

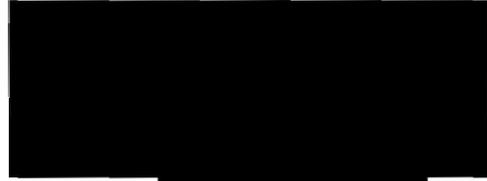
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U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Hr

FILE: [redacted] Office: NEWARK, NJ

Date: DEC 30 2008

IN RE:

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

ON BEHALF OF APPLICANT:



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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Newark, New Jersey. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of the Dominican Republic who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having entered the United States by fraud or willful misrepresentation. The applicant is married to a legal permanent resident and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside with her husband and children in the United States.

The district director found that the applicant failed to establish extreme hardship to her permanent resident spouse and denied the application accordingly. *Decision of the District Director*, dated September 5, 2006.

The record contains, *inter alia*: a statement from the applicant; a psychological evaluation; copies of tax records and financial documents; an affidavit from the applicant's spouse; and a statement from the applicant. The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(6)(C)(i) of the Act provides:

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.

Section 212(i) provides:

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

The record shows, and the applicant does not contest, that she entered the United States in November 1997 using a fraudulent Dominican Republic passport and U.S. nonimmigrant visa for which she paid \$500. Therefore, the record shows that the applicant is inadmissible under section

212(a)(6)(C)(i) of the Act, 8 U.S.C. § 182(a)(6)(C)(i), for entering the United States by fraud or willful misrepresentation.

A section 212(i) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant herself or her children may experience are not permissible considerations under the statute. Once extreme hardship to a qualifying relative 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-Moralez*, 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative “is not . . . fixed and inflexible,” and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include: the presence of family ties to U.S. citizens or lawful permanent residents in the United States; family ties outside the United States; country conditions where the qualifying relative would relocate and family ties in that country; the financial impact of departure; and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted). In addition, the Court of Appeals for the Ninth Circuit has held that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted); *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981) (economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme) (citations omitted).

The record reflects that the applicant’s husband, [REDACTED] came to the United States with his parents when he was sixteen years old. His parents and his eight siblings all live close by and visit each other frequently. [REDACTED] owns a grocery store and works six days per week, fourteen

hours per day, earning \$40,000 per year. The applicant and [REDACTED] have two young children – a son who attends kindergarten and a three-year old daughter who stays home with the applicant. The couple's son has speech development problems and attends weekly speech therapy sessions at the local hospital. The couple's daughter was born prematurely, weighing three pounds at birth, requiring hospitalization for one month and the use of a breathing machine for six months. The daughter currently appears to be developing normally, but receives developmental evaluations on a regular basis.

According to a psychological evaluation, [REDACTED] suffers from significant cognitive and intellectual deficits. *Letter from [REDACTED], supra*, at 4-5, dated October 30, 2006. The results of a cognitive ability test revealed that [REDACTED] ranks in the second percentile when compared to other people his age, *i.e.*, 98% of the population would score higher than [REDACTED] on this test. *Id.* In school, [REDACTED] was left back twice and attended both regular classes as well as special education classes. *Id.* According to the Psychologist, [REDACTED] "clearly had a lot of difficulty understanding and answering my questions and I had to explain myself several times before he could respond to me. On several occasions, I needed the help of his wife in getting the answers to my questions." *Id.* The Psychologist concluded that [REDACTED] "suffers from significant intellectual limitations" and "would have significantly more difficulty coping with [his wife's deportation] than will the average individual." *Id.*

Upon a complete review of the record evidence, the AAO finds that the applicant has established that her husband will experience extreme hardship if she is prohibited from remaining in the United States.

It is evident from the record that the economic, personal, and emotional hardship that would result from the denial of a waiver of inadmissibility constitute extreme hardship, particularly when viewed in light of [REDACTED] cognitive and intellectual limitations. The record shows that [REDACTED] had significant difficulty understanding and answering basic questions from the Psychologist, including how much income [REDACTED] makes from his store. *Letter from [REDACTED], supra*, at 4. [REDACTED] needed to rely on his wife in order to answer the Psychologist's straight-forward questions. *Id.* In addition, the results from the cognitive ability test confirm that [REDACTED] is significantly below average in intelligence. Based on this information, the Psychologist reasonably concluded that [REDACTED] would have significantly more difficulty coping with his wife's deportation than the average individual.

Furthermore, the record shows that [REDACTED] works approximately eighty hours per week in his store and that the applicant is the full-time caretaker of their two young children, both of whom have developmental concerns that are being treated or monitored regularly. If the applicant's waiver application is denied, given [REDACTED] work schedule and income, he would be unable to care for his children himself, unable to afford more than eighty hours of child care per week, and unable to attend to his son's weekly speech therapy sessions and his daughter's monitoring of her development.

It would also constitute extreme hardship for [REDACTED] to go to the Dominican Republic with his wife to avoid separation. [REDACTED] would be separated from his parents and his seven siblings with whom he is close. He would have to give up his store. In addition, he would need to adjust to a life in the Dominican Republic after having lived in the United States since he was sixteen years old, a difficult situation made even more complicated given his intellectual capacity. In sum, the hardship [REDACTED] would experience if his wife were refused admission is extreme, going well beyond those hardships ordinarily associated with deportation. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case are the applicant's fraudulent entry into the United States and her unlawful presence in the country. The favorable and mitigating factors in the present case include: the extreme hardship to the applicant's husband if she were refused admission, particularly in light of his cognitive deficiencies; two U.S. citizen children; the applicant and her husband's record of working and paying taxes in the United States; the existence of property and business ties in the United States; and the fact that the applicant has not had any arrests or convictions in the United States.

The AAO finds that, although the applicant's immigration violations are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.