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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

H5

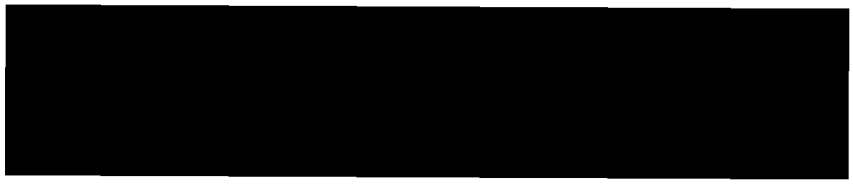
APR 2 3 2010

FILE: Office: ALBANY, NY Date:

IN RE: Applicant:

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.

Perry Rhew
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 combined motion to reopen and reconsider. The motion to reopen 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 the Guyana. The record indicates that the applicant presented a photo substituted passport when entering the United States on December 8, 2001. The applicant 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 entry into the United States by fraud or willful misrepresentation. The applicant is married to a naturalized U.S. 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 U.S. citizen spouse.

On motion, the officer in charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application to Waive Exclusion Grounds (Form I-601) accordingly. *Decision of the Officer in Charge,* dated January 6, 2006.

On appeal, the AAO concurred with the officer in charge 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 December 4, 2007.

In support of the instant motion, counsel for the applicant submits a brief and referenced exhibits. 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 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...

Section 212(i) of the Act provides that a waiver under section 212(a)(6)(C)(i) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. In the present case, the applicant's spouse is the only qualifying relative, and hardship to the applicant cannot be considered, except as it may affect the applicant's spouse.

*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. These factors include the presence of a lawful permanent resident or United States citizen spouse or parent in 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 first step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse would experience extreme hardship if he relocated to Guyana to reside with the applicant due to her inadmissibility. The AAO, in its decision dated December 4, 2007, found that the applicant had failed to establish that her U.S. citizen spouse would suffer extreme hardship were he to relocate to Guyana to reside with the applicant due to the applicant's inadmissibility. *Supra* at 3-5.

On motion to reopen, the applicant's U.S. citizen spouse contends that he will suffer emotional, physical and financial hardship were he to relocate abroad to reside with the applicant due to her inadmissibility. To begin, the applicant's spouse notes that he suffers from numerous medical conditions, including depression due to infertility, obstructive sleep apnea, gastroenteritis and hyperlipidemia, and were he to relocate abroad, he would suffer extreme hardship due to the substandard medical care in Guyana. In addition, he asserts that he would suffer financial hardship in Guyana, as wages are extremely low and unemployment is very high; he would try to get a job cutting sugar at one of the plantations but the most he would expect to earn would be about $50 per week. *Affidavit of* [redacted] dated December 26, 2007.

Counsel further notes that the applicant's spouse has more than 25 family members residing in the United States, but only an elderly grandmother, an uncle and two aunts residing in Guyana. In addition, counsel references the widespread criminal and political violence in Guyana. Finally, counsel contends that the applicant's spouse will not have access to doctors or medical facilities in the village to care for him, and due to interruptions in electrical supply, the machine the applicant's spouse uses at night to help him breath and reduce the risk of his dying from obstructive sleep apnea may not work as required. *Brief in Support of Appeal,* dated December 26, 2007.

On motion, counsel has provided extensive documentation regarding the applicant's spouse's medical situation. In addition, counsel has provided evidence establishing the problematic country conditions in Guyana, including crime and violence, lack of medical care and a substandard economy. As noted by the U.S. Department of State,

> Serious crime, including murder and armed robbery, continues to be a major problem. The murder rate in Guyana is three times higher than the murder rate in the United States.
>
> Medical care in Guyana does not meet U.S. standards. Care is available for minor medical conditions, although quality is very inconsistent. Emergency care and hospitalization for major illnesses or surgery are very limited, due to a lack of appropriately trained specialists, below standard in-hospital care, and poor sanitation. There are very few ambulances in Guyana.
>
> In the event of an emergency, the number for an ambulance is 913, but this number is not always operational and an ambulance may not be available. Visitors are advised to bring prescription medicine sufficient for their length of stay.

*Country Specific Information-Guyana, U.S. Department of State*, dated November 20, 2009.

Based on a totality of the circumstances, the AAO concludes that on motion to reopen, the applicant has established that were her spouse to relocate to Guyana to reside with the applicant due to her inadmissibility, he would experience emotional, physical and financial hardship. He would have to leave his support network, including his father, his mother, his four brothers, and numerous aunts, uncles and cousins, his long-term gainful employment, and his home. In addition, he would be concerned for his safety and health in Guyana, in light of the serious crime and substandard medical care. It has thus been established that the applicant's spouse would suffer extreme hardship were he to relocate abroad to reside with the applicant due to her inadmissibility.

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 relocates abroad due to her inadmissibility. The AAO, in its decision dated December 4, 2007, concluded that extreme hardship had not been established. *Supra* at 5. On motion to reopen, the applicant's U.S. citizen spouse contends that he will suffer emotional, physical and financial hardship if he remains in the United States while the applicant resides abroad due to her inadmissibility. In a declaration he asserts that he will suffer emotional hardship, for he needs his wife to help care for him as he suffers from numerous medical issues. In addition, he notes that he was recently diagnosed as being infertile and such a diagnosis has lead to depression. He asserts that he needs his wife to be there for him emotionally, physically and financially, as they undergo in vitro fertilization, a costly proposition but the only way they may have biological children. Finally, the applicant's spouse contends that he recently purchased a home with a sub prime mortgage but despite the fact that he already has two jobs, he is at risk of foreclosure without his spouse's income. *Supra* at 1-2.

As the applicant further elaborates,

> Besides his infertility and depression, [the applicant's spouse] suffers from hyperlipidemia and obstructive sleep apnea and has been told to lose weight by his doctor. I have been helping get off of a fast food diet resulting from his crazy work schedule holding down two jobs as a cook at a nursing home during the day and at McDonalds in the evening. I cook brown rice, fish and vegetables for him several times a week and help him watch his weight and exercise whenever possible.
>
> is always tired, but keeps pushing himself and never takes a break....

*Affidavit of* dated December 26, 2007.

As noted above, on motion counsel has provided extensive documentation with respect to the applicant's spouse's medical conditions. In addition, counsel has submitted documentation regarding the mental health implications with respect to an infertility diagnosis and the high costs associated with in vitro fertilization, which in the applicant's case, is not covered by insurance. *Supra* at 1. Moreover, financial documentation has been provided, establishing the applicant's financial contributions to the household through her gainful employment, the applicant's current income, and their mortgage obligations. Such evidence establishes the critical financial contributions the applicant makes to the household and further confirms the applicant's spouse's assertion that he needs the applicant to remain in the United States to continue her gainful employment and ensure the family's financial viability. *Form W-2, Wage and Tax Statement for 2006 for* and *Statement from Wells Fargo Home Mortgage,* dated November 19, 2007.

The record reflects that the cumulative effect of the emotional, physical and financial hardship the applicant's spouse would experience due to the applicant's long-term inadmissibly rises to the level of extreme. The AAO thus concludes that were the applicant's spouse to remain in the United States while the applicant relocated abroad due to her inadmissibility, the applicant's spouse would suffer extreme hardship.

A review of the documentation in the record, when considered in its totality, reflects that on motion to reopen, 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 would face if the applicant were to relocate abroad, community ties, gainful employment, property ownership, the applicant's apparent lack of a criminal record, payment of taxes and the passage of over eight 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 or willful misrepresentation and periods of unauthorized presence and employment in the United States.

While the AAO does not condone the applicant's actions, the AAO finds that the favorable factors outweigh 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, the motion to reopen will be granted and the waiver application approved.[1]

***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.

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[1] Counsel also contends that the motion to reconsider should be granted, based on an incorrect application of law or Service policy by the AAO. As noted by counsel, "the Decision [of the AAO] mischaracterized one hardship factor and failed to analyze all...the hardship factors listed in *Matter of Cervantes-Gonzalez, supra*, to the Applicant and her Husband...." *Supra* at 10. In support, counsel references the presence in the United States of the applicant's spouse's family, the lack of family ties in Guyana, the problematic country conditions in Guyana, the lack of ties to the country, the financial impact of departure, and adverse health conditions when tied to the unavailability of suitable medical care in Guyana and asserts that the AAO mischaracterized or failed to properly analyze these factors in its decision. Despite counsel's assertion to the contrary, the AAO, in its decision, referenced the factors considered relevant by the Board of Immigration Appeals and addressed each factor at length, but concluded that either supporting documentary evidence had not been provided by counsel, or assertions by counsel, without documentary evidence, did not satisfy the petitioner's burden of proof. *Supra* at 4-5. Nevertheless, as the applicant has established extreme hardship in the instant motion to reopen, the waiver application will be approved.