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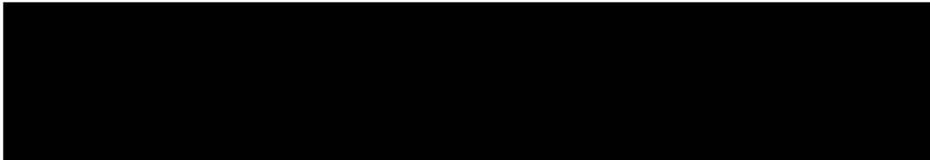
Date **MAY 02 2008**

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) and under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v).

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, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Seattle, Washington, and appealed to Administrative Appeals Office (AAO). The AAO rejected the appeal as untimely filed. However, further information has established that the appeal was not late. Therefore, the AAO will withdraw its prior decision and sua sponte reopen the matter. The appeal will be sustained.

The applicant is a native and citizen of the United Kingdom who 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 a period of one year or more and subsequently departing the United States, and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission into the United States by fraud or willful misrepresentation. The applicant has a U.S. citizen spouse and stepchild. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) and section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his spouse and stepchild.

The field office 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. *Decision of the Field Office Director*, dated April 18, 2007.

On appeal, counsel asserts that the field office director erred in finding that there is no extreme hardship to the applicant's spouse and that she abused her discretion in denying the waiver application. *Form I-290B*, received May 21, 2007.

The record includes, but is not limited to, counsel's brief, the applicant's statements, the applicant's spouse's statements, the applicant's spouse's medical records, a psychological evaluation of the applicant's spouse, a letter from the applicant's spouse's physician, the applicant's spouse's employer's statement and statements from the applicant's spouse's friends and family. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant attempted to enter the United States on May 20, 1996 by misrepresenting himself as a U.S. citizen. The applicant failed to attend his exclusion hearing on August 21, 1996, he was granted parole to attend his exclusion hearing on September 25, 1996 and he failed to attend this hearing. On June 2, 1998, the immigration judge ordered the applicant excluded and deported from the United States. The applicant filed an application to adjust status on June 23, 1998 and the application was denied on March 26, 1999.¹ On June 25, 1998, the applicant filed an appeal with the Board of Immigration Appeals (BIA), the appeal was affirmed without opinion on June 25, 2002 and the BIA denied the applicant's motion to reopen on May 28, 2003. The applicant filed a petition for review on July 24, 2002 with the United States Court of Appeals for the Ninth Circuit and the petition was denied on October 28, 2004. On July 26, 2005, the applicant departed the United States.

¹ The record also reflects that the applicant filed an application to adjust status on March 14, 2000 and another on July 12, 2005, which was withdrawn on November 16, 2005. The AAO notes that the applicant misrepresented his date and method of entry on his June 23, 1998 adjustment of status application.

Although counsel on appeal contends that the applicant entered the United States using an advance parole issued on August 23, 1996, the AAO notes that counsel has previously indicated that the applicant never used the advance parole granted to him as he was already in the United States having entered the country between May 20, 1996, the date on which he was refused admission, and the submission of his case to the immigration judge. *Counsel's Letter, dated March 1, 2000.* Two Form G-325As, Biographic Information forms, submitted by the applicant and included in the record indicated that the applicant's residence in the United States began in June 1989; a third Form G-325A reports U.S. residence as of September 1996. Based on the applicant's own reporting, the AAO finds the record to establish that the applicant was residing in the United States prior to the date of enactment of the unlawful presence provisions under the Act. Therefore, he accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until June 23, 1998, the date he filed his adjustment of status application. As a result of the applicant's prior misrepresentations and unlawful presence, the applicant is inadmissible to the United States.²

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

(B) Aliens Unlawfully Present.-

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

(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 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.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

² The applicant also was found guilty of possession of marijuana in 1992, but the conviction was vacated (expunged) in a state (Washington) which is under the jurisdiction of the 9th Circuit Court of Appeals. Pursuant to *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir, 2000), the applicant is not considered to have a conviction for immigration purposes.

- (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.

Therefore, the applicant requires waivers under sections 212(a)(9)(B)(v) and 212(i) of the Act. These waivers are dependent first upon a showing that the bar imposes an extreme hardship to the applicant's U.S. citizen spouse. Hardship to an applicant's stepchild is not a permissible consideration except to the extent that such hardship may affect the qualifying relative. If extreme hardship is established to the qualifying relative, the Secretary then assesses whether an exercise of discretion is warranted.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship. These factors include the presence of lawful permanent resident or United States citizen family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that she resides in the United Kingdom or 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 first part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that she resides in the United Kingdom. Counsel states that the applicant's spouse is 42 years old, she was born and raised in Seattle, she has always lived in the United States and she has never visited the United Kingdom. *Brief in Support of Appeal*, at 4, dated May 18, 2005. Counsel states that the applicant's spouse's family members are U.S. citizens and she has no relatives in the United Kingdom. *Id.* at 7. Counsel states that the applicant's spouse cannot join the applicant abroad because her daughter's biological father refuses to allow her to take their daughter from the United States for more than six weeks. *Id.* at 8. The daughter's biological father states that he will not permit the applicant's spouse to take their daughter out of the country for more than six weeks, he is returning from his second tour in Iraq and he is struggling with depression. *Letter from*

██████████ dated May 15, 2007.³ The applicant's spouse states that her daughter's father recently returned from Iraq and his job and lifestyle do not permit him to care for their child. *Applicant's Spouse's Statement*, at 1, dated May 18, 2007. The applicant's spouse states that she has established herself as a marketing director with a local architectural studio, this is her dream job, it gives her a sense of accomplishment and the likelihood of finding a similar job is slim. *Id.* at 1-2.

As the applicant's spouse is the primary caretaker of her daughter and the child's father will not permit the child to depart the United States for more than six weeks, the applicant's spouse would be in a situation where she is leaving her daughter in the United States without a full-time parent and she is permanently separated from her daughter. Considering this unique issue in conjunction with the other hardship factors previously mentioned, the AAO finds that the applicant's spouse would experience extreme hardship upon relocation to the United Kingdom.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his spouse remains in the United States. Counsel states that the applicant and his spouse built a lucrative company, but since the applicant's departure, his spouse is struggling to make ends meet. *Brief in Support of Appeal*, at 8. Counsel also states that the applicant's spouse is \$33,000 in debt and faces losing her home. *Id.* The applicant's spouse states that since the applicant's departure, she has experienced depression, anxiety and insomnia; it has been difficult for her to perform her work and parental duties; she has suffered from severe colds, flu, bladder infections, staff infections and pneumonia; and her employment is in jeopardy due the stress and illnesses she has been suffering. *Applicant's Spouse's Statement*, at 2-3. The applicant's spouse's therapist states that the applicant's spouse is experiencing daily panic attacks, weight loss, and an increased desire to drink alcohol to manage her symptoms. *Mental Health Evaluation*, at 2, dated May 12, 2007. The applicant's spouse's therapist states that the applicant's spouse has suffered multiple losses throughout her life, including the drunk driving-related death of her seven year old half-sister, the suicide of her best friend ten years ago and a history of abusive relationships. *Id.* at 3-4. The applicant's spouse's medical records reflects that she has been suffering from anxiety and depressive symptoms. *Applicant's Spouse's Medical Records*, dated May 14, 2007. The applicant's spouse's physician states that the applicant's spouse has been seen for a bladder infection, skin infection and pneumonia, and that these types of infections may be exacerbated by increased amounts of physical and psychological stress. *Letter from ██████████ D.O.*, dated May 4, 2007.

The applicant's spouse's employer states that the quality of the applicant's spouse's work has plummeted to a completely unacceptable level, she is making costly mistakes, she has exhibited unprofessional emotionalism during meetings and her position will be at risk if her behavior doesn't stop. *Letter from the Applicant's Spouse's Employer*, dated May 15, 2007

Considering the totality of the circumstances, the AAO finds that the applicant's spouse would experience extreme hardship upon remaining in the United States without the applicant.

³ A prior statement from the biological father indicated that his daughter's absence from the United States could not exceed two weeks. *First Letter from ██████████* dated June 15, 2005.

The AAO additionally finds that the applicant merits a waiver of inadmissibility 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 include the applicant's exclusion and deportation order, failure to attend his exclusion hearings, unauthorized stay and employment, the number of his misrepresentations and his possession of marijuana conviction.

The favorable factors for the applicant include his U.S. citizen spouse and stepchild, stable employment, length of time since his conviction and expungement as evidence of rehabilitation, extreme hardship to his spouse and several detailed statements from friends and family attesting to his good character and benefit to the community.

The AAO finds that the violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.