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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

[redacted]

FILE: [redacted] Office: NEWARK, NJ Date: MAY 12 2009

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:

[redacted]

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 District Director, Newark, New Jersey and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico 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. The applicant is married to a naturalized United States citizen and 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 his spouse.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly.[1] *Decision of the District Director,* dated September 20, 2005.

On appeal, counsel contends that United States Citizenship and Immigration Services (USCIS) erred as a matter of law in finding that the applicant failed to establish extreme hardship to his qualifying relative, as necessary for a waiver under 212(i) of the Act. *Form I-290B.*

In support of the waiver, counsel submits two statements. The record also includes, but is not limited to, psychological evaluations for the applicant's spouse; an Outpatient Mental Health Clinics/OMHC clarification statement and attachment; a medical statement for the applicant's spouse; airline tickets for the applicant; Forms W-2 and earnings statements for the applicant and his spouse; employment letters for the applicant and his spouse; and tax statements for the applicant and his spouse. The entire record was reviewed and considered in rendering this decision.

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

[1] The District Director also identified the applicant as having twice overstayed the period of validity of prior nonimmigrant admissions. As the applicant's most recent departure from the United States was in 1995, prior to the April 1, 1997, the effective date of the unlawful presence provisions of the Act, the AAO does not find the applicant to be inadmissible under section 212(a)(9)(B) of the Act.

> 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 record reflects that on July 14, 1995 the applicant attempted to procure admission to the United States at the airport in Houston, Texas by using his border crossing card to return to his unlawful residence and employment in the United States. The applicant was found to be in possession of a fraudulent Form I-551, Resident Alien Card, which he had used to obtain his employment in the United States. After being stopped and questioned by immigration officials, he voluntarily returned to Mexico. *Form I-275, Notice of Visa Cancellation Border Crossing Card Voidance and Attached Report*, dated July 14, 1995. On July 17, 1995 the applicant entered the United States without inspection. *Form I-601, Application for Waiver of Excludability*. Based on his attempt to gain admission to the United States as a nonimmigrant, the applicant is inadmissible under Section 212(a)(6)(C)(i) of the Act.

A section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant would experience if the applicant's waiver request is denied is not directly relevant to the determination as to whether the applicant is eligible for a waiver under section 212(i). The only relevant hardship in the present case is the hardship suffered by the applicant's spouse if the applicant is removed. If 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a 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 whether she resides in Mexico or the United States, as she is not required to reside outside 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.

If the applicant's spouse travels with the applicant to Mexico, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse is a native of Ecuador.

Naturalization certificate. At the time the appeal was submitted, the applicant's spouse was under a physician's care for a recurrent first trimester loss of pregnancy - high risk pregnancy. *Statement from* , *Prospect Women's Medical Center*, dated October 12, 2005. She was advised to stay in the United States until further notice. *Id.* According to a clinical psychologist, the applicant's spouse is experiencing a significant level of affective distress. *Statements from* , *Clinical Psychologist, Director of Assessment Services, Neuropsychological Associates of New Jersey, L.L.C.*, undated. The psychologist notes that the applicant's spouse has been diagnosed with autoimmune disorder and that research on stress is replete with examples and articles of how exposure to prolonged and unremitting stress has deleterious and often fatal consequences. *Id.* Formalized testing revealed that the applicant's spouse meets the diagnostic criteria for Generalized Anxiety Disorder and for Major Depression. *Id.* The psychologist further states that there is no question that any additional stress may exacerbate the applicant's spouse's health status. *Id.* When looking at the aforementioned factors, particularly the applicant's spouse's lack of cultural ties to Mexico; her physical and mental health conditions, including her high-risk pregnancy and her history of miscarriage; and her physician's advice to stay in the United States until further notice, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in Mexico.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse has lived in the United States since 1991. *Form G-325A, Biographic Information sheet, for the applicant's spouse*. The record indicates that the parents of the applicant's spouse also live in New Jersey. As previously noted, the applicant's spouse has been diagnosed by a psychologist as having Generalized Anxiety Disorder and Major Depression. *Statements from* , *Clinical Psychologist, Director of Assessment Services, Neuropsychological Associates of New Jersey, L.L.C.*, undated. The past history of the applicant's spouse includes experiencing two robberies which resulted in significant post-traumatic responses. *Id.* To this day, the applicant's spouse has difficulty remaining alone in her home at night and recalls experiencing the characteristic symptoms of Post Traumatic Stress Disorder (PTSD). *Id.* The applicant's spouse also has ongoing medical problems, surgical procedures, and four miscarriages that have rendered her physically weak and mentally demoralized. *Id.* The applicant's spouse informed a psychologist that she no longer has the sense of security about her relationship, family, and life and worries that the very base that has allowed her to cope with early abandonment, traumas, and ongoing medical challenges, will ultimately crumble before her, leaving her alone and defenseless. *Id.* In addition to her clinical depression and anxiety, the thought of being forced to complete her at-risk pregnancy alone is emotionally devastating. *Additional statement from* , *Clinical Psychologist, Director of Assessment Services, Neuropsychological Associates of New Jersey, L.L.C.*, undated. The applicant's spouse worries whether she will be able to function on a day-to-day basis. *Id.* Unlike other spouses similarly situated, formalized testing revealed that the applicant's spouse is suffering from significant affective symptomatology. *Id.* Counsel also asserts that that the applicant's spouse would suffer financial hardship and submits tax statements to show the earnings of the applicant and his spouse. *Attorney's statements*, dated December 31, 2002 and November 9, 2006; *Tax statements*. When looking at the aforementioned factors, particularly the applicant's spouse's high-risk pregnancy and

history of miscarriages, and the mental health conditions, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in the United States.

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).

The adverse factors in the present case are the applicant's prior misrepresentation for which he now seeks a waiver, his use of a fraudulent Form I-551 to obtain employment, and periods of unlawful employment and presence.

The favorable and mitigating factors are the applicant's U.S. citizen spouse, the extreme hardship to his spouse if he were refused admission, his supportive relationship with his spouse, and his payment of taxes.

The AAO finds that, although the immigration violations committed by the applicant were serious and cannot be condoned, when 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.