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U.S. Citizenship
and Immigration
Services

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FILE:

Office: PHILADELPHIA

Date: DEC 19 2008

IN RE:

APPLICATION:

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

A handwritten signature in cursive script that reads "Michael Sherry".

for
John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Philadelphia, Pennsylvania. 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 the United Kingdom who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), 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 was also found to be inadmissible under section 212(a)(6)(C)(i) of 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 is married to a U.S. citizen and has a U.S. citizen daughter. He seeks a waiver of inadmissibility in order to reside in the United States.

The acting district director based the finding of inadmissibility under both section 212(a)(9)(B)(i)(II) of the Act for unlawful presence and section 212(a)(6)(C)(i) of the Act for fraud. *Acting District Director's Decision on Form I-601*, dated April 3, 2005. The director also found that the applicant 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. *Id.*

On appeal, counsel submits additional documentation and states that the acting district director failed to consider the relevant hardship factors in the aggregate in determining whether extreme hardship exists. Counsel states that as the acting district director failed to properly evaluate the emotional, medical and physical hardship to the applicant's spouse, she abused her discretion. *Counsel's Brief*, dated May 29, 2008.

In the present application, the record indicates that the applicant entered the United States under the Visa Waiver Program on January 3, 2001 by presenting an Irish passport with a passport number of [REDACTED]. At this time the applicant was authorized to stay in the United States until April 2, 2001. The applicant departed the United States on December 12, 2005 and on December 27, 2005 he re-entered the United States on the passport issued by the United Kingdom. Therefore, the applicant accrued unlawful presence from when he entered the United States on January 3, 2001 until December 12, 2005, the date he departed the United States. The acting district director's decision states that the applicant admitted that upon his return to the United States, he presented the passport issued by the United Kingdom in order to conceal that he has been unlawfully present in the United States and based his finding of fraud on this admission.

The AAO finds that the record does not contain sufficient evidence to show that the applicant committed fraud or made a willful material misrepresentation. The interviewing adjudications officer's notes state that the applicant left the United States on December 12, 2005 using his Irish passport and on November 30, 2005 he was issued a passport from the United Kingdom. *Appendix J: I-485 Processing Sheet*, dated July 25, 2007. The notes further state that the applicant stated that he lost his Irish passport and on December 27, 2005 he reentered the United States on the passport from the United Kingdom. The officer then goes on to state that the applicant "obviously obtained and used the United Kingdom passport to hide his prior overstay. He even applied for it before he left the United States." *Id.* The AAO finds that these notes are not sufficiently detailed to demonstrate that the applicant admitted to willfully concealing a material fact from a U.S. government official. The applicant entered the United States on a valid passport issued to him by the United

Kingdom. The record does not include documentation that he concealed his prior visits to the United States beyond presenting the validly issued passport or that he made any misrepresentations in response to questions from the inspecting officer(s). The Department of State Foreign Affairs Manual (FAM) offers interpretations regarding the statutory reference to misrepresentations under section 212(a)(6)(C) of the Act. It states, in part, that "silence or the failure to volunteer information does not in itself constitute a misrepresentation..." *DOS Foreign Affairs Manual*, § 40.63 N4.1-N.46, *see also In re Tijam*, 22 I&N Dec. 408, 425 (BIA 1998). The applicant's failure to volunteer information regarding his prior visits to the United States does not, by itself, amount to fraud or a misrepresentation. Therefore, the AAO finds that the applicant is not inadmissible under 212(a)(6)(C)(i) of the Act.

However, the applicant is inadmissible under section 212(a)(9)(B) of the Act for having accrued unlawful presence from when he entered the United States on January 3, 2001 until December 12, 2005, the date he departed the United States. In applying for adjustment of status, the applicant is seeking admission within 10 years of his December 12, 2005 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant experiences or his daughter experiences due

to separation is not considered in section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's spouse.

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 applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. 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.

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). 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 AAO notes that extreme hardship to the applicant's spouse must be established in the event that she relocates to the United Kingdom or Ireland and in the event that she remains in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

In his brief, counsel states that the applicant's spouse suffers from a genetic blood disorder called Factor V Leiden Mutation, putting her at high risk for developing a fatal blood clot. *Counsel's Brief*, dated May 29, 2008. He states that in the past, the applicant's spouse suffered a pulmonary embolism and deep vein thrombosis of the leg. *Id.* Counsel states, in a supplement to his brief, that the applicant's spouse recently gave birth by caesarian section to her first child and in order to prevent a blood clot from forming she requires monitoring and daily injections. *Supplement to Appeal's Brief*, dated July 18, 2008. In support of these assertions, counsel submitted a letter from the applicant's spouse's obstetrician and a letter from her hematologist. The applicant's spouse's obstetrician, [REDACTED], states that the applicant's spouse delivered a baby on June 25, 2008 and has been having a complicated post partum course of treatment including the use of injectable anticoagulants along with a follow-up hospitalization on July 2, 2008. *Letter from [REDACTED]*, dated July 7, 2008. [REDACTED] states that given the applicant's spouse's post partum condition it is extremely important that she have the assistance and support of her husband. [REDACTED] states that he anticipates the applicant's spouse having some ongoing issues with her condition. *Id.* The letter from [REDACTED], the applicant's spouse's hematologist, states that the applicant's spouse has deep vein thrombosis and had a blood clot last year that traveled to her lung. *Letter from [REDACTED]* dated July 11, 2008.

He states that she survived only because she went straight to the emergency room and they were able to start her on blood thinner, which she was required to take for six months. [REDACTED] states that the applicant's spouse has Factor V Leiden mutation, which is a genetic mutation that increases her risk of having another blood clot, especially in the case of surgeries or pregnancy. He states that the applicant's spouse gave birth two weeks ago and is currently on an injectable form of blood thinner called Lovenox. [REDACTED] explains that Lovenox is given daily and that it increases the applicant's spouse's risk of developing a condition called heparin-induced thrombocytopenia, which can be a fatal condition if not detected early. For this reason, Dr. [REDACTED] asserts the applicant's spouse must be monitored closely for symptoms and signs of this condition, which can include: shortness of breath, blue fingers or lips and decreased mentation. The doctor states that if these symptoms exhibit themselves then the applicant's spouse would need to be taken to the emergency room immediately. [REDACTED] states that with patients in similar situations as the applicant's spouse, he is concerned with their remembering to give themselves the required injection at the same time everyday. [REDACTED] states that if the applicant's spouse were to forget to take the shot then there would be the potential for her clotting in the lung again. When clotting of the lung begins, states [REDACTED] the patient becomes short of breath and is unable to make decisions or communicate. Thus, [REDACTED] states that the applicant's spouse needs the applicant to not only give her the injection, but to also watch for the signs of heparin-induced thrombocytopenia. In addition, [REDACTED] states that it is not advisable for the applicant's spouse to travel in a plane or on a long car ride due to her blood condition and the risk of clotting. *Id.* Counsel also submitted information from the National Human Genome Research Institute on Factor V Leiden, the Mayo Clinic on Pulmonary Embolism and Wikipedia on Deep Vein Thrombosis, confirming the information provided by the applicant's spouse's obstetrician and hematologist about these conditions.

The record in the applicant's case also contains a psychological evaluation for his spouse completed by [REDACTED]. Dr. [REDACTED] states that the applicant's spouse's father and grandfather are suspected of also having Factor V Leiden as they both died of heart attacks at a young age. *Psychological Evaluation*, dated June 13, 2007. She states that because of the applicant's spouse's condition it is important for her to have continuity of care with the team of doctors she is currently working with. She states that relocation is not possible, nor is it in the best interests for the applicant's spouse's health. *Id.*

Based on the serious medical condition of the applicant's spouse, her level of care in the United States and that traveling on a long flight to Europe would mean the risk of her developing a fatal blood clot, the AAO finds that it would be an extreme hardship for her to relocate to the United Kingdom or Ireland to be with the applicant.

Furthermore, the AAO finds that separating the applicant's spouse from the applicant at this time would also constitute extreme hardship. In her statement, the applicant's spouse states that the applicant injects her medications of Lovenox and Heparin into her abdomen three times per day. *Spouse's Statement*, dated July 8, 2008. She states that leading up to her cesarean operation she was scared, worried and nervous and that the applicant spent the whole day and night by her side and was so calm and comforting. She states that the only way she feels she was able to get through her surgery was because she had the applicant by her side. The applicant's spouse states that he is the only person in her life that she trusts and relies on completely. In addition to her medical condition, the applicant's spouse also states that their newborn daughter has to be monitored for enlarged kidneys and has to have ultrasounds and sees an urologist. *Id.* In her psychological evaluation [REDACTED] states that the applicant's spouse's only close relative living in the Philadelphia

area is her sister and that due to her father's sudden death at a young age the applicant's spouse has had attachment issues since the age of twelve. *Psychological Evaluation*, dated June 13, 2007. The applicant's spouse stated to [REDACTED] that she did not socialize with others until college and that her first significant relationship was with the applicant. [REDACTED] finds that the removal of the applicant's spouse from the United States would cause extreme psychological hardship, recreating an environment of loss precipitating the likelihood of depression and isolation, which the applicant's spouse experienced for nearly a decade from age twelve to age twenty-two. In addition to psychological hardships, the applicant's spouse also stated to [REDACTED] that she would suffer financial hardships as a result of the applicant's removal from the United States. *Addendum to Psychological Evaluation*, dated March 19, 2008. She stated that she depends on the applicant to assist with the finances of the family. She states that she is unable to maintain the mortgage and bills for their new home. The applicant's spouse also states that thinking about raising her daughter without the applicant brings back the feelings she had when grieving for her own father's death. *Id.*

When considering the applicant's spouse's situation in the aggregate, taking into account her medical condition and course of treatment, the assistance and support that the applicant provides for this condition, the applicant's spouse's family history, the existence of a newborn baby in the applicant's spouse's life and the financial hardships she would suffer without the applicant, the AAO finds that the applicant's spouse would suffer extreme hardship as a result of being separated from the applicant.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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 adverse factors in the present case are the applicant's immigration violations, including his unlawful presence and fraudulent entry into the United States. The favorable factors in the present case are the

applicant's family ties to the United States; extreme hardship to his U.S. citizen spouse if he were to be denied a waiver of inadmissibility; the support the applicant provides for his spouse's medical condition, the applicant's consistent record of self-employment and the applicant's lack of a criminal record.

The AAO finds that the immigration violations committed by the applicant 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.