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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: NEWARK, NJ Date: MAR 2 0 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)

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.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Newark, New Jersey, 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 Ghana who was found to be inadmissible to the United States. The applicant is the spouse of a U.S. citizen and father of two lawful permanent resident children. He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his spouse and children.

The district 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 (Form I-601) accordingly. *Decision of the District Director*, dated March 7, 2005.

The record reflects that, on May 1, 1994, the applicant attempted to enter the United States by presenting a photo-substituted South African passport under the name [redacted]." The applicant was found inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission to the United States by fraud or willful misrepresentation. The applicant was placed into proceedings. On November 14, 1994, the applicant filed an Application for Asylum or Withholding of Removal (Form I-589) with the immigration court. On June 30, 1995, the immigration judge denied the applicant's applications for asylum and withholding of removal and ordered him removed. The applicant appealed the decision to the Board of Immigration Appeals (BIA). The BIA dismissed the applicant's appeal on June 25, 1998. On March 23, 1997, the applicant married his U.S. citizen spouse, [redacted]. [redacted] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant and he subsequently filed an Application to Register Permanent Residence or Adjust Status (form I-485), that was denied on August 3, 1999. The applicant filed a motion to reopen with the BIA. The BIA dismissed the applicant's motion to reopen and a final order of removal was issued on May 7, 2001. On May 6, 2002, the applicant filed a second Form I-485 and a Form I-601 with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his family members.

On appeal, counsel contends that the district director failed to take into account all of the factors set forth by case law in determining whether the applicant's wife would suffer extreme hardship. *Brief In Support of Appeal*, dated April 6, 2005. In support of his contentions, counsel submitted the referenced brief, a new affidavit from the applicant's spouse, medical documentation and psychological documentation in regard to the applicant's spouse and children, and medical information on Hepatitis B. The entire record was reviewed and considered 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.
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> . . . .
>
> (ii) 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.

The district director based the finding of inadmissibility under section 212(a)(6)(C)(i) of the Act on documentation in the record establishing that the applicant attempted to enter the United States by fraud in 1994. Counsel does not contest the district director's determination of inadmissibility.

Hardship to the alien himself is not a permissible consideration under the statute. A section 212(i) waiver is therefore 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. It is noted that Congress specifically did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. Any hardship suffered by the applicant's children, therefore, is considered only insofar as it results in hardship to a qualifying relative in the application, in this case, 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 alien 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. 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).

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 U.S. citizen by birth. The applicant has a 23-year old daughter from a previous relationship who is a native of Ghana who became a lawful permanent resident in

1999 and a naturalized U.S. citizen in 2006. The applicant has a 15-year old daughter from a previous relationship who is a native and citizen of Ghana who became a lawful permanent resident in 1999. The applicant's youngest daughter has been diagnosed with Attention Deficit Disorder (ADD) and receives schooling under an individualized education program (IEP) in the Hamilton Township Schools System. The record reflects further that the applicant is in his 50's, [redacted] is in her 40's and that Ms. [redacted] has been diagnosed with and is being treated for major depression, recurrent and severe, hypertension and Hepatitis B with multiple masses within her liver.

Counsel contends that [redacted] would suffer extreme financial and emotional hardship whether she remained in the United States without the applicant or traveled to Ghana in order to reside with the applicant. [redacted] is currently unemployed, has no medical insurance and has, in the past, worked as a substitute teacher. The applicant claims no marketable job skills and is employed as a gas station attendant. [redacted] is currently being treated for a mental illness for major depression, recurrent, severe with medication and continued evaluation and counseling. *See Psychological Evaluation and Henry J. Ausin Health-Center, Inc. Letter.* Counsel submits medical documentation that shows [redacted] has been diagnosed with Hepatitis B with multiple masses within her liver, as well as high blood pressure. The medical documentation indicates that [redacted] is on blood pressure medication and requires close monitoring of her liver functions due to the masses and elevated liver enzymes. Counsel submitted medical documentation indicating that, in 1987, [redacted] was treated for cervical cancer and continues to receive monitoring for recurrence from her physician. Counsel submits documentation that shows the applicant's youngest daughter was diagnosed with ADD for which she has been placed in an IEP within her local school system. *See Hamilton Township Schools IEP Evaluation and Psychological Evaluation.* The documentation reflects that the applicant's youngest daughter has been receiving evaluation and specialized education for ADD since 2003. The psychological evaluation indicates that [redacted] "who has already suffered the blows of cervical cancer and a failed first marriage, would be left without the love and support of [redacted] while at the same time attempting to bring up her stepdaughter . . . suffering from Attention Deficit Hyperactivity Disorder and has learning issues which have kept her two years behind in school . . . if her father is removed to Ghana, she will suffer from depression, separation anxiety disorder, and isolation. When these clinical symptoms are combined with the issues presented by her Attention Deficit Hyperactivity Disorder, she will be unable to marshal her resources effectively . . . in order for (her) to deal effectively with her Attention Deficit Hyperactivity Disorder, she will need the full support and presence of her father, her stepmother . . . and the school system." The psychological evaluation states that, as a teacher, [redacted] understands what is required to care for her stepdaughter's learning problems and that her presence is imperative in effectively treating her stepdaughter's ADD. Financial documentation indicates that, when [redacted] was working as a substitute teacher she earned approximately $10,425 in 2002, which is below the poverty guidelines for her family. *Federal Poverty Guidelines,* http://aspe.hhs.gov/poverty/figures-fed-reg.shtml. [redacted] fears that, if her health continues to deteriorate, she would not be able to provide financially for the family, as well as continue to provide the necessary daily mental stimulation and early academic intervention for her stepdaughter. Counsel and [redacted] are concerned that medical services for [redacted] s medical conditions, specifically those relating to her Hepatitis B, would not be available in Ghana, or that the applicant's daughter would be able to receive appropriate educational services for her ADD. There is no documentation of country conditions on the record.

The applicant and his wife are responsible for the care of one minor child. The couple's prospects, even with [redacted]'s substitute teacher qualifications, for adequate employment in Ghana are somewhat dim. If she remained in the United States, [redacted] would face trying to maintain alone a household with a young child who has a significant learning disability that would be additionally hampered by the absence of her father, without the financial and emotional assistance the applicant currently provides, as well as trying to combat her own psychological and medical problems which could be exacerbated by the applicant's absence. It would be extremely difficult for [redacted] to mitigate the effects of separation by visiting the applicant, due to the cost in relation to any income she may derive and the psychological effects on her stepdaughter's learning disability. In Ghana, [redacted]'s medical conditions would most likely suffer, and it is probable that [redacted] would be unable to obtain adequate care. Although [redacted] is skilled and has an education, in Ghana, where wages are generally lower and the unemployment rate is high, these skills and education would be undermined and she and her family could be reduced to poverty, compounded by her medical conditions and the applicant's daughter's learning disability. The hardship [redacted] would face is substantially greater than that which aliens and families upon removal would normally face. [redacted] has no immediate family in Ghana and she has significant family ties in the United States, including her U.S. citizen mother. A finding of extreme psychological, physical and financial hardship is the inevitable conclusion of the combined force of the submitted medical and psychological documentation. A discounting of the extreme hardship Ms. [redacted] would face in either the United States or Ghana if her husband 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 factor in the present case is the fraud or willful misrepresentation for which the applicant seeks a waiver and a prior order of removal. The favorable and mitigating factors in the present case are the extreme hardship to the applicant's wife if he were refused admission, the absence of any other negative information in his background, and the significant learning disability of the applicant's lawful permanent resident daughter.

The AAO finds that, although the immigration violations committed by 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.