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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

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FILE:

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Office: SALT LAKE CITY, UT

Date:

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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.

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Salt Lake City, Utah and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Peru 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 her spouse and their United States citizen child.

The Field Office 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. *Decision of the Field Office Director*, dated March 19, 2009.

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

In support of the waiver, counsel submits several statements. The record also includes, but is not limited to, statements from the applicant's spouse; medical statements and records for the applicant's child; a psychological evaluation of the applicant's spouse; loan statements; credit card bills; a medical statements for the applicant and her spouse; bank statements; a car insurance policy; a confirmation statement of the applicant's spouse's health coverage; employment letters for the applicant's spouse; a tax return for the applicant and her spouse; W-2 forms for the applicant's spouse; criminal records for the applicant's spouse; and a boarding pass for the applicant. 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 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 October 6, 2000 the applicant entered the United States without inspection near Douglas, Arizona. *Form I-213, Record of Deportable/Inadmissible Alien*. On February 14, 2001, the applicant was arrested for Retail Theft (Shoplifting).¹ *Id.* On February 15, 2001 the applicant pled guilty to Retail Theft under a false name. *Criminal records, 4th District Court – Orem, Utah County, State of Utah*. On May 8, 2001, the applicant was granted voluntary departure until September 5, 2001. *Order of the Immigration Judge, Immigration Court, dated May 8, 2001*. On July 14, 2001 the applicant departed the United States under the grant of voluntary departure. *Form G-146; Boarding pass*. She reentered the United States on September 25, 2001, using the B-2 nonimmigrant visa issued to her on May 8, 2000 in her lawful name. The AAO observes that in October 2000, the applicant began unauthorized employment as a cook in Orem, Utah. *Form G-325A, Biographic Information sheet, for the applicant*.

The AAO finds that the applicant's failure to provide her true name during her immigration court hearing shut off a line of inquiry that was relevant to her eligibility for a grant of voluntary departure and might well have resulted in the denial of her request for this relief. *See Matter of S- and B-C-*, 9 I&N Dec. 436, 448-449 (AG 1961). Furthermore, the AAO notes that a grant of voluntary departure is a benefit under the Act as it allows an alien to avoid the adverse future consequences of having been ordered removed from the United States. In that the applicant used a false name in obtaining voluntary departure, she is inadmissible under Section 212(a)(6)(C)(i) of the Act for having sought a benefit under the Act through the willful misrepresentation of a material fact. The applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for having used a B-2 nonimmigrant visa to enter the United States on September 25, 2001. As the applicant began working almost immediately after her 2001 entry, the AAO finds that she misrepresented her intent to live and work in the United States when she presented her nonimmigrant visa to enter the United States.

A section 212(i) waiver of the bar to admission resulting from a violation of section 212(a)(6)(C) of the Act are 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 or her child would experience if her request is denied is not directly relevant to the determination as to whether she 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).

¹ The AAO notes that on March 23, 2001 the applicant was convicted of Retail Theft in Utah, sentenced to a term of 20 days, and placed on probation for 12 months. *Court records, 4th District Court – Orem, Utah County, State of Utah*. Retail theft is a crime involving moral turpitude. *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006). As the maximum sentence for this offense is six months and the applicant was sentenced to no more than six months of imprisonment, the applicant's conviction is amenable to the petty offense exception in section 212(a)(2)(A)(ii)(II) of the Act and does not render her inadmissible under section 212(a)(2)(A)(i)(I).

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 he resides in the Peru or the United States, as he 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 relocates to Peru, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse is a native of Mexico. *Naturalization certificate*. His parents live in the United States. *Form G-325A, Biographic Information, for the applicant's spouse*. The applicant and her spouse have one United States citizen child who was born in 2006. *Birth certificate*. Their child has a history of medical problems, suffering from multiple infections and illnesses throughout his two and one half years of life, including pneumonia, cough, pharyngitis, sinusitis, viral exanthema and multiple upper respiratory infections. *Statement from [REDACTED]*, dated April 3, 2009; *Medical records for the applicant's child*. He has suffered from recurrent otitis media and eventually had Eustachian tubes placed in his ears. *Id.* As a result of these tubes, the applicant's child needs to be seen by an Ears, Nose and Throat specialist every six months to have his ears evaluated. *Medical statement*, dated February 13, 2008. The applicant's child has received consistent care for his various health conditions from the same pediatrician and his partners since birth. *Statement from [REDACTED]* While the AAO notes that the applicant's child is not a qualifying relative for the purposes of this case, it acknowledges that he too would relocate to Peru if both of his parents were residing there. The AAO further acknowledges the added hardship faced by the applicant's spouse in caring for a child with recurrent respiratory problems. While the record does not include published country conditions reports regarding the availability and adequacy of health care in Peru, the AAO notes that relocation to Peru would necessarily disrupt the child's current treatment schedule and remove him from the care of doctors who have been treating him since birth, thus further complicating his health care needs. When looking at the aforementioned factors, particularly the applicant's spouse's lack of familial and cultural ties to Peru as well as the added responsibility of seeking care for a sick child in an unfamiliar medical environment, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to reside in Peru.

If the applicant's spouse resides in the United States, the applicant needs to establish that her spouse will suffer extreme hardship. As previously noted, the applicant's spouse is a native of Mexico. *Naturalization certificate*. His parents live in the United States. *Form G-325A, Biographic Information, for the applicant's spouse*. A psychological evaluation included in the record states the applicant's spouse suffers from Anxiety Disorder and Dysthymic Disorder as a result of his potential

separation from the applicant. *Statement from* [REDACTED] dated April 6, 2009. A treatment plan was established with a minimum of 18 weekly outpatient individual or conjoint therapy sessions with the applicant while she remains in the United States. *Id.* The evaluator reports that the applicant's spouse is deeply concerned that the applicant and his son will not receive proper medical attention in Peru. Although, as previously indicated, the record does not include documentation of the availability of health care in Peru, the AAO notes that the applicant suffers from autoimmune thyroiditis, and Graves disease. *Statement from* [REDACTED], dated February 4, 2008. The applicant's thyroid function tests continue to fluctuate significantly and she must continue to be followed by her physician every three months to control her thyroid levels. *Id.* As previously mentioned, the applicant's child has a history of medical problems, suffering from multiple infections and illnesses. *Statement from* [REDACTED], dated April 3, 2009; *Medical records for the applicant's child; Medical statement*, dated February 13, 2008. When looking at the aforementioned factors, the AAO finds that when the impact of separation on the applicant's spouse's mental/emotional health, including the concerns generated by the documented health problems of the applicant and his son, are considered in combination with the disruptions and difficulties normally created by the removal of a family member, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he 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 misrepresentation for which she now seeks a waiver, her unlawful presence in the United States, her criminal conviction in 2001, and unauthorized employment while in the United States. The favorable and mitigating factors are her U.S. citizen spouse and child, the extreme hardship to her spouse if she were to be refused admission, and her supportive relationship with her spouse as documented in the record.

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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.