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



U.S. Citizenship
and Immigration
Services

H5

FILE:



Office: NEWARK, NJ

Date: DEC 06 2010

IN RE:



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 PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

f Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Newark, New Jersey and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO as a motion to reopen. The motion is granted. The AAO's decision will be withdrawn and the waiver application will be approved.

The applicant is a native and citizen of Peru 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 sought to procure an immigration benefit by fraud or willful misrepresentation. The applicant is married to a lawful permanent resident and the daughter of a U.S. citizen. She seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside with her family members in the United States.

The District Director concluded that the applicant had failed to establish that the bar to her admission would result in extreme hardship to a qualifying relative and denied the applicant's waiver application accordingly. *Decision of the District Director* dated July 29, 2004. The AAO reached this same conclusion and dismissed the applicant's appeal. *Decision of the Acting Chief, Administrative Appeals Office*, dated March 6, 2009.

On motion, counsel submits new evidence to establish changed circumstances, specifically that the applicant's spouse has suffered a massive stroke and is now completely dependent on the applicant. *Form I-290B, Notice of Appeal or Motion*, dated March 21, 2009.

The record of proceeding contains, but is not limited to, counsel's briefs, statements from the applicant's spouse's daughters, medical statements and records relating to the applicant's spouse, prescription records for the applicant's spouse, a psychological evaluation of the applicant's spouse, and tax returns and a bank statement for the applicant and her spouse. The entire record was reviewed and all relevant evidence considered in reaching a decision in this matter.

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 District Director found the applicant to be inadmissible under section 212(a)(6)(C)(i) of the Act based on a January 28, 1995 attempt to enter the United States using a photo-substituted passport and her failure to indicate on the Form I-485, Application to Register Permanent Resident or Adjust Status, she filed on August 19, 2003 that she had previously been ordered removed from the United States.¹ In our March 6, 2009 decision, the AAO did not find the record to indicate that the applicant had knowingly sought to conceal the exclusion order issued against her on March 31, 1995,² but that her attempt to enter the United States using a photo-substituted passport on January 28, 1995 did bar her admission to the United States under section 212(a)(6)(C)(i) of the Act. The AAO accordingly considered whether the record established that the applicant's spouse would experience extreme hardship as a result of her inadmissibility, but concluded that the evidence of record did not support this conclusion whether the applicant's spouse relocated with her to Peru or remained in the United States.

In that the AAO's prior decision included a discussion of the AAO's application of the extreme hardship standard and relevant precedent decisions, we now turn directly to a consideration of the additional evidence submitted by the applicant on motion and whether it establishes that a qualifying relative would suffer hardship as a result of the applicant's inadmissibility.

The newly provided evidence contains medical reports from St. Barnabas Medical Center, Livingston, New Jersey, that establish the applicant's spouse suffered a severe stroke on December 10, 2006, resulting in both cognitive and physical impairment. It also includes statements from medical personnel who provide care for the applicant's spouse and are knowledgeable about his current medical status.

¹ The AAO notes that as the applicant is the subject of an order of removal, she is also inadmissible to the United States under section 212(a)(9)(A)(ii) of the Act. To obtain an exception from a section 212(a)(9)(A) inadmissibility, an individual must file the Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal

² The Form I-485 filed by the applicant does not indicate that the applicant answered "No" to Question 9 in Part 3, as stated in the District Director's denial. Instead, the applicant appears to have checked neither "Yes" or "No" in response to the question, "Have you ever been deported from the U.S., or removed from the U.S. at government expense, excluded within the past year, or are you now in exclusion or deportation proceedings?" The AAO finds that the applicant also failed to provide a response to Question 10, "Are you under a final order of civil penalty for violating section 274C of the Immigration and Nationality Act for use of fraudulent documents or have you, by fraud or willful misrepresentation of a material fact, ever sought to procure, or procured, a visa, other documentation, entry into the U.S. or any immigration benefit?" There is no evidence in the record that the applicant answered these questions in the negative at the time of her March 26, 2004 interview as the officer who interviewed the applicant did not amend the Form I-485 by checking the "No" response and no officer notes/comments in the record report that these questions were administered orally. Accordingly, the record does not establish that the applicant willfully misrepresented a material fact when submitting her Form I-485 or at the time of her interview.

In a March 18, 2009 statement, [REDACTED] Internal Medical Faculty Practice, Saint Barnabas Medical Center, states that the applicant's spouse has been treated by her practice since June 2008 and that he suffers from paralysis and paresis of the right side of his body, right foot drop, dysarthria and aphasia, and has lost vision in his left eye. Although [REDACTED] indicates that the applicant has made some progress as a result of physical, occupational and speech therapy, she also notes that this progress has now ceased and that his condition must be considered permanent. She states that the applicant's spouse must continue with his current treatment program to prevent his current health situation from deteriorating and that he is being closely monitored by several specialists, including a neurologist, cardiologist, gastroenterologist, physiatrist and a retinal specialist. [REDACTED] also reports that the applicant's spouse is completely dependent on his wife for all daily living activities, including getting out of bed, walking to the bathroom, getting dressed, washing, eating, attending doctors' appointments and that to continue with his treatment program, he needs the applicant's assistance at all times.

In a March 25, 2009 letter, [REDACTED] Kessler Institute for Rehabilitation, indicates that her medical practice has provided care for the applicant's spouse since 2007 and that the stroke he suffered in 2006 left him with severe aphasia, a communication disorder that has stripped him of the ability to speak or read, and that he also has paralysis on the right side of his body, with his arm being more affected than his leg and that he has no movement in this arm. [REDACTED] states that considering the length of time that has elapsed since his stroke, the applicant's spouse's prognosis for improvement is limited and that she anticipates that his ability to communicate verbally or read will be extremely limited and that his right arm will continue to be paralyzed. She also indicates that the applicant's spouse's ability to walk is very limited. [REDACTED] notes that the applicant's spouse is dependent on others in order to function, particularly in undertaking activities that require communication. She states that her patient's main caregiver is the applicant.

In an undated statement, [REDACTED] Kessler Institute for Rehabilitation echoes [REDACTED] evaluation of the effect that the applicant's spouse's stroke has had on his ability to live his life. She states that although he is a motivated patient, he is extremely limited in his ability to speak, in his overall safety awareness and in his functional abilities, and that he is at high risk of falls as a result of his loss of vision and his cognitive deficits. [REDACTED] indicates that the applicant's spouse requires close supervision for everything he does and that, without such supervision, he risks serious injury from a fall. She reports that the applicant has attended her spouse's therapy sessions, which have educated her about guarding him, the techniques necessary to assist him, and the hygiene and skin care required to prevent pressure ulcers. [REDACTED] also states that the applicant assists her spouse with his home exercise program. She further reports that the applicant recently received instruction in the operation of a highly specialized computerized leg brace and that, without her, the spouse will not be able to use this technology to help him with his walking. [REDACTED] states that the applicant is an integral part of her husband's recovery and that the years of education and training she has received are essential to his quality of life and maintaining a stable medical status.

The record also includes an October 25, 2007 letter from [REDACTED] Retina Associates, New Jersey who reports that he is treating the applicant's spouse for the permanent loss of vision in

his left eye and [REDACTED] Diagnostic and Clinical Cardiology, PA, who states that the applicant's spouse, in addition to dealing with the effects of his 2006 stroke, suffers from atrial fibrillation and has a history of HIV disease. [REDACTED] states that to maintain even the limited quality of life that he has, the applicant's spouse must take a blood thinner and HIV medications. He indicates that the applicant's spouse will never be able to function independently as he will not recover from his stroke, will always suffer from atrial fibrillation and will always have to take HIV medications.

Having reviewed the medical evidence just discussed, the AAO finds it to establish that the applicant's spouse suffers from multiple, debilitating medical conditions that would result in significant hardship for him should he move to Peru with the applicant. Although the record does not contain documentary evidence to demonstrate that the applicant's spouse would be unable to receive adequate medical treatment in Peru, the AAO acknowledges the negative impact that relocation would potentially have on his health, disrupting his current, complex treatment program and removing him from the care of medical providers who have experience in dealing with his specific medical issues. We further note the limits that the applicant's spouse's cognitive deficits and physical limitations would place on his ability to adapt to a new life in Peru. When the applicant's health problems and physical limitations, and the difficulties and disruptions that commonly result from relocation are considered in the aggregate, the AAO finds the applicant to have demonstrated that her spouse would experience extreme hardship if he relocated to Peru.

The new evidence submitted by the applicant also establishes that her spouse would suffer extreme hardship if her waiver application is denied and he remains in the United States without her. The applicant and her spouse have been married for 13 years and the AAO acknowledges the emotional hardship created by the separation of any husband and wife who have shared a life for this length of time. However, in the present case, we find that the denial of the applicant's waiver application would not only result in the applicant's spouse's loss of a beloved wife, but of his primary caregiver on whom he is dependent in virtually every area of his life, including his ability to maintain a stable medical status.

Medical statements in the record offer proof that the applicant's spouse requires a full-time caregiver to support him in his daily life and establish that it has been the applicant who has provided him with this care. The record also indicates that the applicant has been trained to provide the specific types of care that her spouse requires, including the operation of the computerized leg brace that assists him in walking. Although the applicant's spouse has two adult daughters, both of whom live in New Jersey, the record contains sworn statements from each daughter indicating their inability to provide the level of care required by their father's medical conditions. While the AAO does not find the record to offer any documentary evidence in support of the claims made by the applicant's spouse's daughters regarding the reasons they are unable to care for their father, we nevertheless note that the nature and extent of the care required by their father is realistically available only from a caregiver who resides with him on a full-time basis, i.e., the applicant. When the applicant's spouse's debilitating medical conditions, his physical and emotional dependence on the applicant to help him live with these conditions and the normal hardships created by the separation of a husband and wife are considered in the aggregate, the applicant has demonstrated

that her spouse would experience extreme hardship if she is removed from the United States and he remains here without her.

The applicant has proved that her spouse would suffer extreme hardship as a result of her section 212(a)(6)(C)(i) inadmissibility whether he relocates with her or remains in the United States. She has, therefore, established eligibility for a waiver under section 212(i) of the Act and the AAO will proceed with an analysis of whether she merits that waiver 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-Morales, 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 attempt to enter the United States using a photo-substituted passport, her failure to depart the United States on January 30, 1995 after withdrawing her application for admission and being released on her own recognizance, and her failure to appear for her hearing before an immigration judge on March 29, 1995. The favorable factors in the present case are the applicant's lawful permanent resident spouse and U.S. citizen father, the extreme hardship to her spouse if the waiver application is not granted, the absence of a criminal record or offense, and the supportive role she has played in her spouse's life, as indicated by statements from medical personnel and the applicant's daughters.

The AAO finds the immigration violations committed by the applicant to be serious in nature and does not condone them. Nevertheless, we conclude that, 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 AAO's March 6, 2009 decision will be withdrawn and the waiver application will be approved.

ORDER: The AAO's prior decision is withdrawn. The waiver application is approved.