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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: [redacted] Office: MEXICO CITY Date: JUN 19 2009

IN RE: [redacted]

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

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).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, Mexico City, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be sustained.

The applicant is a native and citizen of Venezuela who was found to be inadmissible to the United States under sections 212(a)(6)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(ii), for falsely claiming United States citizenship; 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for unlawful presence in the United States of more than one year; and 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), for having been previously removed.

The applicant sought waivers of inadmissibility pursuant to the following sections of the Act: 212(i), 8 U.S.C. § 1182(i); 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v); and 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated September 20, 2006. The applicant filed a timely appeal.

On appeal, counsel argues that the applicant is not inadmissible under section 212(a)(6)(C)(ii) of the Act for signing and filing a voter registration application and allegedly falsely claiming U.S. citizenship on March 7, 1996. Counsel indicates that because the applicant's citizenship claim was made prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) on September 30, 1996, the relevant inadmissibility section of the Act is 212(a)(6)(C)(i), not (ii). Under section 212(a)(6)(C)(i) of the Act, counsel states a person is inadmissible for making a false citizenship claim only if that claim is made to obtain a benefit under the Act such as a passport or entry into the United States, or other documentation or benefit under the Act; and furthermore, only if it is made before an immigration officer or other personnel who are involved in implementing the Act. Voting, counsel states, is not an immigration benefit provided under the Act; and counsel asserts that the applicant's false citizenship claim was not made before an immigration officer or other personnel involved in implementing the Act.

At the same time, counsel states that a waiver is available if the applicant is found inadmissible under section 212(a)(6)(C)(i), and that U. S. Citizenship and Immigration Service (USCIS) abused its discretion in denying his waiver application. He states that the applicant's spouse will experience extreme emotional hardship as a result of separation from her husband. Counsel states that the applicant and his spouse married in Venezuela in 2002 and have never lived together in the United States, and that Venezuela's high unemployment makes it impossible for his wife to live there. Even though the applicant's spouse is employed in the United States, counsel states that she struggles to earn enough money. Counsel states that the applicant's parents have serious health problems and rely upon the applicant emotionally and financially. Counsel states that while the applicant lived with his parents in the United States he drove them to appointments and assisted in cooking and cleaning. Counsel states that the applicant's parents are anxious and depressed because their son has not returned to the United States.

Lastly, counsel claims that the applicant is not inadmissible under section 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i), for having been previously removed. According to counsel, the applicant left the United States according to the terms of an order granting him voluntary departure, regardless of whether he provided notification of his departure.

The AAO will first address whether the applicant is inadmissible under section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii), based upon his falsely claiming citizenship on a voting application.

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 chapter is inadmissible.
>
> (ii) Falsely claiming citizenship
>
> (I) In general
>
> Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter . . . is inadmissible.
>
> . . . .
>
> (iii) Waiver authorized
> For provision authorizing waiver of clause (i), see subsection (i) of this section.

The Voter Registration Application reflects that the applicant claimed to be a citizen of the United States on March 7, 1996, which is the date he signed and dated the application. Section 212(a)(6)(C)(ii) of the Act was added by section 344(a) of the IIRAIRA and applies only to representations made on or after the date of enactment (September 30, 1996). Accordingly, counsel is correct in that the applicant is not inadmissible under section 212(a)(6)(C)(ii) of the Act as the false claim was made prior to September 30, 1996. Counsel is also correct in that the false claim was not made to obtain an immigration benefit.

The statutory provision of section 212(a)(6)(C)(i) of the Act makes inadmissible "[a]ny 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 [Chapter 12 of Title 8]."

Counsel argues that this statutory provision's language does not cover a misrepresentation of citizenship made in connection with voting because the alien is not seeking "any benefit under this chapter," and further, the false citizenship claim was not made before an immigration officer or other personnel involved in implementing the Act. The AAO agrees that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act.

The director found the applicant to be inadmissible under section 212(a)(9)(B)(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i), for unlawful presence in the United States of more than one year.

Inadmissibility for unlawful presence is found under section 212(a)(9) of the Act, which reads, in part:

> (B) Aliens Unlawfully Present
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or
> >
> > > (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.

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.[1] For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.

[1] Memorandum by [redacted] Assoc. Director, Refugee, Asylum and International Operations Directorate and [redacted] Acting Chief, Office of Policy and Strategy, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act; AFM Update AD 08-03; May 6, 2009.

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply.

USCIS records reflect that the applicant was born on August 17, 1975. He was admitted to the United States on May 28, 1989 with a nonimmigrant B-2 visitor visa with authorization to remain in the country for a temporary period not to exceed six months. On November 10, 1997 the applicant filed an adjustment of status application, which he withdrew on June 22, 2000. On May 9, 2001, an immigration judge granted the applicant voluntary departure to leave the United States on or before September 6, 2001. USCIS records show that the applicant returned to Venezuela on September 5, 2001.

An alien with a pending and properly filed adjustment application is in an authorized period of stay and does not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act. *See* Memo, note 1. If a person is granted voluntary departure after commencement of removal proceedings, unlawful presence ceases to accrue with the grant, and resumes after the expiration of the voluntary departure period.

Here, the applicant began to accrue unlawful presence on April 1, 1997. He stopped accruing unlawful presence after filing an adjustment of status application on November 10, 1997. He therefore accrued 223 days of unlawful presence. When the applicant withdrew the adjustment application on June 22, 2000 he again began to accrue unlawful presence, which continued to accrue until May 9, 2001, the date he was granted voluntary departure. Thus, the applicant accrued 321 days of unlawful presence.

Section 212(a)(9)(B)(i) of the Act applies to an alien who has accrued the required amount of unlawful presence during any single stay in the United States. If, during any single stay, an alien has more than one (1) period during which the alien accrues unlawful presence, the length of each period of unlawful presence is added together to determine the total period of unlawful presence time accrued during that single stay.

The total period of unlawful presence time accrued during the applicant's single unlawful stay is 544 days. By departing from the United States on September 5, 2001, the applicant triggered the ten-year bar and is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The AAO notes that the applicant is not inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), for having been previously removed. The record clearly establishes that the applicant voluntarily departed from the United States on September 5, 2001, which is within the period of time he was granted voluntary departure.

The AAO has found the applicant to be inadmissible only under section 212(a)(9)(B)(i)(II) of the Act. A waiver is available for this inadmissibility ground under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

Section 212(a)(9)(B)(v) of the Act provides that:

> Waiver. – The Attorney General [now Secretary, 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 waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.,* the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant is not a consideration under this section of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case are the applicant's U.S. citizen spouse and his naturalized citizen father and lawful permanent resident mother.

Once extreme hardship is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). *Matter of Cervantes-Gonzalez* lists the factors considered relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors relate to an applicant's qualifying relative and 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. *Id.* at 565-566.

The factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996). The trier of fact considers the entire range of hardship factors in their totality and then determines "whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's qualifying relative must be established in the event that she or he remains in the United States without him, and alternatively, if she or he joins the applicant to live in Venezuela. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

Counsel states that the applicant's spouse will experience extreme emotional hardship as a result of separation from the applicant, and that the applicant's parents are anxious and depressed because of separation from their son. In her letter, the applicant's spouse states that she loves her husband and that she and her husband have a strong bond with their parents, brothers, sisters, and peers. She indicates that it is "very hard on us being separated." The record contains letters from the applicant and from his friends that collectively indicate that the applicant and his wife and family members have a close relationship. Counsel states that the applicant's parents have diabetes and high blood pressure and his father had open-heart surgery, and while the applicant lived in the United States they relied upon him emotionally and in assisting them with daily activities. The applicant's waiver application and his Application for Immigrant Visa and Alien Registration reflect that his wife lives with his parents. Contained in the record are the applicant's father's medical records and a letter, dated November 16, 2006, from Mesquite Heart Center. That letter conveys that the applicant's father is being treated for coronary artery disease (severe 3-vessel), that he had coronary artery bypass surgery, and that he recently had a heart catheterization and was placed on medical therapy.

Courts have stated that "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).

In taking into consideration the serious health problems of the applicant's father and counsel's statement that the applicant had provided care and emotional support to his parents while living in the United States, the AAO finds that the record is sufficient to show that the combined emotional hardship of the applicant's parents and spouse rises to the level of extreme hardship if they were to remain in the United States without the applicant, or if they were to join the applicant in Venezuela.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of medical, economic, and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

Thus, in the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in removal has been met so as to warrant a finding of extreme hardship under section 212(a)(9)(B)(v) of the Act. Having carefully considered

each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do in this case constitute extreme hardship to a qualifying family member for purposes of relief under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The grant or denial of the above waiver does not depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The adverse consideration in the present case is the applicant's periods of unlawful presence.

The favorable factors in the present case are the applicant's family ties to the United States; the extreme hardship to the applicant's parents if he were removed; and his compliance with the order of voluntary departure. The AAO notes that the applicant does not appear to have a criminal record.

The AAO finds that although the immigration violation committed by the applicant is serious in nature and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the applicant merits a waiver of inadmissibility.

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

ORDER: The appeal is sustained.