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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

H2

FILE:

Office: ALBANY

Date: AUG 13 2009

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 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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Albany, New York. The denial was reaffirmed by the Officer in Charge on motion. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted and the waiver application will be approved. The matter will be returned to the officer in charge for continued processing.

The applicant is a native and citizen of Thailand 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 procured admission into the United States, in July 2002, by fraud and/or willful misrepresentation.¹ The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i) to reside in the United States with her U.S. citizen spouse and child, born in November 2007.

The officer in charge concluded that extreme hardship to a qualifying relative had not been established and denied the Application to Waive Exclusion Grounds (Form I-601) accordingly. *Decision of the Officer in Charge*, dated December 27, 2004.

The applicant filed a Motion to Reconsider on January 25, 2005 which as asserted as follows: the Service erred regarding the sequence of events and the knowledge that the applicant's spouse had regarding the applicant's intent to reenter the United States; the Service failed to properly consider the applicant's spouse's extensive family and financial ties to the United States or his lack of family and employment opportunities in Thailand; and that the applicant was remorseful for her actions. *Motion to Reopen and Reconsider*, dated January 24, 2005.

The officer in charge found that the documentation submitted both with the original filing and subsequent motion failed to establish that the applicant's inadmissibility would cause extreme hardship to the applicant's spouse. *Decision of the Officer in Charge*, dated April 5, 2005.

On appeal, the AAO concurred with the officer in charge that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act, and moreover, determined that extreme hardship to a qualifying relative had not been established, as required by section 212(i) of the Act. Consequently, the appeal was dismissed. *Decision of the AAO*, dated April 12, 2007.

On May 9, 2007, counsel for the applicant filed a motion to reopen, stating new facts to be considered. In support of the motion to reopen, counsel for the applicant submitted a brief and

¹ The record indicates that on July 31, 2002, the applicant, at JFK international airport in New York, presented an F1 student visa to enter the United States. The applicant stated to the immigration officer that she was a student at the University of Wisconsin, when in fact she had stopped her studies at the university and was intending to reside in the United States with her fiancé.

referenced exhibits. In addition, on April 24, 2009, the AAO received additional evidence in support of the motion. The entire record was reviewed and considered in rendering this decision.²

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 immigrant 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 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 held in *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted) that:

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

² The AAO notes that counsel requested that the AAO remand the matter to the Field Office Director, Albany, for issuance of a new decision. As the most recent decision was the dismissal of the appeal by the AAO, the field office director does not have jurisdiction over this application and therefore, no purpose would be served in remanding the matter. Further, the AAO makes all determinations on remands and does not respond to such requests from applicants or counsel.

hardships takes the case beyond those hardships ordinarily associated with deportation.

Section 212(a)(6)(C)(i) of the Act provides that a waiver under section 212(i) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Unlike waivers under section 212(h) of the Act, section 212(i) does not mention extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant herself a permissible consideration under the statute. In the present case, the applicant's spouse, a U.S. citizen, is the only qualifying relative and hardship to the applicant and/or their U.S. citizen child cannot be considered, except as it may affect the applicant's spouse.

The first part of the analysis requires the applicant to establish extreme hardship to her spouse in the event that he resides abroad based on the applicant's inadmissibility. The AAO, in its decision dated April 12, 2007, found that because of the applicant's strong family ties to the United States, his inability to speak the Thai language, and his financial obligations in the United States, relocating abroad due to his spouse's inadmissibility would cause him extreme hardship. *Decision of the AAO*, dated April 12, 2007. As such, this criteria does not need to be re-addressed at this time.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse would suffer extreme hardship if he remained in the United States while the applicant resided abroad due to her inadmissibility. The AAO, in its decision dated April 12, 2007, concluded that extreme hardship had not been established. With the instant motion, counsel for the applicant addresses the issues raised by the AAO and further elaborates on the hardships the applicant's U.S. citizen spouse would encounter were he to remain in the United States while the applicant relocated abroad due to her inadmissibility. The new facts to be considered, as noted by counsel, include:

1. the Applicant's U.S. Husband suffers from severe hyperlipidemia.
2. based upon the medical history of the paternal side of his family, the U.S. Husband's health risks are enormous. His father, all his father's brothers, and his paternal grandparents have suffered from coronary artery disease, diabetes, hypertension, and hyperlipidemia. One of his uncles had a toe amputated in January 2007 and is no longer working in the family business.
3. the Applicant provides critically needed assistance to her U.S. Husband in making sure that he takes his medication and eats a healthy diet to minimize his serious health risks.
4. the Applicant recently found out she is pregnant³.... Her U.S. Husband is afraid to have them return to the dangerous conditions which exist in Thailand since the military coup in September 2006.

³ The record establishes that the applicant and her spouse's U.S. citizen child was born on November 8, 2007. See *Certificate of Live Birth*, dated November 16, 2007.

5. the work and family stress that the U.S. Husband has been experiencing for the past two years has taken a significant turn for the worse since January 2007 as a result of his parents' being unable to operate their business without her U.S. Husband's assistance while he is simultaneously trying to operate his greenhouse single-handedly....
6. the Applicant's U.S. Husband suffers from depression.

Brief in Support of Motion to Reopen, dated May 9, 2007.

To corroborate counsel's statements, numerous documents have been provided establishing extreme hardship to the applicant's spouse were the applicant's waiver of inadmissibility denied. To begin, in December 2007, the applicant's spouse sustained a traumatic injury to his left dominant hand with a chop saw; said injury required extensive treatment and therapy, including superficial heat, splinting, tendon gliding, scar massage, wound managements, gradual strengthening and dexterity training. *Letter from ██████████ Albany Memorial Hospital Northeast Health*, dated October 21, 2008. The applicant's spouse asserts that said injury was caused by stress due to his wife's immigration situation. *See Affidavit of ██████████ dated April 21, 2009*. In addition, documentation has been provided confirming that the applicant's spouse has met with ██████████, Licensed Psychologist, on numerous occasions due to his emotional stress with respect to his wife's inadmissibility. *Letters from ██████████, Licensed Psychologist*, dated March 25, 2009 and October 17, 2008. A letter has also been provided by the applicant's spouse's treating physician, confirming that he is suffering from severe hyperlipidemia, has an extensive family history of coronary heart disease, diabetes, hypertension and hyperlipidemia, and must be closely monitored for control of his medical conditions. *Letter from ██████████ Seton Health Primary Care*, dated December 15, 2008. Documentation about the financial crisis in the United States and the problematic country conditions in Thailand has also been submitted by counsel.

The applicant's spouse further asserts as follows:

My life continues to be one never ending struggle to try to keep my greenhouse business from failing, to keep ██████████ [the applicant] mentally and emotionally stable, and to be a real father to my son. I average at least 100 hours per week at the greenhouse. On Wednesday and Friday mornings, I still get up at 3:30 am to drive my truck to the Menands Wholesale Market and sell my plants until 10am. I then race back to the greenhouse and try to catch up on all my chores there before trying to help my mom and dad at their hardware store in the afternoons....

My parent's medical and financial condition has gotten worse and they have no one at all to help them, so I still spend all my spare time with them....

Business at my greenhouse and my parent's hardware store has gotten much worse because of the severe credit crunch and deep cuts in consumer spending as a result of the deep recession and rising unemployment.... For example, one of my father's business friends in Troy, NY just closed his hardware store yesterday because his sales had dropped sharply as a result of the current financial meltdown....

Thailand is again undergoing a dangerous period of political and military instability. What really worries me more than ever is if [REDACTED] finds out she can't support our son in Thailand...and leaves our son with me. With my work schedule at the greenhouse and at my folks store, I could not take care of my son myself. My mom would love to help out, but she is already watching my niece [REDACTED] and [REDACTED] sister, all the time while trying to help my dad at the store.

Supra at 2-3.

The record establishes that the applicant's U.S. citizen spouse depends on the applicant for emotional and psychological support and encouragement so that he may properly fulfill his duties and responsibilities to his own business, to his parent's business, to his family, to himself and to the community, all while suffering from medical and mental health issues. Moreover, the record establishes that the applicant's spouse fears for his wife's safety, due to the problematic country conditions in Thailand. He notes that he does not want his U.S. citizen child relocating abroad with the applicant due to said fears, but at the same time, he notes that he does not want his child to remain in the United States without the applicant, as he is unable to properly care for his child due the demands of the business, and that a separation from his mother would cause the child hardship, which would in turn cause the applicant's spouse extreme hardship. As such, the AAO concludes that were the applicant unable to reside in the United States, the applicant's spouse would suffer extreme emotional, financial and professional hardship. The applicant's spouse needs the support that the applicant provides; the cumulative effects of her prolonged absence would cause him extreme hardship.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that her U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Moreover, it has been established that the applicant's U.S. citizen spouse would suffer extreme hardship were he to relocate abroad to reside with the applicant. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. 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 . . . 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-Moralez, 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 favorable factors in this matter are the hardships the applicant's U.S. citizen spouse, in-laws and child would face if the applicant were to relocate abroad, community ties, the applicant's apparent lack of a criminal record, payment of taxes and the passage of over seven years since the applicant's immigration violation that lead to her inadmissibility. The unfavorable factors in this matter are the applicant's entry to the United States by fraud and/or willful misrepresentation and periods of unauthorized presence in the United States.

While the AAO does not condone the applicant's actions, the AAO finds that the hardship imposed on the applicant's spouse as a result of the applicant's inadmissibility outweighs the unfavorable factors in this application. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The instant motion to reopen will be granted and the waiver application will be approved. The officer in charge shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.