

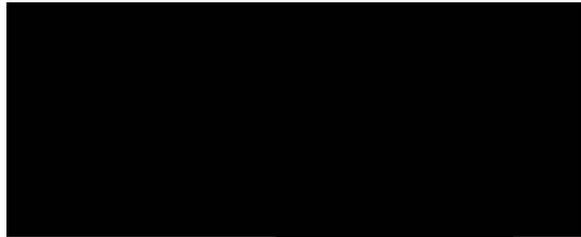
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FILE:

Office: FRANKFURT, GERMANY

Date: **APR 25 2008**

IN RE:



APPLICATION:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Officer in Charge, Frankfurt, Germany, denied the waiver application, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Egypt who was found to be inadmissible to the United States pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(9)(B)(i)(II), for procuring admission to the United States by fraud or willful misrepresentation and for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant is the spouse of a naturalized U.S. citizen and the father of a U.S. citizen son. He seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i), in order to reside in the United States with his spouse and son.

The officer in charge 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 (Form I-601) accordingly. *Decision of the Officer in Charge*, dated June 26, 2006.

The record reflects that, on January 29, 1997, the applicant was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States after his authorized stay expired on July 28, 1997. On June 7, 2000, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed by his first U.S. citizen spouse, [REDACTED]. On February 1, 2001, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advanced parole authorization to depart and return to the United States on June 24, 2001. On January 26, 2002, the applicant arrived at the John F. Kennedy, New York Port of Entry. The applicant presented the advanced parole authorization. However, the applicant was deemed inadmissible pursuant to section 212(a)(6)(C)(i) of the Act and was permitted to withdraw his application for admission. The applicant returned to Egypt where he has since resided. On August 27, 2002, the applicant's marriage to [REDACTED] was annulled. On July 23, 2003, the Form I-130 was denied based on the failure of the applicant and [REDACTED] to appear for a scheduled interview. The Form I-485 was also denied.

On September 29, 2003, the applicant married his current spouse, [REDACTED]. On November 6, 2003 [REDACTED] filed a Form I-130 on behalf of the applicant, which was approved on August 29, 2004. On September 6, 2005, the applicant filed the Form I-601 with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his spouse and son.

On appeal, counsel contends that the applicant is not inadmissible pursuant to section 212(a)(6)(C)(i) of the Act and that [REDACTED] would suffer extreme hardship if the applicant were denied admission to the United States. *See Counsel's Brief*, dated July 26, 2006. In support of his contentions, counsel submits the referenced brief, affidavits, and medical, disability, psychological and financial documentation, as well as country conditions information. The entire record was reviewed in rendering a decision in this case.

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

(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.

(iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides:

(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.

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.

The officer in charge based the finding of inadmissibility under section 212(a)(9)(B)(v) of the Act on documentation and testimony establishing the applicant's unlawful presence in the United States from July

28, 1997, the date on which his nonimmigrant status expired, and June 7, 2000, the date on which he filed an affirmative application for adjustment of status. Counsel does not contest the officer in charge's finding of unlawful presence. The officer in charge based the finding of inadmissibility under section 212(a)(6)(C)(i) on his finding that the applicant had engaged in marriage fraud in order to gain a benefit under the Act.

On appeal, counsel contests the officer in charge's determination of inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act. Counsel contends that, in the sworn statement given by him at the port of entry, the applicant did not explicitly state that he married his first wife for the sole purpose of circumventing immigration law. Counsel asserts that the questioning did not explore the issue of whether the couple entered into a bona fide marriage and there is no unequivocal evidence that the applicant engaged in marriage fraud. While the AAO does not find the record to establish definitively that the applicant engaged in marriage fraud, it does demonstrate that he misrepresented the nature of his relationship with his first wife in an attempt to benefit from his advanced parole authorization and that these misrepresentations led the immigration inspector to find him inadmissible to the United States. In that the applicant misrepresented of material facts regarding his relationship with his spouse in attempting to obtain entry into the United States in 2002, he is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, irrespective of whether he engaged in marriage fraud.

Hardship to the alien himself is not a permissible consideration in a Form I-601 waiver proceeding. A section 212(a)(9)(B)(v) or 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. Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship in 212(a)(9)(B)(v) and 212(i) cases. Thus, hardship to the applicant's U.S. citizen son will not be considered in this decision, except as it may affect the applicant's spouse, the only qualifying relative.

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. *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. These factors include, with respect to the qualifying relative, 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).

Since an applicant's qualifying relative is not required to reside outside of the United States as a result of denial of the applicant's waiver request, an applicant must establish that the qualifying relative would suffer extreme hardship whether he or she remained in the United States or accompanied the applicant to the foreign

country of residence. 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).

The record reflects that [REDACTED] is a native of Moldova who became a lawful permanent resident in 1995 and a naturalized U.S. citizen in 2003. The applicant and [REDACTED] have a 7-year old son who is a U.S. citizen by birth. [REDACTED] has an older child from a prior marriage who is also a U.S. citizen. The divorce decree indicates that custody of this child was given to [REDACTED] former husband and she was ordered to pay child support. The record reflects that the applicant is in his 30's and [REDACTED] is in her 40's.

Counsel asserts that [REDACTED]'s psychological health and heart condition, family responsibilities and community ties prevent her from living in Egypt or living in the United States without the applicant. He asserts that [REDACTED]'s psychological hardships have proven to be particularly severe and have the potential of causing medical illness, hospitalization or even death. He asserts that [REDACTED] developed Major Depressive Disorder as a result of her forced and painful separation from her husband and she requires help with daily life activities. He asserts that, in 2001, [REDACTED] was diagnosed with coronary artery disease, hypertension heart disease, rheumatic heart disease, moderate aortic insufficiency, low back pain, fatigue, tension headache and depression. He asserts that if [REDACTED] aortic insufficiency becomes worse she will need open heart surgery with valve replacement. He asserts that [REDACTED] has been previously diagnosed with major depression, which makes her highly susceptible to re-occurrences which are often triggered by extreme levels of stress or devastating events, such as being separated from one's spouse or moving to a foreign country in which one would be isolated. He asserts that [REDACTED] is unable to work in the United States due to her illnesses and receives a very limited amount of public assistance, which is insufficient to support her and her son. He asserts that living without the applicant has had devastating affects and Ms. [REDACTED] is raising her son alone. He asserts that [REDACTED] is being sued for financial difficulties in regard to debt owed to a credit card company and her inability to pay her rent. He asserts that if [REDACTED] joins her husband in Egypt she would have to overcome tremendous anxiety problems and the exacerbation of her major depressive disorder. He asserts that [REDACTED] would also be unable to obtain sufficient medical and psychological treatment in Egypt due to the language barrier and because the Egyptian health service is inferior to that of the United States. He asserts that [REDACTED] is a very ill person who would be risking her life if she relocated to Egypt. He asserts that [REDACTED] would also be unable to find employment in Egypt, even if her medical condition permitted her to work. He asserts that the only friends that [REDACTED] has reside in the United States. Moreover, [REDACTED] has an older son who resides with his father and if Ms. [REDACTED] resided in Egypt it would be impossible for her to see this son. He asserts that if [REDACTED] resided in Egypt, as a Jew, she would be persecuted. *See Counsel's Brief*, dated July 26, 2006. Documentation from the World Health Organization indicates that the probability of dying between the ages of 15 and 60 years of age in Egypt is 158 versus 81 out of 1,000 in the United States. The documentation also indicates that the mortality rate for cardiovascular diseases in Egypt is 560.1 versus 187.8 out of 100,000 in the United States. *See Country Conditions Reports*, dated July 25, 2006.

[REDACTED] in her affidavit, states that she does not have sufficient support in the United States and her antidepressants are not helping. She states that her son is living without his father and she has been living without her husband, which has affected her health. She states that when she becomes ill she does not have anyone to care for her. She states that, even though she and her son have visited the applicant in Egypt, they would be unable to live there as they both only understand Russian and English. She states that the country is poor and it would be difficult to support a family there. She states that her medical needs are sophisticated and

that Egypt only has basic medical care. See [REDACTED]'s *Affidavit*, dated July 25, 2006. A medical letter indicates that [REDACTED] has been under a doctor's care for major depressive disorder since August 12, 2005. It states that [REDACTED]'s condition is one that is life long and can be treated or improved by certain therapy methods. It states that [REDACTED] is having difficulty coping with her separation from her husband and the separation of her son from his father. The letter concludes that [REDACTED] needs to be reunited with her husband and, due to a language barrier she would be unable to function and receive therapy in Egypt. See *Medical Letter*, dated July 26, 2006. Medical documentation indicates that [REDACTED] has severe heart disease and was diagnosed with coronary artery disease, hypertension heart disease, rheumatic heart disease, moderate aortic insufficiency, low back pain, fatigue, tension headache and depression. The documentation also indicates that [REDACTED] suffers from temporal lobe epilepsy, is on a number of medications and requires assistance in daily life. See *Medical Documentation*, dated July 23, 2006. A medical letter indicates that [REDACTED] was recently diagnosed with an epigastric hernia which requires surgery. The letter also indicates that [REDACTED] refused surgery because if she is incapacitated there is no one to care for her son. See *Medical Letter*, dated October 29, 2006. A decision from the Social Security Administration's Office of Disability Adjudication and Review indicates that [REDACTED] is entitled to collect disability beginning April 15, 2005, as a result of her history of heart disease, rheumatoid arthritis and major depressive disorder. See *Social Security Administration Claim Decision*, dated May 16, 2007.

The economic hardship [REDACTED] faces is not uncommon to aliens and families upon removal. However, this hardship, when combined with the emotional and physical hardship associated with [REDACTED] psychological condition and medical needs, is substantially greater than that which aliens and families would normally face upon removal. [REDACTED] has no ties to Egypt and she has significant ties in the United States, including her older son from a prior marriage. A finding of extreme psychological hardship is the inevitable conclusion of the combined force of the submitted medical and psychological evidence. A discounting of the extreme hardship [REDACTED] would face in either the United States or Egypt if the applicant were refused admission is, therefore, not appropriate. 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 unlawful presence and misrepresentation of a material fact in attempting to obtain entry into the United States for which the applicant seeks a waiver. The favorable and mitigating factors in the present case are the extreme hardship to the applicant's spouse and son if the applicant were refused admission, his otherwise clean background, and the applicant's spouse's and son's significant ties to the United States.

The AAO finds that, although the immigration violations of the applicant 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.