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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H2

FILE:

Office: CALIFORNIA SERVICE CENTER
and
(Relate)

Date: **AUG 26 2008**

IN RE:

HECTOR ROBELSON

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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, 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 having attempted to procure admission into the United States by fraud or willful misrepresentation in 1999. The applicant is married to a U.S. citizen and has two U.S. citizen children. He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The director concluded that the record did not support a finding that the applicant's spouse or parent would suffer extreme hardship as a result of the applicant's inadmissibility to the United States. The application was denied accordingly. *Decision of the Director*, dated May 24, 2006.

On appeal, counsel asserts that the financial, emotional and developmental aspects of the applicant's case have not been sufficiently considered in determining extreme hardship, especially in view of the family's current circumstances and conditions in Haiti. *Form I-290B*, dated June 13, 2006.

The record indicates that in 1999, the applicant presented a Canadian citizenship card in an unsuccessful attempt to gain entry into the United States. He was subsequently admitted to the United States as the fiancé of a U.S. citizen under section 101(a)(15)(K) of the Act and, on January 17, 2003, filed a Form I-485, Application to Register Permanent Resident or Adjust Status, to adjust his status to that of lawful permanent resident. Based on his 1999 attempt to enter the United States using an identity document not his own, the applicant is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act.

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.

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on the applicant's U.S.

citizen or lawful permanent resident spouse and/or parent. Hardship the alien experiences or his children experience due to separation is not considered in section 212(i) waiver proceedings unless it causes hardship to the applicant's spouse and/or parent.

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 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). 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 AAO notes that extreme hardship to the applicant's spouse must be established in the event that she resides in Haiti and in the event that she resides in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

The first part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that she resides in Haiti. Counsel states that the director erred in not properly applying the extreme hardship standard to the facts in the applicant's case. *Counsel's Brief*, dated June 16, 2006. In particular, counsel states that the director failed to consider the country conditions in Haiti and the financial, emotional and psychological circumstances of the applicant's spouse. Counsel states that the conditions in Haiti make it inconceivable that the applicant's wife and her two children would accompany the applicant to Haiti. In support of this assertion, counsel submits the section on Haiti from the 2005 Country Reports on Human Rights Practices published by the Department of State. The 2005 report indicates that the United Nations Stabilization Mission, stationed in Haiti to provide security and stability, faced increased security challenges throughout 2005 and that the government's human rights record remained poor, with various actors perpetrating numerous human rights abuses throughout the year. *2005 Country Reports on Human Rights Practices*, dated March 8, 2006. The AAO also notes that the State Department issued a travel warning for Haiti in April, which is current. The warning states that U.S. citizens should defer non-essential travel to

Haiti. *State Department Travel Warning*, dated April 30, 2008. The warning also reminds U.S. citizens of ongoing security concerns in Haiti, including frequent kidnappings of Americans for ransom. The warning cites incidents of civil unrest, which occurred in April 2008. The AAO finds that due to the current country conditions in Haiti, it would be an extreme hardship for the applicant's spouse to relocate to Haiti.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his spouse remains in the United States. The applicant's spouse states that her family depends on the applicant's income. *Spouse's Statement*, dated June 13, 2006. She states that she can only work 21 hours per week because she has to care for their two children. *Id.* She also states that she cannot, by herself, meet the living expenses of the family in the applicant's absence and submits a list of their monthly expenses totaling \$3,678, as well as copies of a utility bill, a telephone bill, and receipts for rent and day care payments. *Id.*, *Monthly Expenses of Mr. and Mrs.* [REDACTED]

The AAO notes that the record establishes that the applicant's spouse is employed part-time as a certified nursing assistant, earning \$15.50 an hour. *Applicant's Payroll Stub*. She nets approximately \$15,000 per year. *Spouse's Employer Letter*, dated May 27, 2005. In addition, the record shows that the applicant's stepson is nine years old and the applicant's son is four years old. The applicant's spouse states that her husband contributes to about two-thirds of the family's joint income and that if he were to return to Haiti he would not be able to find employment and contribute to the family income in the United States. *Spouse's Statement*, dated June 13, 2006.

In addition to the documentation provided to establish financial hardship, counsel submits a psychological evaluation by [REDACTED], a licensed psychologist, to support a finding that the applicant's spouse would suffer extreme emotional hardship upon separation from the applicant. [REDACTED] concludes that the applicant's spouse is suffering from Adjustment Disorder with Mixed Anxiety and Depressed Mood as a result of her fear that she will be separated from her husband. *Psychological Evaluation*, dated June 12, 2006. He states that her symptoms include: sleep disturbance, poor appetite, weight loss, difficulty focusing and concentrating, persistent sadness, loss of sexual libido, chronic anxiety and a desire to "run away." He further states that if she were to be separated from her husband, her symptoms would become exacerbated and might evolve into a Major Depressive Disorder. [REDACTED] also finds that the applicant's two children adore him and that he is an active and positive influence in their lives. *Id.*

In that [REDACTED]'s report is based on a single interview with the applicant's spouse, the AAO finds that it fails to offer the insight and detailed analysis that would result from an established, ongoing relationship with a mental health professional, rendering his diagnosis speculative and of diminished value in determining extreme hardship. The AAO has, however, noted the **symptoms of emotional distress reported by the applicant's spouse during her interview with [REDACTED]** and will consider them independently of [REDACTED] diagnosis in assessing hardship to the applicant's spouse.

The evidence of record establishes that the applicant's spouse has two small children for whom she would assume sole responsibility should the applicant be removed from the United States. Her annual net income from her part-time employment is insufficient to cover the family's expenses and the applicant's ability to supplement his wife's income from Haiti would be minimal, based on economic and political conditions in

that country. Although the applicant's spouse could increase her income by seeking full-time employment, she could not do so with first obtaining childcare for her sons. The applicant's spouse, as reported in Dr. [REDACTED] evaluation, is already exhibiting a significant number of symptoms associated with emotional distress in response to her husband's potential removal from the United States. When considered in the aggregate, the AAO finds the significant emotional distress already being experienced by the applicant's spouse, the increased family responsibilities that would fall on her and the financial problems she would experience with the removal of the applicant to establish that she would suffer extreme hardship if she remained in the United States following the applicant's removal.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States that 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 only adverse factor in the present case is the applicant's attempt to enter the United States with a Canadian identity document on January 1, 1999. At the time of his attempted entry, the applicant was not ordered removed from the United States, but allowed to withdraw his application for admission. Therefore, the AAO notes that he is not subject to the ground of inadmissibility in section 212(a)(9)(A)(i)(I) of the Act. The AAO further notes that the applicant was not prosecuted for his attempted entry.

The positive factors in the present case are the extreme hardship to the applicant's U.S. citizen wife if he were to be denied a waiver of inadmissibility; the general hardship to his U.S. citizen children; the applicant's lawful admission to the United States as the beneficiary of an approved Form I-129F, Petition for Alien Fiancé(e), and his subsequent compliance with the conditions of his K-1 nonimmigrant admission; the absence of a criminal record and his lawful employment in the United States.

The AAO finds the immigration violation committed by the applicant to have been serious in nature and does not condone it. Nevertheless, it concludes that, when considered in the aggregate, the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.