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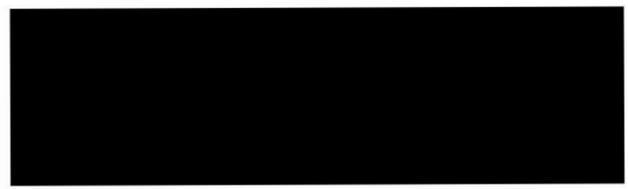


FILE: [redacted] Office: MIAMI, FL Date: SEP 22 2008

IN RE: [redacted]

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Interim District Director, Miami, Florida, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Colombia who, on February 20, 2001, appeared in the Transit Without Visa (TWOV) lounge of the Miami International Airport and requested the presence of immigration officials because she did not intend to continue her travel to Spain. The applicant was placed into secondary inspections where she admitted that she boarded the plane in Colombia with the intent to seek asylum in the United States and without the intent to continue travel through the United States and onto Spain as was indicated by her presentation of a Colombian passport and ticket to Spain via Miami, Florida. The applicant was scheduled for a credible fear interview. On March 19, 2001, the applicant was placed into immigration proceedings pursuant to credible fear interview procedures. On March 10, 2002, the applicant married her U.S. citizen spouse, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On May 29, 2003, the immigration judge denied the applicant's applications for asylum, withholding of removal and, convention against torture and ordered her removed from the United States. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On July 9, 2004, the BIA dismissed the applicant's appeal. On July 19, 2004, the Form I-130 was approved. On January 28, 2007, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. On the same day, the applicant also filed a Form I-601. A warrant for the applicant's removal was issued. On October 16, 2007, the applicant filed a motion for stay of removal. On October 17, 2007, the applicant's stay of removal was denied. On November 28, 2007, the applicant was removed from the United States and returned to Colombia, where she has since resided. The applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act and she seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with her U.S. citizen spouse.

The interim district director determined that the applicant had failed to establish that his spouse would suffer extreme hardship. *See Interim District Director's Denial of Form I-601*, dated October 11, 2007.

On appeal, counsel contends that the interim district director failed to consider additional materials that were submitted in support of the Form I-601 in determining that the applicant had failed to establish that her spouse would suffer extreme hardship. *See Form I-290B and Cover letter*, dated October 16, 2007 and October 19, 2007. In support of his contentions, counsel submits the referenced Form I-290B, cover letter and copies of documentation previously provided. On August 8, 2008, the AAO received additional evidence from the Office of Congressional Relations consisting of medical documentation related to the applicant's spouse. The entire record was reviewed in rendering a decision in this case.

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 Act is inadmissible.

- (iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides:

- (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 interim district director based the finding of inadmissibility under section 212(a)(6)(C)(i) of the Act on the applicant's misrepresentation of intent to travel as a TWOV through the United States from Colombia to Spain, while her true intent was to enter the United States and apply for asylum. *See Matter of Shirdel*, 19 I&N Dec. 33 (BIA 1984) *Ymeri v. Ashcroft*, 387 F.3d 12, FN 4 (1<sup>st</sup> Cir. 2004) *U.S. v. Kavazanjian*, 623 F.2d 730, 732 (1<sup>st</sup> Cir. 1980). Counsel does not contest the interim district director's determination that the applicant is inadmissible to the United States as an alien who is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

Additionally, the AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for accumulating more than one year of unlawful presence, from July 9, 2004, the date on which the BIA dismissed her appeal, until November 28, 2007, the date on which she was removed from the United States, and is seeking admission within ten years of her last departure.

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.

Hardship to the applicant herself is not a permissible consideration under the statute. Section 212(a)(9)(B)(v) and 212(i) waivers are dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship in 212(a)(9)(B)(v) and 212(i) cases.

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 alien has established extreme hardship to a qualifying relative. 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. The BIA has held:

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).

Since an applicant's qualifying relative is not required to reside outside of the United States as a result of denial of the applicant's waiver request, an applicant must establish that the qualifying relative would suffer extreme hardship whether he or she remains in the United States or accompanies the applicant to the foreign country of residence. 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 record reflects that [REDACTED] is a U.S. citizen through birth in Puerto Rico, who has resided in the United States since 1961. The applicant and [REDACTED] do not appear to have any children together. Mr. [REDACTED] has an adult son from a prior marriage who is a U.S. citizen by birth. The applicant is in her 40's and [REDACTED] is in his 60's.

A letter from [REDACTED] adult son, states that he is an Army Recruiter stationed in Brooklyn, New York. He states that the applicant has been married to his father since March 2002, and he has visited them on many occasions. He states that he has found the applicant to be a law-abiding person of good moral character from a Christian family. He states that he is happy that his father will be able to spend his life with her.

A letter from [REDACTED] states that the applicant and [REDACTED] first visited Lighthouse Family Care, P.A., offices in March, 2003. He states that [REDACTED] has always visited the offices in the company of the applicant, who has shown respect and care for him, and expressed concern over his health and well-being. He states that the applicant and [REDACTED] are honest and hardworking people who have a solid and stable marriage in the community.

Letters of support from friends and coworkers state that the applicant and [REDACTED] have a great work ethic and are truly genuine people, who love each other. They state that their marriage is very stable and happy.

A psychological evaluation, prepared by [REDACTED], a licensed psychologist, indicates that he interviewed [REDACTED] on March 28, 2007 and administered a personality/psychological test on July 19, 2007. He states that [REDACTED] feels the applicant's life would be in danger in Colombia if she returns. He states that the applicant's employment history began at the age of sixteen and he worked his way up through the restaurant business to become a chef. He states that, at the time of interview, there were no serious illnesses, injuries, operations or falls and that [REDACTED] denied any history of anxiety or depression. He states that there is no suicidal ideation. [REDACTED] conclusions state that [REDACTED] bodily complaints suggest that he experiences health problems, frequent stress-related disorders, or possibly a combination of both. He states that [REDACTED] seems to have excessive periods of moodiness, restlessness, anxiety and agitation, which may disrupt his sleep, concentration and ability to relax and also may affect his physical health. He states that [REDACTED] could possibly be diagnosed with somatoform disorder, bipolar, manic or cyclothymic features, attention hyperactivity disorder features and possible alcohol abuse features. He states that it is obvious that [REDACTED]'s mental health is continuously deteriorating as a result of stress, restlessness and a general level of anxiety and agitation and that he functions poorly when he does not receive the support he needs. He states that the removal of the applicant would pose a significant mental and physical health issue, which would constitute severe emotional duress, increased somatic complaints and worry. He recommends that any removal considerations would consider the negative impact on [REDACTED] and the resulting mental deterioration.

While the input of any medical health professional is respected and valued, [REDACTED] evaluation is based on a single interview with [REDACTED] the administration of one written psychological test, neither of which identifies a history of mental health issues or treatment. The AAO notes that a psychological evaluation based on one interview does not reflect the insight and detailed analysis commensurate with an established relationship with a mental health professional, thereby rendering [REDACTED]'s findings speculative and diminishing his evaluation's value to a determination of extreme hardship. Accordingly, Dr. [REDACTED] evaluation will be given little evidentiary weight.

A letter from [REDACTED] Florida Cancer Specialists-Broadway, dated July 23, 2008, states that [REDACTED] is under his care for the treatment of metastatic non-small cell lung carcinoma. He states that [REDACTED] has been receiving treatment with chemotherapy.

While the economic and the general psychological hardship described in the psychological evaluation is not uncommon to alien and families upon deportation, the hardship [REDACTED] faces is substantially greater than that which aliens and families upon deportation would normally face when combined with his diagnosis and treatment for metastatic non-small cell lung carcinoma. A finding of extreme psychological and physical hardship is the inevitable conclusion of the medical documentation. A discounting of the extreme hardship

would face in either the United States or Colombia if his spouse were refused admission is, therefore, not appropriate. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case are the fraud and unlawful presence for which the applicant seeks a waiver and her removal from the United States. The favorable and mitigating factors in the present case are the extreme hardship to the applicant's spouse if she were refused admission, the applicant's spouse's significant ties to the United States and the applicant's otherwise clear background.

The AAO finds that, although the immigration violations committed by the applicant are serious and cannot be condoned, the favorable factors in the present case, when considered in the aggregate, outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

The AAO notes that the applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), and must file an Application for Permission to Reapply for Admission (Form I-212).

**ORDER:** The appeal is sustained.