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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE:



Office: TAMPA, FLORIDA

Date: APR 30 2010

(consolidated)

IN RE:

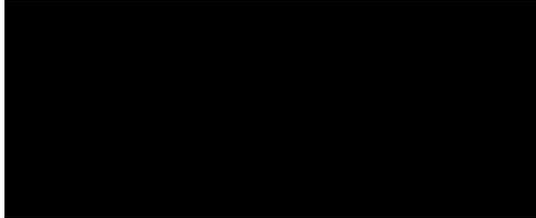
Applicant:



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 District Director, Tampa, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The District Director shall reopen the Form I-485, Application to Register Permanent Residence or Adjust Status, for action consistent with this decision.

The record reflects that the applicant is a native and citizen of Haiti who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for entering the United States by presenting a photo-substituted Haitian passport in someone else's name. The record indicates that the applicant is the son of a lawful permanent resident, is married to a naturalized United States citizen and is the father of two United States citizen children. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 United States citizen spouse, children, and lawful permanent resident father.

The District Director found that the applicant had failed to establish that extreme hardship would be imposed on his qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated November 12, 2009.

On appeal, the applicant acknowledges that he broke the law but states that he was "trying to avoid a chaotic situation in Haiti that was rapidly evolving that could even cost [him] [his] life." *Letter attached to Form I-290B*, dated December 9, 2009. Additionally, the applicant claims that his family is suffering and he asks for "an opportunity to stay here to help [his family] fulfill their share of the American dream." *Id.*

The record includes, but is not limited to, statements from the applicant and his spouse; a letter from [REDACTED] and medical documentation relating to the applicant's wife's medical issues; household bills, mortgage documents, and bank statements; and photographs and birth certificates for the applicant's family. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) 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.
- (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212 of the Act provides, in pertinent part, that:

- (i) (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the [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 [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...

In the present application, the record indicates that on July 2, 1997, the applicant entered the United States by presenting a photo-substituted Haitian passport. The applicant claimed fear of returning to Haiti, and was referred to an immigration judge. On July 21, 1997, an immigration judge ordered the applicant returned to the legacy Immigration and Naturalization Service (now United States Citizenship and Immigration Services (USCIS)) for removal from the United States. On August 7, 1997, the applicant was removed from the United States. On September 30, 1998, the applicant attempted to enter the United States by presenting a Haitian passport issued to another individual. On November 13, 1998, a Notice to Appear (NTA) was issued. On December 10, 1998, the applicant was paroled into the United States. On January 28, 1999, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On May 11, 1999, an immigration judge ordered the applicant removed from the United States. On May 14, 1999, a Warrant of Removal/Deportation (Form I-205) was issued against the applicant. On September 9, 1999, the applicant filed a motion to reopen the immigration judge's decision. On August 8, 2000, the immigration judge denied the applicant's motion to reopen. On April 13, 2001, the applicant's lawful permanent resident father filed a Form I-130 on behalf of the applicant. On September 24, 2002, the applicant's wife became a United States citizen. On October 22, 2002, the applicant's wife filed a Form I-130 on behalf of the applicant. On March 17, 2005, the Form I-130 filed by the applicant's wife was approved. On January 26, 2006, the applicant filed a motion to reopen the immigration court proceedings. On March 16, 2007, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On February 25, 2008, the applicant filed a Form I-601. On November 12, 2009, the District Director denied the applicant's Form I-485 and Form I-601, finding that the applicant failed to demonstrate extreme hardship to his qualifying relative. On December 31, 2009, the Form I-130 filed by the applicant's father was denied.

The AAO notes that the applicant does not dispute that he misrepresented himself in order to gain entry into the United States. Therefore, the AAO finds that the applicant willfully misrepresented a material fact in order to obtain a benefit under the Act and is inadmissible under section 212(a)(6)(C) of the Act.

A section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C)(i) 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. Hardship the applicant himself experiences upon removal is irrelevant to a section 212(i) waiver proceeding. The AAO also notes that the record contains references to the hardship that the applicant's children would suffer if the applicant were denied admission into the United States. 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 citizen or lawfully resident

spouse or parent. Unlike a waiver under section 212(h) of the Act, Congress does not mention extreme hardship to United States citizen or lawful permanent resident children. Therefore, hardship to the applicant's children is not considered in section 212(i) waiver proceedings except to the extent that it creates hardship for a qualifying relative. 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 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 *Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an applicant 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 also 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).

U. S. courts have stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO notes, however, that the courts have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). The common results of deportation are insufficient to prove extreme hardship as extreme hardship has generally been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. *See Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *see also 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). Only “in cases of great actual or prospective injury...will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984).

On appeal, the applicant states his family will suffer if he is removed from the United States. The applicant worries that his children will “become delinquent and criminals” without him to care and guide them, and his wife has health problems and requires his help. In a letter dated February 18, 2008, [REDACTED] states that he is treating the applicant’s wife for asthma and hypertension. The applicant states that when his wife has an asthma attack she cannot walk and she cannot “function under stress.” Additionally, the applicant’s states his son has allergies and a nasal infection, which “sends him to the hospital all the time.” The applicant states that his immigration status has caused a lot of suffering for his family, because he cannot work or continue his education. The applicant blames himself for the financial difficulties his family has faced. The applicant states his wife has paid \$15,000 to \$20,000 to immigration lawyers and they are losing their home through foreclosure. The AAO notes that the applicant provided documentation establishing that his home is in foreclosure. The applicant states if his family joins him in Haiti, their “living conditions will undoubtedly be chaotic and deadly.” He claims that this family knows nothing about Haiti, he does not have a home in Haiti, and he will not be able to find a job in order to provide for his family.

The Department of Homeland Security (DHS) Secretary, Janet Napolitano, has determined that an 18-month designation of Temporary Protected Status (TPS) for Haiti is warranted because of the devastating earthquake and aftershocks which occurred on January 12, 2010. As a result, Haitians in the United States are unable to return safely to their country. Even prior to the current catastrophe, Haiti was subject to years of political and social turmoil and natural disasters. In a travel warning issued on January 28, 2009 the U.S. Department of State noted the extensive damage to the country after four hurricanes struck in August and September 2008 and the chronic danger of violent crime, in particular kidnapping. *U.S. Department of State, Travel Warning – Haiti*, January 28, 2009. Based on the designation of TPS for Haitians and the disastrous conditions which have compounded an already unstable environment, and which will affect the country and people of Haiti for years to come, the AAO finds that the relocation of the applicant’s wife to Haiti would result in extreme hardship.

For the same reasons, the AAO finds that the applicant’s wife would also experience extreme hardship were she to remain in the United States without the applicant. This finding is based on the extreme emotional harm the applicant’s wife will experience due to concern about the applicant’s well-being and safety in Haiti, a concern that is beyond the common results of removal or inadmissibility. Accordingly, the AAO finds that the applicant has established that his United States citizen wife would suffer extreme hardship if his waiver of inadmissibility application were denied.

The favorable factors presented by the applicant are his United States citizen wife and children, his lawful permanent resident father, the extreme hardship to his wife if he were to be found inadmissible to the United States, and the absence of a criminal record apart from his immigration violations.

The unfavorable factors include the applicant's two attempts to enter the United States by misrepresentation, his failure to comply with an order of removal and his unauthorized presence in the United States.

While the AAO does not condone his actions, the applicant has established that the favorable factors in his application outweigh the unfavorable factors. In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The District Director shall reopen the denial of the Form I-485 on motion for action consistent with this decision.