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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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[redacted]

FILE: [redacted] Office: LONDON Date: AUG 0 4 2009

IN RE: [redacted]

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

Michael Grissom

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge (OIC) London, England. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, and the application will be approved.

The applicant, [redacted] is a native and citizen of Ireland, and a resident of the United Kingdom. He 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 admission within 10 years of his last departure from the United States. He was also found to be inadmissible to the United States 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 entry into the United States by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(i) in order to return to the United States to join his United States citizen spouse, [redacted].

The OIC concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, his United States citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel asserts that the OIC abused his discretion in ignoring the totality of the circumstances when evaluating the applicant's spouse's claims of extreme hardship. Counsel contends that the applicant's spouse maintains strong family bonds within the United States. Counsel contends further that the applicant's spouse is suffering from depression due to her separation from the applicant. As corroborating evidence, counsel furnished affidavits from the applicant and his spouse, a psychiatric evaluation, a letter from a chiropractor, family photographs, and attestations from friends and family members. Counsel noted in a letter dated May 9, 2006, that additional documentation would be furnished in support of the appeal. As of the date of this decision, the AAO has not received any additional documentation from counsel. Accordingly, the record will be considered complete. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .
>
> (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 [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.

In the present application, the record reflects that the applicant, a citizen of Ireland, entered the United States under the terms of the Visa Waiver Program in September 1994. The applicant resided in the United States until June 2003. Time in unlawful presence begins to accrue on April 1, 1997, the date of enactment of unlawful presence provisions under the Act. Consequently, the applicant accrued unlawful presence for a period of over six years. The record further reflects that in July 2003, the applicant reentered the United States under the terms of the Visa Waiver Program. He remained in the United States until September 2004. Accordingly, he accrued a second period of unlawful presence for over one year. The applicant is seeking admission within ten years of his September 2004 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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 September 18, 2004, the applicant attempted to enter the United States at the Detroit Ambassador Bridge located in Detroit, Michigan, under the Visa Waiver Program. The applicant stated that he was entering the United States for a visit and indicated that he was not employed in the United States. Upon further questioning, the applicant admitted that he was married to a U.S. citizen and had lived and worked in the United States for the pervious eight years. The applicant's Biographical Information Form (G-325A), signed April 4, 2005, reveals that he was self-

employed as a carpenter in Knoxville, Tennessee from March 1999 to September 2004. The applicant is, therefore, inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for willfully misrepresenting material facts to procure admission to the United States.

Section 212(a)(9)(B)(v) and 212(i) of the Act waivers of the bar to admission, resulting from the respective violations of sections 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Act, are dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the alien himself experiences upon refusal of admission is irrelevant to section 212(a)(9)(B)(v) and 212(i) waiver proceedings. The only hardship relevant in this particular case is hardship to the applicant's U.S. citizen spouse, [redacted] 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 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 United States 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).

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 appeal, counsel asserts that the OIC abused his discretion in ignoring the totality of the circumstances when evaluating the applicant's spouse's claims of extreme hardship. Counsel contends that the applicant's spouse maintains strong family bonds within the United States. Counsel contends further that the applicant's spouse is suffering from depression due to her separation from the applicant.

The first issue to be addressed in these proceedings is whether the applicant's spouse would suffer from extreme hardship if she accompanied the applicant to Ireland or the United Kingdom. The record contains an affidavit that the applicant's spouse filed with the waiver application, dated September 15, 2006. The applicant's spouse asserts in her affidavit that it would be financially impossible for her to move to the United Kingdom. She states that she has a mortgage and outstanding debts totaling over $75,000.00. She indicates that would not be able to live as comfortably in the United Kingdom and she could not afford to visit her family. She notes that she is currently a Jewelry Supervisor at the JCPenny Company and earns $34,000.00 per year. She indicates that she does not have a college education and would be unable to find similar employment in England. She states that she would have to pay for her own health care in England as a non-resident. She indicates that this is relevant because she is currently receiving care for compressed disks in her spine at the base of her neck. As corroborating evidence, the record contains an undated letter from her chiropractor, [redacted], which provides that the applicant's spouse presented to his office on June 29, 2006 with cervical spine pain. [redacted] indicates that the applicant's spouse will require treatment for 6-9 months and continue maintenance once a month for life. The record also contains an affidavit from the applicant that he filed with the waiver application. The applicant states in his affidavit that the cost of living in the United Kingdom is incredibly high and his income would make it difficult to sustain him and his spouse until she could become employed. He states that it would be very difficult for him and his spouse to live in the United Kingdom because she has never worked there and does not have a college degree.

The AAO will consider financial hardship as one factor in establishing extreme hardship. However, in the present case, sufficient documentation has not been provided to demonstrate the applicant's spouse's financial situation. The AAO notes that the only financial documentation provided in the present case is the first two pages of the applicant's spouse's credit report. The only significant information provided on the report is that she has 31 accounts in good standing, none of which are past due, with an account balance of $78,293. The applicant furnished two letters from managers with JCPenny Company; however neither of the letters documents the applicant's annual income. No other documentation has been provided to show the applicant's spouse's annual income and expenses or her assets and liabilities. Nor has any documentation been provided in regard to the employment opportunities and availability of health care in either Ireland or the United Kingdom. The applicant and his spouse's assertions that she would not be able to find commensurate employment and would not receive necessary health care in England are based on speculation alone. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, neither the applicant nor his spouse has addressed the possibility of residing in the applicant's country of citizenship, Ireland. Although the applicant and his spouse's unsupported assertions are relevant and have been considered, they can be afforded little weight in the absence of supporting evidence.

The applicant's spouse further asserts in her affidavit that she and her adult daughter have an especially close emotional bond because they endured her abusive marriage to her ex-husband. She notes that she was abused physically, verbally and emotionally by her ex-husband. She indicates that

her daughter, son-in-law and grandchild live with her because of financial difficulties. She notes that her daughter is in counseling for depression. She states that she would feel depressed, anxious and stressed if she left her daughter at such a difficult time. She states that she helps take care of her grandchild in the evening when her daughter and son-in-law are working. She states that her father, who is 74 years old, is diabetic and has other health issues. She notes that she planned for her father to live with her if he is unable to live on his own. She notes that she worries that if she left the country, she would never again see her grandmother, who is 91 years old. She indicates that she and the applicant were appointed in her sister's will to be the guardian to her sister's eight adopted special needs children. She notes that she has five dogs that she would be unable to take to the United Kingdom.

The record contains the applicant's sister-in-law's last will and testament, which assigns the applicant and his spouse to guardianship of her eight special needs children. The record also contains attestations of relationship from the applicant's spouse's family members. The letter from the applicant's sister-in-law, dated June 19, 2006, notes that part of her adoption agreement for her last four children was that if something happened to her, the applicant and his spouse would take care of her children. She indicates that her children see the applicant and his spouse during the holidays, spring break, and summer break. The affidavit from the applicant's stepdaughter, dated September 15, 2006, provides that she and her family are residing with her mother to get their finances in order. She indicates that she has an extremely close bond with her mother because she is an only child and was witness to the physical, emotional and verbal abuse her mother suffered when her mother was married to her ex-husband, an alcoholic. She notes that she recently started seeing a psychologist for depression and is taking medications. As corroborating evidence, the record contains a letter from her clinical psychologist, indicating she has major depression, and copies of her hospital records. Finally, the letter from the applicant's father-in-law states that he plans to reside with his daughter when he can no longer live on his own.

The AAO notes that hardship to the applicant's spouse's family members will be considered insofar as it results in hardship to the applicant's spouse. The AAO finds that the foregoing documentation demonstrates the strong family ties the applicant's wife has with her family in the United States. The family ties involve commitments and obligations that, if severed, would cause her to suffer emotional hardship that is beyond the hardship normally expected upon the separation a family member. Therefore, based on the totality of the evidence, the applicant's wife would suffer extreme hardship if she accompanied the applicant to Ireland or the United Kingdom due to his inadmissibility.

The next issue to be addressed is whether the applicant's spouse would suffer extreme hardship if she remained in the United States without the applicant. The applicant's spouse notes in her affidavit that the applicant treats her daughter as his own child. She indicates that she and her daughter have been suffering terrible depression and anxiety because of their long separation from the applicant. She states that since the applicant's visa has been denied, she has trouble eating, sleeping, cries all the time, and is very depressed. She indicates that she has headaches and emotional meltdowns that she did not have previously, and has considered suicide. She notes that she is extremely depressed, and has been suffering with clinical depression and stress because of her separation from the applicant.

The record contains a psychiatric evaluation from [redacted], dated August 3, 2006. noted in his evaluation that the applicant's spouse presented as a very sad and tearful woman who was depressed. He stated that the applicant's spouse cried very frequently and deeply during the interview, and was sad throughout the interview. He stated that the applicant described her separation from the applicant as becoming harder to take everyday and that she is finding it very difficult to handle the daily routine of her life. [redacted] diagnosed the applicant's spouse with moderate Dysthymic Disorder, a depressive disorder that arises out of great stress in life or emotional losses. [redacted] indicated that the applicant's spouse is under extremely severe stress because of the separation from her husband. He rated her at a code 4, the maximum level of stress a person can experience under the terms of the diagnostic and statistical manual of the American Psychiatric Association, or DSM-IV. [redacted] prescribed an antidepressant, Cymbalta, to treat the applicant's spouse. He indicated that she would need a combination of psychotherapy and the antidepressant for the best prognosis of her case. He noted that there is tremendous concern that the applicant's spouse's depression would become debilitating or markedly more severe should she continue to be separated from her husband.

The Ninth Circuit Court of Appeals has 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). *See also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the 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). Although the present case did not arise in the Ninth Circuit, separation of family will be given appropriate weight in the assessment of hardship factors.

The AAO finds that the situation presented in this application rises to the level of extreme hardship because the record demonstrates that the applicant's spouse would continue to suffer extreme psychological distress if the applicant were denied admission to the United States. The psychological suffering experienced by the applicant's spouse surpasses the hardship typically encountered in instances of separation as demonstrated by her diagnosis with Dysthymic Disorder and a code 4 rating for stress under the DSM-IV. Therefore it can be concluded that the applicant's spouse would suffer extreme hardship if the applicant's waiver of inadmissibility is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The favorable factors in this matter are the extreme hardship to the applicant's spouse and the passage of almost five years since the applicant's immigration violation. The unfavorable factors in this matter are the applicant's willful misrepresentation of a material fact before a U.S. government official to procure admission to the United States and periods of unauthorized presence. The AAO notes that the applicant does not appear to have a criminal record.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's breach of the immigration laws of the United States, the severity of the applicant's fraud is at least partially diminished by the fact that almost five years have elapsed since the applicant's immigration violation. The AAO finds that the hardship imposed on the applicant's spouse as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

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

ORDER: The appeal is sustained.