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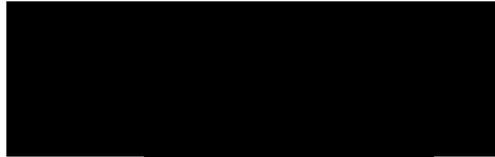
U.S. Department of Homeland Security  
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Washington, DC 20529



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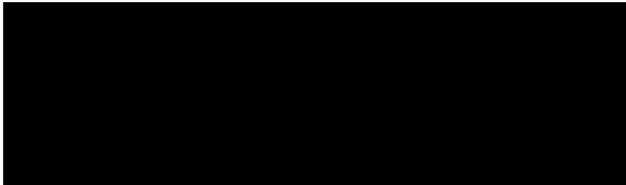
Office: CALIFORNIA SERVICE CENTER

Date: SEP 21 2007

IN RE:

PETITION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v), Section 212(g) of the Immigration and Nationality Act, 8 U.S.C. § 1182(g), and Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i).

ON BEHALF OF PETITIONER:



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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Malaysia 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 seeking to procure benefits (asylum and employment authorization) under the Act and for procuring admission by fraud or willful misrepresentation.

The AAO also finds that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of one year or more and seeking readmission within 10 years of her last departure from the United States, and pursuant to section 212(a)(1)(A)(i) of the Act, 8 U.S.C. § 1182(a)(1)(A)(i), as an alien who is determined to have a communicable disease of public health significance. The applicant is the spouse of a U.S. citizen. The applicant is seeking a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) and section 212(g) of the Act, 8 U.S.C. § 1182(g), in order to reside in the United States with her spouse.

The director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility. *Director's Decision*, dated April 12, 2006.

On appeal, counsel asserts that the applicant's spouse will suffer extreme hardship in the event of the applicant's removal to Malaysia. *Brief in Support of Appeal*, undated.

The record includes, but is not limited to, counsel's brief, affidavits from the applicant and her spouse, physician letters and medical records for the applicant's spouse, World Health Organization reports, photographs, letters of support, and joint documents of the applicant and her spouse. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant misrepresented information on her 1994 asylum and employment authorization applications. The record also reflects that the applicant possessed immigrant intent when she entered the United States on a nonimmigrant tourist visa on October 21, 1999. As a result of these prior misrepresentations, the applicant is inadmissible to the United States.

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.

The record also reflects that the applicant entered the United States in 1993 using a tourist visa, filed an asylum application which was administratively closed in 1996 and departed the United States for approximately one month to Malaysia in September 1999. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until her departure from the United States in September 1999. As such, the applicant is inadmissible under Section 212(a)(9)(B) of the Act. This ground of inadmissibility was not mentioned in the director's decision.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

Based on the record, the applicant requires waivers under sections 212(a)(9)(B)(v) and 212(i) of the Act.

*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 are relevant in section 212(a)(9)(B)(v) waivers as well since the same standard of extreme hardship is applied. These factors include the presence of lawful permanent resident or United States citizen family ties to 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 spouse must be established in the event that he resides in Malaysia or in the event that he resides 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 spouse in the event that he resides in Malaysia. Counsel states that the applicant's spouse has three children, grandchildren and great grandchildren, he has no ties to Malaysia and he does not speak the language. *Brief in Support of Appeal*, at 3. Counsel states that the applicant's spouse is 74 years old and making a transition to a new society and culture would be difficult. *Id.* at 5.<sup>1</sup> The applicant's spouse's physician states that the applicant's spouse has diabetes mellitus with complications, neuropathy, chronic obstructive pulmonary disease, coronary artery disease, transient ischemic attacks, hyperlipidemia, cellulitis and septic bursitis of his left knee, and osteoarthritis. *Letter from [REDACTED]*, dated April 25, 2006. The record reflects that the applicant's spouse needs to take multiple medications to control these chronic diseases. *Id.* The record reflects that the applicant's spouse has a history of depression, myocardial infarctions, emphysema and peptic ulcer disease, and that he would be placed at a severe hardship if his established patterns of medical care and medical management were disrupted by leaving the United States. *Psychiatric Assessment by [REDACTED]* dated April 9, 2004.

Counsel asserts that the medical system in Malaysia is inferior to the United States, it would not be able to adequately treat his conditions and 90% of healthcare costs are paid out of pocket in Malaysia. *Brief in Support of Appeal*, at 5. The record includes evidence that between 1998 and 2002, the out-of-pocket expenditure as a percentage of private expenditure on health in Malaysia was above 90%. *World Health Organization Report on Malaysia*, at 2, undated. The applicant's spouse's affidavit details his lengthy history of financial and medical problems. *Applicant's Spouse's Affidavit*, at 1-6, dated May 18, 2006. The applicant's spouse's joint tax return reflects that he has an office cleaning business and his and the applicant's 2005 total income was negative \$74,107. *2005 Federal Tax Return*, at 1-3, undated. The record is not clear as to whether the applicant would be able to find employment in Malaysia. However, even if the applicant were able to find employment in Malaysia comparable to her U.S. employment, it is plausible that she would not be able to pay for all of her spouse's numerous medical expenses and he would face financial difficulty in regard to paying for medical treatment.

Considering the applicant's spouse's age as it relates to transitioning to a new society and culture, his ties to the United States, his lack of ties to Malaysia, his medical issues, the disruption of his established patterns of medical care, and the financial difficulty related to obtaining medical treatment in Malaysia, the AAO finds that the applicant's spouse would face extreme hardship if he relocated to Malaysia.

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<sup>1</sup> The AAO notes that at the time of this adjudication, the applicant's spouse is seventy-six years old.

The second part of the analysis requires the applicant to establish extreme hardship in the event that her spouse remains in the United States. Counsel states that the applicant's spouse suffers from a serious disability to his left arm, it is difficult for him to perform everyday activities and he needs the applicant's assistance to perform routine activities. *Brief in Support of Appeal*, at 4. Counsel asserts that the applicant's spouse relies on the applicant to help keep track of his medications, make sure his prescriptions are full and makes sure he attends his doctor appointments. *Supra.* at 4. Counsel states that the applicant's spouse's depression is exacerbated by the applicant's immigration issues and separation would make his mental health issues worse. *Id.* at 5. The applicant's spouse states that he has been diagnosed with depression, he is taking medication, he has had many problems and low points in his life, and his wife has helped him overcome everything. *Applicant's Spouse's Affidavit*, at 5-6. The record reflects that the applicant's spouse has a history of depression, he is currently moderately depressed and he would likely become seriously depressed upon separation. *Psychiatric Assessment by [REDACTED]* The applicant's spouse's physician states that the applicant's spouse is reliant on the applicant to help correctly administer his medications and she assists him with daily activities that are restricted by his neuropathy and chronic arthritic pain. *Letter from [REDACTED]* The applicant's spouse's physician states that the applicant's spouse's medical condition would deteriorate considerably if the applicant was not available to facilitate his medical care. *Id.*

The applicant's spouse states that he had been distant from his children for many years, his children were closer to his ex-wife, the applicant has pulled his family together and she has made him stay in touch with them. *Applicant's Spouse's Affidavit*, at 3.

The applicant's spouse states that he receives \$2,100 per month between his pension and social security, he receives free rent as a building superintendent, he can't pay his bills with the money he receives and things have been harder financially since his wife's work permit expired. *Id.* at 5. The applicant states that she worked as a clinical technician before her work permit expired and she and her spouse have started to take money out of their savings account. *Applicant's Affidavit*, at 4, dated May 18, 2006. The AAO notes that without the applicant's financial contribution, it is plausible that the applicant's spouse would encounter financial hardship.

Considering the emotional, medical and financial issues, the AAO finds that separation from the applicant would cause extreme hardship to the applicant's spouse.

The AAO also notes that the applicant's medical examination indicates that she tested positive for the HIV infection. *Form I-693*, dated June 5, 2002. Therefore, she is inadmissible under section 212(a)(1)(A)(i) of the Act. This ground of inadmissibility was not mentioned in the director's decision.

Section 212(a)(1)(A) of the Act provides, in pertinent part, that any alien:

- (i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance. . . is inadmissible.

HIV has been determined by the Public Health Service to be a communicable disease of public health significance. 42 C.F.R. § 34.2(b)(4). Applicants infected with HIV, however, upon meeting certain conditions, may have such inadmissibility waived.

Section 212(g)(1) of the Act provides, in part, that the Attorney General may waive such inadmissibility in the case of an individual alien who:

(A) is a spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa. . .

An applicant who meets this statutory requirement must also demonstrate that the following three conditions will be met if a waiver is granted:

- (1) The danger to the public health of the United States created by the alien's admission is minimal; and
- (2) The possibility of the spread of the infection created by the applicant's admission is minimal; and
- (3) There will be no cost incurred by any government agency without prior consent of that agency.

In this case, the applicant is married to a U.S. citizen, she tested positive for the HIV infection, and the results of the serological examination for HIV were confirmed by Western blot. The applicant's physician states that the applicant was started on a highly active antiretroviral therapy known as HAART, she has had an excellent response with only a few minor side effects, she has been diligent with maintaining excellent adherence to a very strict regimen, she should be able to live a normal life in the United States, and she is very aware and very conscious about safety and risk of transmission. *Letter from* [REDACTED] 1-2, dated April 26, 2004. The record does not indicate that the applicant has relied on the government to cover her medical expenses. The record includes a copy of the applicant's HealthCare Advantage insurance card. Accordingly, it is concluded that the applicant has met the three conditions listed previously and is eligible for a section 212(g) waiver.

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-Morales*, 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. (Citations omitted).

The main adverse factors in the present case are the applicant's aforementioned misrepresentations and unlawful presence.

The favorable factors include the presence of the U.S. citizen spouse, the lack of a criminal record, extreme hardship to the applicant's spouse and the applicant's good character, as evidenced by letters of support in the record.

The AAO finds that the applicant's violations are serious in nature and cannot be condoned. Nevertheless, the AAO finds that 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.