



U.S. Citizenship
and Immigration
Services

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H2

[REDACTED]

FILE:

[REDACTED]

Office: CIUDAD JUAREZ, MEXICO

Date: DEC 31 2007

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(i) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge, Ciudad Juarez, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(i), for attempting to procure admission into the United States by fraud or willful misrepresentation. The applicant is engaged to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States.

The officer-in-charge found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen fiancé and the application was denied accordingly. *Decision of the Officer-in-Charge*, dated February 20, 2007.

On appeal, counsel asserts that the I-601 should have never been filed as the applicant was filing for a K-1 nonimmigrant visa. *Form I-290B*, received March 21, 2007.

The record includes, but is not limited to, letters from counsel, letters from the applicant's fiancé's physician and a letter from the applicant's fiancé. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant attempted to enter the United States in or around April 2004 by presenting a document of another person. As a result of this misrepresentation, the applicant is inadmissible under section 212(a)(6)(C) of the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) 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.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

Counsel asserts that the K-1 is a nonimmigrant visa and waiver requests for nonimmigrant visas are under section 212(d) of the Act. *Letter from Counsel*, dated May 24, 2007. The AAO notes that if an alien seeking a K-1 nonimmigrant visa is inadmissible, the alien's ability to seek a waiver of inadmissibility is governed by 8 C.F.R. § 212.7(a), which provides, in pertinent part:

- (a) *General*—(1) *Filing procedure*—(i) *Immigrant visa or K nonimmigrant visa applicant*. An applicant for an immigrant visa or “K” nonimmigrant visa who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision.

Counsel asserts that the applicant does not have a qualifying relative under section 212(i) of the Act. *Form I-290B*. However, the AAO considers the applicant’s fiancé to be a qualifying relative in this situation. In determining that a fiancé is equivalent to a spouse for purposes of the extreme hardship statute, the AAO relies on 22 C.F.R. § 41.81 which provides:

§ 41.81 Fiancé(e) or spouse of a U.S. citizen and derivative children.

...

(a) Fiance (e). An alien is classifiable as a nonimmigrant fiancé(e) under INA 101(a)(15)(K)(i) when all of the following requirements are met:

...

(3) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, *including the requirements of paragraph (d)* of this section.

...

(d) *Eligibility as an immigrant required*. The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under paragraphs (a), (b) or (c) of this section *as if the alien were an applicant for an immigrant visa*, except that the alien must be exempt from the vaccination requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

A section 212(i) waiver is dependent first upon a showing that the bar imposes an extreme hardship to a U.S. citizen or lawfully resident spouse or parent of the applicant. As mentioned previously, the AAO considers the fiancé as an equivalent to a spouse in this section. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or

United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

Therefore, an analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The AAO notes that extreme hardship to the applicant's fiancé must be established in the event that he relocates to Mexico or in the event that he remains in the United States, as he is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to her fiancé in the event that he relocates to Mexico. Although the applicant's fiancé was born in Mexico, he has resided in the United States since 1958. *Applicant's Fiancé's Statement*, at 1, dated November 26, 2007. The applicant's fiancé's physician states that the applicant's fiancé is under his care, carries a diagnosis of malignant lymphoma, is being treated with chemotherapy and is experiencing a fair amount of toxicity from his chemotherapy. *Letter from [REDACTED], M.D.*, dated January 5, 2007. The applicant's fiancé's physician provided an updated letter in which he states that the applicant's fiancé has aggressive recurrent lymphoma, he is in intensive chemotherapy requiring hospitalizations, he will likely require a stem cell transplant, his long-term outcome is doubtful, he has hearing loss and he has disabilities primarily in his hands due to prior chemotherapy and other illnesses. *Second Letter from [REDACTED], M.D.*, dated November 16, 2007. In addition, counsel states that the applicant's fiancé cannot travel to Mexico due to his poor health and treatment schedule. *First Letter from Counsel*, dated January 22, 2007. As the applicant's fiancé has an established patient-physician relationship for an extremely serious illness and is being treated for the disease, it is not plausible for him to relocate to Mexico. Considering the unique health issues of the applicant's fiancé, the AAO finds that extreme hardship has been established in the event that the applicant's fiancé relocates to Mexico.

The second part of the analysis requires the applicant to establish extreme hardship in the event that her fiancé remains in the United States. As previously mentioned, the applicant's fiancé carries a diagnosis of malignant lymphoma, is being treated with chemotherapy and is experiencing a fair amount of toxicity from his chemotherapy. *Letter from [REDACTED], M.D.* The applicant's fiancé states that he has begun a second series of chemotherapy and he will likely undergo a stem cell transplant. *Applicant's Fiancé's Statement*, at 1. The applicant's fiancé's physician states that it will be extremely helpful if the applicant can stay with him in California primarily for physical, but also for, emotional support. *Letter from [REDACTED], M.D.* The applicant's fiancé states that the applicant helped him rediscover his life after the death of his first wife and they decided to marry in order to spend their final years together. *Applicant's Fiancé's Statement*, at 1. The record reflects that the applicant's fiancé is 68 years old. The applicant's fiancé states he has lost the use of his hands as a result of arthritis and the side effects of chemotherapy, he has near total loss of hearing and is unable to care for himself in a meaningful way.. *Id.* at 2. The applicant's fiancé states that the applicant's presence would greatly facilitate his treatments and possible recovery. *Id.* at 3. The applicant's fiancé also states that should his treatments be unsuccessful, he would be able to spend his remaining days with someone who loves him and could care for him. *Id.* Based on the unique medical issues and the critical role that the applicant's fiancé's physician indicates that the applicant could play in his health care, the AAO finds that extreme hardship has been established in the event that the applicant's fiancé remains in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country'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 the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf 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.

The main adverse factor in the present case is the applicant's aforementioned misrepresentation.

The favorable factors include the presence of the applicant's U.S. citizen fiancé, the lack of a criminal record and extreme hardship to her fiancé.

The AAO finds that the applicant's violation is serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.