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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: CHICAGO

Date: MAY 06 2009

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(i) and Section 212(a)(9)(B)(v) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT: SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, Chicago, Illinois, denied the waiver application that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Guatemala, the spouse of a U.S. lawful permanent resident (LPR), the father of a U.S. citizen son and a U.S. LPR daughter, and the beneficiary of an approved Form I-130 petition.

The district director found that the applicant had sought to enter the United States by fraud or by misrepresenting a material fact, and is therefore inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(6)(C)(i). The director also found that the applicant had been unlawfully present in the United States for more than a year, and is therefore inadmissible pursuant section 212(a)(9)(B)(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i). The applicant seeks a waiver of inadmissibility in order to remain in the United States with his wife and children. Further still, the district director found that the applicant failed to show that extreme hardship to his spouse would result from denying the waiver application, and denied the application.

On appeal the applicant provided additional evidence and argued that denying the waiver application would result in extreme hardship to his U.S. LPR spouse. Although the applicant did not appear to contest the district director's determination of inadmissibility, the AAO will review that determination.

Section 212(a)(6)(C)(i) of the Act provides:

In general.—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(a)(9)(B)(i) of the Act provides:

Any alien (other than an alien lawfully admitted for permanent residence) who –

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

The record contains a Form I-275, Withdrawal of Application for Admission, completed by an officer of the U.S. Immigration and Naturalization Service. The record also contains sworn statements the applicant made to an INS officer on March 29, 1999. Both indicate that the applicant applied for admission to the United States at the Hartsfield International Airport near Atlanta, Georgia as a nonimmigrant visitor for pleasure on that date. The applicant initially stated that he was going to Chicago, but that he knew no one there and was going to stay in a hotel. He later admitted that he intended to stay with his sister-in-law in Chicago, who would seek employment for him there. He further admitted that, when he applied for a visa to enter the United States, he had misrepresented the purpose of his trip. The record contains a Customs Form 60598 that indicates that the applicant, who signed that form on March 29, 1999, indicated that he was not coming to the United States to engage in any sort of commerce.

In a statement sworn to before an office of the USCIS on May 30, 2006, the applicant stated that he first entered the United States on January 1996 without inspection at Douglas, Arizona, then departed during November of 1997. He stated that he next attempted to enter the United States during February 1999, but was turned back to Guatemala at the airport in Atlanta, Georgia. The applicant stated that he again entered the United States during July 1999 without inspection at Douglas, Arizona and had not departed the United States since. In an affidavit dated May 20, 2006, the applicant asserted that his attempted entry at Atlanta, Georgia was during April 1999.

On his Form I-485 the applicant, who signed that form on August 30, 2005, confirmed that his last entry had been without inspection, on July 1999.

Pub. L. 104-208, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides at section 309,

(a) IN GENERAL.-Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

At section 301(b)(3), the IIRIRA provides,

TREATMENT OF UNLAWFUL PRESENCE BEFORE EFFECTIVE DATE.-In applying section 212(a)(9)(B) of the Immigration and Nationality Act, as inserted by paragraph (1), no period before the title III-A effective date shall be included in a period of unlawful presence in the United States.

The IIRIRA was passed by the 104th United States Congress on Sept. 30, 1996. Therefore, for the purpose of this inadmissibility provision, the applicant's illegal presence began on April 1, 1997 and continued until his departure during November 1997, a period of more than six months but less than one year. This office finds, therefore, that, pursuant to section 212(a)(9)(B)(i)(I) of the Act, the

applicant was inadmissible for three years after his November 1997 departure. That period of inadmissibility, however, has ended. The applicant is no longer inadmissible pursuant to that section.

The remaining basis of inadmissibility is for fraud or misrepresentation as defined in section 212(a)(6)(C)(i) of the Act.

The statement of the USCIS officer on the Form I-275, which the applicant does not appear to challenge, is sufficient to show that the applicant misrepresented his purpose for coming to the United States when he attempted to enter on March 29, 1999.¹ If the applicant had revealed his true intention, to reside in the United States and to seek unlawful employment, he would have been inadmissible. The applicant's misrepresentation, therefore, was material. The evidence shows that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

Because the applicant has been found inadmissible pertinent to that section, the balance of this decision will pertain to whether waiver of that inadmissibility is available and whether the applicant has demonstrated that waiver of that inadmissibility, if available, should be granted.

Section 212(i)(1) of the Act provides, in pertinent part:

The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien . . .”

A waiver of inadmissibility under section 212(i)(1) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his children is not directly relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's wife is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

¹ In his sworn statement of May 30, 2006, the applicant indicated that this attempted entry occurred during February 1999. In his sworn statement of May 20, 2006, he indicated that the attempted entry was during April 1999. The AAO finds the statement of the date on the contemporaneous record executed by the INS officer to be more credible, and finds that the applicant's attempted entry into the United States at the Hartfield International Airport near Atlanta, Georgia was on March 29, 1999. The AAO notes that, in any event, the date discrepancy is immaterial.

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 nonexclusive list of factors relevant to determining whether an alien 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. 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).

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 contains an undated declaration from the applicant’s wife that was submitted to the USCIS on May 7, 2007. The body of that declaration states, in its entirety,

I am very worried about my husband case, I can say that husband and father, like him, nobody can find a person like him. Me and our two children, need his support, moral and financial. His presence in our home is needed, our children needs him while growing up, he presen and his authority, as the father and man of the house, in our culture, is very important.

The appeal, now in your hands, will bring back him to us and our family unity will be as strong as ever, but if he PARDON is not accepted, our way of living will be difficult, our children and I, will feel the absense of [the applicant] and our family could be separated for years to come. Please extend the working permit while the Administrative office in processing the appeal, please.

LET US KNOW IF WE CAN SUBMIT THE I-765 APPLICATION while the appeal is in process.

[Errors in the original.]

On the Form I-290B appeal, the applicant stated that his family needs him in the United States. The applicant stated that, although he was previously unable to hold a steady job because he lacked a social security number, he is now employed full-time. The applicant stated that, without his income, his wife's salary would be insufficient to cover the family's expenses and the family will lose their house. He added that although his wife has family members in Chicago, they would be unable to help as they have their own financial problems.

The record contains the applicant's wife's 2003 Form 1040A U.S. Individual Tax Return. The applicant's wife filed as head of a household consisting of her and a son. The applicant is not mentioned. The applicant's wife claimed Line 15 Total income of \$22,889. A copy of a Form W-2 Wage and Tax Statement submitted shows that all of that income came from the applicant's wife's job at a uniform store in Burbank, California. There is no indication that the applicant contributed to family income.

The applicant's wife also filed a Form 2004 Form 1040 U.S. Individual Tax Return as head of household. During that year, she had total income of \$25,441 from the same single employer and no other income. The tax return does not indicate that the applicant contributed to family income during that year.

During 2005, the applicant's wife, again filing as head of household, but with two children, claimed income of \$25,295 from the same employer. A Schedule C-EZ attached to that return indicates that the applicant earned gross receipts of \$2,900 in an unspecified construction enterprise. The record contains no other evidence to support the applicant's assertion that he has ever earned income in the United States.

Letters, dated August 26, 2005 and May 12, 2006, from the applicant's wife's employer, indicate that she has worked for that company since September 11, 2001.

The record contains a Form DS-1743, Offer of Employment to Alien, dated May 27, 2006. That offer, from a used car dealership, indicates that the applicant would be paid \$7.50 per hour plus commission for selling used cars and keeping them clean. Other than this offer and the applicant's wife's 2005 tax return, the record contains no other evidence that the applicant has ever been employed in the United States.

The record in the instant case indicates that the applicant's wife has been steadily employed. The record shows that the applicant himself earned gross receipts of \$2,900 during one salient year, but does not show any income during any other year.

Although the statement by the applicant that he has earned income and contributed to his family's support is relevant and has been taken into consideration, little weight can be accorded it in the absence of supporting evidence. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The record does not show that the applicant has contributed substantially to his family's support in the past, and does not, therefore,

support the proposition that the loss of his income will cause hardship to his family that, separately or when considered with the other hardship in this case, rises to the level of extreme hardship.

The remaining hardship factor may be characterized as emotional hardship. It is the hardship the applicant's wife described in stating that it is important that her family remain intact, that is; that her husband be permitted to remain in the United States. Although the applicant's wife stated that her children need the applicant while they are growing up, she did not provide any evidence that this need is more vital in the instant case than it is in other cases, or that the result of denying this waiver application would be more severe in this case than it would be in an ordinary case. Further, the applicant has provided no evidence that his wife and children could not join him in Guatemala without severe hardship.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse faces extreme hardship if the applicant is refused admission. Rather, the record suggests that she will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States.

The record demonstrates that the applicant's wife is concerned about the prospect of the applicant's anticipated departure from the United States. Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances.

In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress made plain that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

Separation from one's spouse or child is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the standard in INA § 212(i), the hardship must be greater than the normal, expected hardship involved in such cases.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally

insufficient to establish extreme hardship. *See INS v. Jong Ha Wang, 450 U.S. 139 (1981)* (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to his LPR spouse as required under INA § 212(i), 8 U.S.C. § 1186(i) and under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v) and that waiver is therefore unavailable. Because the applicant has been found statutorily ineligible, the AAO need not address whether the applicant merits waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.