Citizenship and Immigration Services (USCIS) overseas offices.