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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[Redacted]

FILE: [Redacted] Office: HARTFORD, CT (BOS) Date:

APR 29 2003

IN RE: Applicant: [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]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Boston, Massachusetts, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is before the AAO on a second motion to reconsider. The motion will be granted and the order dismissing the appeal will be reaffirmed.

The applicant is a native and citizen of Ghana who procured admission into the United States (U.S.) on February 16, 1992, by presenting a passport and visa issued to another person. He was found to be inadmissible under 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 procured admission into the United States by fraud or willful misrepresentation. The applicant married a native of Ghana and naturalized U.S. citizen on September 7, 1996, while being unlawfully present in the U.S. He is the beneficiary of an approved petition for alien relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with his U.S. citizen spouse.

The district director concluded that the applicant had failed to establish his wife (Ms. [REDACTED]) would suffer extreme hardship if he were removed from the United States, and denied his application accordingly. The AAO affirmed the decision on appeal and on a subsequent motion to reconsider.

On second motion to reconsider, counsel asserts that by finding that the extreme hardship requirement outlined in section 212(i) of the Act applied retroactively to the applicant, the AAO misapplied the law. Counsel additionally asserts that even if section 212(i) provisions do apply to the applicant retroactively, the AAO erred in not assessing the mental state of Ms. [REDACTED] in its hardship analysis, and in not finding that extreme hardship was established based on the evidence in the record.

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 may, in the discretion of the Attorney General, 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 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.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

On appeal, counsel states that the AAO erroneously relied on *Matter of Soriano*, 21 I&N Dec. 516 (BIA 1996) and *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) to support the finding that section 212(i) extreme hardship requirements applied to the applicant. Counsel asserts that the applicant's case was pending when the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (IIRIRA) came into effect and that the U.S. Supreme Court decision, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed. 2d. 229 (1994), held that there is a presumption against retroactive statutes. Counsel further asserts that *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998) reversed the holding in *Soriano*, *supra*, and found that the extreme hardship standard set forth in section 212(i) of the Act could not be applied to a case that was pending when IIRIRA was enacted. Counsel concludes that because the applicant's case is within the jurisdiction of the Second Circuit Court of Appeals, section 212(i) provisions do not apply to him retroactively. Counsel similarly concludes that the extreme hardship provisions set forth in *Soriano* and *Cervantes-Gonzalez* do not apply to the applicant.

Counsel's argument is not persuasive. *Landgraf* held that a statute has a retroactive effect when:

[I]t would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf at 280. In the absence of specific language regarding Congress' intent, the intent is discerned through traditional tools of statutory construction. See *Henderson* at 129 (citing *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed. 2d 694 (1984)).

Congress' intent in recent years to limit rather than extend the relief available to aliens who have committed fraud or misrepresentation is clear. In 1986, Congress expanded the reach of the grounds of inadmissibility in the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, and redesignated as section 212(a)(6)(C) of the Act by the Immigration Act of 1990 (Pub. L. No. 101-649, Nov. 29, 1990, 104 Stat. 5067). The Act of 1990 imposed a statutory bar on those who make oral or written misrepresentations in seeking admission into the United States and on those who make material misrepresentations in seeking admission into the United States or in seeking "other benefits" provided under the Act.

In 1990, section 274C of the Act, 8 U.S.C. § 1324c. was added by the Immigration Act of 1990 (Pub. L. No. 101-649, *supra*) for persons or entities that have committed violations on or after November 29, 1990. Section 274C(a) states that it is unlawful for any person or entity knowingly "[t]o use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act."

Moreover, in 1994, Congress passed the Violent Crime Control and Law Enforcement Act (Pub. L. No. 103-322, September 13, 1994) which enhanced the criminal penalties of certain offenses, including:

- (a) [I]mpersonation in entry document or admission application; [and] evading or trying to evade immigration laws using assumed or fictitious name . . . See 18 U.S.C. § 1546.

Counsel argues that despite the above history, the Second Circuit Court of Appeals clearly held in *Henderson, supra*, that section 212(i) provisions could not be applied retroactively. Counsel states further that the U.S. Supreme Court also made this finding by denying writ of certiorari review of the government's appeal in *Henderson*. Specifically, counsel states that "the U.S. Supreme Court, and the 2nd Circuit Court of Appeals have sent a clear message that the AAO ought to heed. THE EXTREME HARDSHIP STANDARD CANNOT BE APPLIED TO A CASE THAT WAS PENDING WHEN THE LAW WAS AMENDED." See *Motion to Reconsider*, dated June 9, 1999.

It is noted that counsel provides no actual case quotes or citations to support his assertion. Moreover, a review of *Henderson* reveals that the case does not discuss section 212(i) or extreme hardship provisions at all. Rather, the issue in *Henderson* was whether Antiterrorism and Effective Death Penalty Act (AEDPA) provisions applied to an alien

whose deportation proceedings were pending on the date that AEDPA went into effect. *Henderson* dealt specifically with section 440(d) of AEDPA, which statutorily barred aliens from seeking discretionary 212(c) waiver relief from deportation - a right they possessed previously. See *Henderson, supra*; see also *Mojica v. Navas*, 1997 WL 289700 (E.D.N.Y. 1997). *Henderson* held that when section 440(d) was "read in conjunction with the rest of the AEDPA and with the legislative history of that statute, there [was] abundant direct evidence that the section was not intended to apply retroactively." *Henderson* at 129.

In *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271 (2001), the U.S. Supreme Court clarified that section 212(c) relief remained available to criminal aliens who were aggravated felons and had entered into plea agreements prior to the enactment of AEDPA and IIRIRA. In finding that section 212(c) was available under these specific circumstances, the Supreme Court reasoned that:

IIRIRA's elimination of § 212(c) relief for people who entered into plea agreements expecting that they would be eligible for such relief clearly attaches a new disability to past transactions or considerations. Plea agreements involve a *quid pro quo* between a criminal defendant and the government, and there is little doubt that alien defendants considering whether to enter into such agreements are acutely aware of their convictions' immigration consequences. The potential for unfairness to people like *St. Cyr* is significant and manifest. Now that prosecutors have received the benefit of plea agreements, facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would be contrary to considerations of fair notice, reasonable reliance, and settled expectations to hold that IIRIRA deprives them of any possibility of such relief.

St. Cyr at 291.

The reasoning set forth in *St. Cyr* and *Henderson* regarding former section 212(c) of the Act is not applicable to the applicant's section 212(i) waiver case. Indeed, the Fourth Circuit Court of Appeals case, *De Osorio v. INS*, 10 F.3d 1034, 1042 (4th Cir. 1993), clearly held that section 212(i) has a retroactive effect and that "an alien could not reasonably rely on the availability of a discretionary waiver of deportation when choosing to engage in illegal . . . activity." Moreover, the Fourth Circuit reasoned that to consider whether an alien had a reasonable expectation of a waiver at the time that the

alien perpetrated a fraud or made a material misrepresentation would be absurd and would make a mockery of the immigration laws of the United States. See *Okpa v. INS*, 266 F.3d 313 (4th Cir. 2001). The reasoning set forth in *Okpa* applies with equal force to the applicant's case.

Counsel's assertion that the applicant established extreme hardship to his U.S. citizen wife is also unconvincing. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) provided a list of factors the BIA deemed relevant in determining whether an alien had established extreme hardship pursuant to section 212(i) of the Act. These factors included 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. See *Cervantes-Gonzalez* at 565-566.

The record indicates that Ms. [REDACTED] is a native of Ghana and that although she helps the applicant care for his young U.S. citizen son, the child's biological mother resides in the U.S. as well. The record indicates further that the child lives with the applicant pursuant to a mutual out of court agreement between the applicant and the biological mother relating to finances. Although counsel asserts that Ms. [REDACTED] suffers distress because she does not know what would happen to the child if the applicant were removed, based on the evidence in the record it can be presumed that the child would remain in the U.S. with his biological mother. The record contains no other information regarding Ms. [REDACTED] ties in or outside of the United States.

Counsel asserts that the applicant's imminent deportation has made Ms. [REDACTED] suicidal, and that the evidence regarding Ms. [REDACTED] psychological state raises this case beyond the hardship presented in *Cervantes-Gonzalez*. Counsel also asserts that there is evidence in the record "demonstrating a real financial dependence upon the financial contributions of each individual." See *Motion to Reconsider*, dated June 9, 1999.

The psychological evidence referred to by counsel has no probative value. Counsel provided no evidence regarding [REDACTED] M.D.'s medical credentials or background. The record also contains no evidence pertaining to Dr. [REDACTED] qualifications to provide psychiatric care. Indeed, there

is no evidence that Dr. [REDACTED] is even a licensed psychiatrist. Dr. [REDACTED] letters additionally provide no detailed information about the actual treatment that he provided to Ms. [REDACTED] the effect of the treatment, or the methods by which he arrived at his medical conclusions.

Furthermore, a review of the evidence in the record indicates that, despite counsel's assertion to the contrary, the evidence of financial hardship contained in the file consists only of one general assertion by Ms. [REDACTED]. Counsel submitted no other evidence to document the claim that Ms. [REDACTED] is financially dependent on the applicant or that she would suffer extreme financial hardship if he were removed from the U.S. To the contrary, the evidence in the record indicates that Ms. [REDACTED] is gainfully employed as a nurse's aide in the United States, and that she is able to support herself financially.

As discussed in the previous district director and AAO decisions, U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). *Matter of Pilch*, 21 I&N Dec. 627 (BIA) 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan, supra*, further held that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

A review of the documentation in the record, when considered in its totality reflects that the applicant has failed to show that his U.S. citizen spouse would suffer extreme hardship if he were removed from the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The order dismissing the applicant's appeal will be reaffirmed.