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U.S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: MIAMI, FLORIDA Date: APR 2 8 2009

IN RE: Applicant: [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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. 103.5(a)(1)(i).

Ellen C. Johnson

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Haiti who was found to be inadmissible to the United States under 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 a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with his U.S. citizen wife.

The district director concluded 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.

On appeal, counsel for the applicant asserts that the district director's decision is factually deficient and legally incorrect and failed to take into consideration all elements of hardship to the applicant's wife in aggregate. Counsel contends that the director failed to take into consideration the developmental disability and medical condition of the applicant's son, as well as current country conditions in Haiti. Counsel contends that the evidence demonstrates that the applicant's wife will suffer extreme hardship if the applicant is prohibited from remaining in the United States.

The entire record was reviewed and considered in rendering this decision.

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 reflects that on or about August 8, 1999, the applicant attempted to enter the United States by presenting a Haitian passport with a counterfeit Adit stamp indicating U.S. Permanent Resident Status, at the Miami International Airport. The applicant executed a sworn statement on

that date before an officer of the U.S. Citizenship and Immigration Services (USCIS) in which he stated that he purchased the counterfeit stamp for $4,500 and was aware that it was illegal to obtain the stamp in such manner and to use the stamp to gain entry into the United States. Based on the foregoing, the applicant had committed fraud in order to procure entry into the United States, and the director correctly found the applicant to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i). The applicant does not contest this finding.

A section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawful permanent resident spouse or parent of the applicant. Hardship to the applicant or to his children is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. Once extreme hardship to a qualifying relative 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 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 (BIA) 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).

U. S. courts have stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request. On his Form I-601, the applicant indicated that he is claiming eligibility for a waiver through his wife, [redacted], who is a citizen of the United States. Along with the Form I-601, the applicant submitted, among other things: (1) an affidavit from his wife dated June 11, 2007; (2) a letter from his wife confirming her employment; (3) a report dated October 16, 2006 from the School Board of Broward County evaluating special educational needs and prescribing an individual education plan for the applicant's son, [redacted]; (4) medical records from Holy Cross Hospital in Fort Lauderdale, Florida documenting the admission and treatment of the applicant's son on February 3, 2004, October 10, 2005, and February 26, 2006; (5) the U.S. Department of State's Haiti Country Report on Human Rights Practices - 2006.

In her affidavit, [redacted] stated that she has been married to the applicant since 1997. They have two U.S. citizen sons, born in 2000 and 2002. She indicated that she works full-time at Publix Supermarket in Customer Service to provide the main source of income for her household. Because her hours are irregular, [redacted] stated, she relies on her husband to take care of the children. She stated that the applicant takes the children to school and picks them up, tend to their school activities, takes them to the doctor, and stays with them when they are not in school. If he were not present to care for the children, she stated, she would not be able to work to provide their financial support and take care of them at the same time.

[redacted] stated that her younger son, [redacted] has suffered from asthma since he was born and has been hospitalized several times due to severe asthma attacks, which, on one occasion, developed into pneumonia. The medical records from Holy Cross Hospital corroborate this claim, indicating that on February 3, 2004, the applicant's son [redacted] was admitted to the emergency room and was diagnosed with bronchiolitis. He was again admitted to the emergency room on October 1, 2005 and treated for bronchiolitis, asthma, and pneumonia. On February 26, 2006, he was again brought to the emergency room for treatment of an asthma attack; the record for that admission indicated that it was "one of multiple admissions to Holy Cross Hospital for status asthmaticus for this 5-year-old Haitian male."

The applicant's wife reported in her affidavit that the same child also has a speech impediment that is affecting his development in school and for which he is receiving speech therapy and special educational aid. The October 2006 report from the Broward County School Board corroborates this claim, detailing the range of the speech and developmental disabilities of the applicant's son and prescribing speech and language therapy and daily specialized instruction for the child outside of the normal curriculum.

The applicant's wife further stated in her affidavit that if the applicant has to return to Haiti, she and the children would have to accompany him because she would not be able to take care of her children by herself in the United States. However, she stated, she expects that she would not be able

to find employment, given her lack of educational degrees and specialized skills, and that her children would be deprived of needed healthcare and educational opportunities the United States offers them. She concluded that she would suffer extreme hardship if her husband is deported to Haiti.

In denying the application for waiver, the district director concluded that the applicant "has presented no evidence of how [his] spouse would suffer extreme hardship beyond the normal emotional and financial distress" nor has he presented evidence of why his spouse would be unable to visit or relocate with him to Haiti. In the same decision, the district director also concurrently denied the applicant's Form I-485, Application to Adjust Status as a Permanent Resident.

In the Form I-290B, Notice of Appeal, filed on September 19, 2007, counsel for the applicant asserts that the district director's decision is factually deficient and legally incorrect and failed to take into consideration all elements of hardship to the applicant's wife in aggregate. Counsel contends that the applicant's waiver application was not based solely on financial hardship, or the likely inability of the applicant's wife to find employment, and the deprivation of educational and economic advantages to the applicant's children, in Haiti. Counsel contends that USCIS neglected to take into consideration the developmental disability and medical condition of the applicant's son, as well as current country conditions in Haiti, in light of the medical and special education needs of the applicant's son. Counsel contends that the evidence demonstrates that the applicant's wife will suffer extreme hardship if the applicant is prohibited from remaining in the United States.

On October 18, 2007, counsel submitted a brief and additional supporting evidence, including (1) a letter dated September 18, 2007 from [redacted], who confirms that the applicant's son, [redacted] was seen in his office for asthma; (2) an updated evaluation of special needs and corresponding individual education plan for the applicant's son from the School Board of Broward County, dated September 4, 2007; and (3) a psychiatric evaluation of the applicant's wife, dated September 18, 2007, by [redacted], a Board-certified psychiatrist.

In his evaluation, [redacted] stated that the applicant's wife "presents some phobias and paranoid thoughts," that her "mood and affect are constricted and depressed with episodes of anxious feelings," and that she "acknowledges episodes of suicide ruminations." He further noted that she has "extreme fear of staying alone." [redacted] diagnosed the applicant's wife as having adjustment disorder, anxiety and depression. He recommends "supportive and insight oriented psychotherapy" but noted that no psychotropic medications are needed at the time of the evaluation. In recounting his interview with the family, [redacted] noted that the applicant is the one "most involved with the children, taking them to school therapy and doctors." He stated that in light of the attachment between the applicant and his wife, separation from her husband will be "a tremendous stress situation . . . with strong possibility that such forced separation could bring a serious mental illness."

In addition to assertions made on the Form I-290B, counsel emphasized in his brief the results of [redacted] evaluation and asserted that the applicant's wife is likely to develop mental illness either if she is separated from her husband or if she relocates to Haiti, where her son will not be able to receive adequate medical care.

Upon a complete review of the evidence of record, the AAO finds that the applicant has established that his wife will experience extreme hardship if he is prohibited from remaining in the United States.

The evidence of record, as discussed above, shows that the applicant's younger son [redacted] suffers from asthma, a chronic medical condition, for which he has been hospitalized multiple times in recent years. The same child also has speech and developmental disabilities which apparently continue to require therapy and other remedial measures through his current school system. The applicant's wife has indicated that the applicant has been the primary caregiver parent for their children as she works irregular hours to provide financial support for the family. She has indicated that without the applicant, she would be unable to provide for her family financially and take adequate care of the children at the same time. As previously noted, hardship to the applicant's children is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. However, in this case, the AAO finds that given the medical condition and developmental disabilities of the applicant's younger son, the applicant's wife would suffer significant hardship if she is left to cope with the greater than normal needs of her children without the help of the applicant, while at the same time supporting her family financially. The May 2007 letter from [redacted]. confirming [redacted] employment indicates that at that time, she worked forty hours per week, earning $12.00 per hour. Given that she works irregular hours and most likely requires significant childcare outside of school hours, it is unlikely that she would be able to afford adequate childcare in addition to meeting her family's basic needs on her wages.

In addition, [redacted] psychological evaluation indicates that the applicant's wife suffers significant psychological distress at the prospect of the applicant's removal from the United States. As he stated, the applicant's wife was "depressed with episodes of anxious feelings," and "acknowledge[d] episodes of suicide ruminations." He further indicated that she has "extreme fear of staying alone." He concluded that there is a "strong possibility that such forced separation [from her husband] could bring a serious mental illness." Although the input of any mental health professional is respected and valuable, it is noted that the submitted report is based on a single interview between the applicant's spouse and the psychiatrist. There is no record of an ongoing relationship between a mental health professional and the applicant's spouse or any history of treatment for the generalized psychological symptoms suffered by the applicant's spouse. As such, the value of [redacted] evaluation to a determination of extreme hardship is limited, and is not in and of itself evidence of extreme hardship. Nonetheless, the evaluation does indicate that the psychological distress of the applicant's wife is likely and credible in light of other anticipated factors of hardship as described above.

Based on the foregoing, the AAO finds that, when considered in aggregate, the factors of hardship to the applicant's wife, should she remain in the United States without the applicant, constitute extreme hardship.

Finally, as noted above, there is no requirement under the statutes or regulations that a qualifying relative must relocate or reside outside of the United States based on the denial of the applicant's waiver request. However, to establish statutory eligibility for a waiver of inadmissibility, the applicant must also establish extreme hardship to his spouse in the event that she relocates with him to Haiti. Here, the AAO has reviewed the range of hardships claimed by counsel and [redacted] While it does not find all to be supported by the record, it, nevertheless, concludes that there is sufficient evidence to establish that the applicant's spouse would experience extreme hardship if she joined him in Haiti. In reaching its conclusion, the AAO notes that although counsel's brief and the supporting background evidence regarding Haiti date back to 2006, the poverty and unrest in Haiti depicted therein continue to exist and are exacerbated by the recent series of hurricanes and civil unrest in 2008. The AAO also observes that the Department of State, as of January 28, 2009, continues to update its travel warning for U.S. citizens in Haiti, finding the risk of violence, particularly kidnapping, to exist in all parts of the country. The State Department's travel warning further recommends delaying nonessential travel to Haiti until further notice and states that "conditions in Haiti may occasionally limit Embassy assistance to American citizens to emergencies services." In light of current country conditions, the AAO finds that the applicant's spouse would face extreme hardship if she relocates to Haiti to be with the applicant.

Based on the forgoing, the AAO finds that the applicant's wife will face extreme hardship if the applicant's waiver application is denied. Thus, the applicant has shown that a qualifying relative would suffer extreme hardship if he is required to depart the United States.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra,* at 12.

The negative factors in this case consist of the following:

The applicant knowingly entered the United States with a fraudulent audit stamp on his passport on or about August 8, 1999.

The positive factors in this case include:

The applicant has significant family ties to the United States, including his U.S. citizen wife and children. The applicant has been married to his current spouse since 1997, and the applicant's wife would suffer extreme hardship if he is compelled to depart the United States, as discussed above. The applicant is presently the primary caregiver for his U.S. citizen children, one of whom has a chronic illness requiring greater than normal care. The applicant has a record of working, when he was authorized to work, and paying his taxes in the United States. Finally, the applicant has no criminal record.

Although the applicant's immigration violations cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.