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

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 09 2007

IN RE: [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) and section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[redacted]

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 California Service Center Director. 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 Republic of Congo (Congo) 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 attempted to procure an immigration benefit fraud or willful misrepresentation on. The applicant was also found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien convicted of a crime involving moral turpitude. The applicant is married to a U.S. citizen and has three U.S. citizen children. He seeks a waiver of inadmissibility in order to reside in the United States.

The district director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse, parent, son or daughter. The application was denied accordingly. *Decision of the Director*, dated March 21, 2006.

On appeal, counsel asserts that director erred in denying the applicant's waiver application when he failed to consider all relevant evidence of extreme hardship to the applicant's spouse and children. *Counsel's Brief*, undated.

The present application indicates that the applicant was convicted of Attempted Trademark Counterfeiting in the Second Degree, in violation of New York Penal Law §110-165.72 on May 8, 2002 for events that took place on April 17, 2002.

Section 212(a)(2)(A) of the Act states in pertinent part:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
>
> > (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> > (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –
> >
> > > (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

The AAO notes that the events leading to the applicant's conviction occurred less than 15 years prior to the applicant's applying for admission. Therefore, the applicant is still subject to section 212(a)(2)(A) of the Act and will require a waiver under section 212(h)(1)(B) of the Act.

The present application also indicates that on April 13, 2004, during his adjustment interview, the applicant falsely stated that he had only been arrested, cited, charged, indicted, fined, or imprisoned for disorderly conduct. He failed to reveal his arrest and conviction for Attempted Trademark Counterfeiting in the Second Degree. *Officer's Notes Form I-485*, dated April 8, 2002.

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.

A section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C)(i) of the Act dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse and/or parent of the applicant. A section 212(h) waiver of the bar to admission resulting from section 212(a)(2)(A) of the Act is dependent upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse, parent and/or child of the applicant. Hardship the alien himself experiences due to separation is irrelevant to section 212(h) and section 212(i) waiver proceedings unless it

causes hardship to the applicant's spouse. The AAO notes that the applicant has three U.S. citizen sons and hardship to these sons is considered in section 212(h) waiver proceedings, but is not considered in section 212(i) waiver proceedings unless it is shown that the hardship to his children is causing hardship to his spouse. Thus, the applicant's waiver application will be analyzed in accordance with the more restrictive, section 212(i) waiver proceedings.

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

> 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 resides in Congo or in the event that she resides 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.

The first part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that she resides in the Congo. Counsel states that the applicant's spouse and children cannot relocate to the Congo where they will be subjected to a life where disease is prevalent, health conditions are poor and the level of medical care is extremely low. *Counsel's Brief,* undated. He states that the health conditions are extremely important to the applicant's family because their youngest son, [redacted] has had to undergo two gastro surgeries and is scheduled for a third. *Id.* In addition, he has had to have a feeding tube inserted into his stomach because of his failure to eat. Counsel states that the medical community has been unable to determine what is causing these eating problems and relocating to Congo would only place him in a more dangerous situation. *Id.* Counsel also emphasizes that the applicant would not be able to support his family financially in Congo, his spouse would be separated from her entire family and that the applicant's spouse and children will lose the educational opportunities they have in the United States. *Id.* In support of his assertions regarding the medical condition of the applicant's son, counsel submitted a letter from [redacted] a social worker from Cincinnati Children's Hospital, photographs of their son with his feeding tube, and various medical records outlining the son's inability to eat. In support of his assertions regarding medical care in the

Congo, counsel submitted, the 2005 State Department Country Report for the Congo; a Travel Health Report for the Congo; and a State Department Consular Information Sheet for the Congo. The Travel Health Report contained a lengthy list of common medical diseases found in the Congo that are not prevalent in the United States. The Travel Health Report also states that in the Congo medical care is substandard, hospitals are inadequate and modern technology is lacking. *Travel Health Report from www.wrongdiagnosis.com*, dated April 18, 2006. In addition, the Consular Information Sheet states that medical facilities in the Congo are extremely limited, some medicines are in short supply, and that an anti-malarial drug resistant form of malaria is prevalent in the Congo and visitors are at a high risk for contracting malaria. *Consular Information Sheet*, dated April 19, 2006. The AAO finds that due to the limited and substandard medical facilities in the Congo and the severity and life threatening nature of the applicant's son's illness, it would be an extreme emotional hardship on the applicant's spouse to have to relocate her child to the Congo.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his spouse remains in the United States. Counsel states that the applicant's family will suffer extreme financial hardship and the trauma of family separation. Counsel asserts that family separation will be an extreme hardship on the applicant's spouse because she is unemployed, attending school part-time and devoting the majority of her time to caring for her three children [redacted], in particular. *Counsel's Brief*, undated. Counsel states that the applicant works to support his entire family. The applicant's spouse states that she was forced to quit work because of their son's medical problems. She states that his care occupies a very large portion of her time, causes great expense and prohibits her ability to earn income. *Spouse's Affidavit*, dated April 18, 2006. The applicant's spouse also submitted statements from her mother and brother supporting her assertions regarding employment and caring for her son. As an example of the expenses involved in the medical care for their son, the applicant also submitted a medical bill from the Cincinnati Children's Hospital showing $4,506.00 for physician services only. *Physician Billing Statement*, dated March 29, 2006. Again, the AAO notes that due to the severity of the applicant's son's condition and the care he requires, separating the family and leaving the applicant's spouse without her primary means of financial and/or emotional support would cause extreme emotional and financial hardship to the applicant's spouse.

A review of the documentation in the record establishes the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States.

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-Moralez, 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 criminal conviction and his misrepresentation concerning that conviction. The favorable factors in the present case are the extreme hardship to the applicant's children and wife, payment of taxes, stable employment and the lack of a criminal record since 2002.

The AAO finds that the crimes committed by the applicant and the misrepresentation he made concerning those crimes 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.