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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

#5

FILE:

[REDACTED]

Office: SANTA ANA, CA

Date: **AUG 02 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank You,

Tarig Syed
for
Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California and the applicant appealed this decision to the Administrative Appeals Office (AAO). The AAO subsequently remanded the matter to the District Director for adjudication of the Form I-130, Petition for Alien Relative, which underlies the applicant's waiver request, and the issuance of a new decision. The Field Office Director has now approved the Form I-130 and issued a new decision denying the waiver application. The matter is again before the AAO on certification. The appeal will be sustained.

The applicant is a native and citizen of Cambodia 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 and a benefit 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.

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 Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated November 27, 2006. The Field Office Director also found the record to contain insufficient proof that the bar to the applicant's admission would result in extreme hardship to a qualifying relative. *Decision of the Field Office Director*, dated February 3, 2010.

On appeal, prior counsel for the applicant contends that United States Citizenship and Immigration Services (USCIS) erred as a matter of law in finding the applicant to be inadmissible. In the alternative, prior counsel asserts that the applicant has established extreme hardship to her qualifying relative, as necessary for a waiver under 212(i) of the Act. He further contends that USCIS violated the due process rights of the applicant by failing to consider all of the submitted evidence and to consider hardship factors in the aggregate. *Form I-290B; Prior Attorney's brief*.

In support of the waiver, prior counsel submits a brief. The record also includes, but is not limited to, tax return transcripts for the applicant and her spouse; tax statements for the applicant and her spouse; W-2 forms for the applicant's spouse; bank statements for the applicant and her spouse; insurance policy statements; residential leases; telephone bills; a statement from the applicant's spouse; a psychological evaluation of the applicant's spouse; bank statements for the applicant and her spouse; health insurance cards for the applicant and her spouse; a car title; employment letters for the applicant and her spouse; and earnings statements for the applicant and her 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 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 May 10, 2001 the applicant submitted a Non-Immigrant Visa Application which stated she was married to [REDACTED]. *OF-156, Non-Immigrant Visa Application*. On March 25, 2004, the applicant's spouse filed a Form I-130 on behalf of the applicant, which indicated that the marriage between the applicant and [REDACTED] had ended on August 14, 1999. *Form I-130, Petition for Alien Relative*. She also submitted a Cambodian divorce certificate. *Divorce certificate*. The District Director found the divorce certificate to be fraudulent based on records obtained by USCIS from the United States Department of State. *Notice of Intent to Deny*, dated March 10, 2006. She further found the applicant to be inadmissible under 212(a)(6)(C)(i) of the Immigration and Nationality Act. *Decision of the District Director*, dated November 27, 2006.

Prior to addressing whether the applicant qualifies for the Form I-601 waiver, the AAO finds it necessary to address the issue of inadmissibility. The AAO notes that the District Director erred in finding the applicant's divorce certificate to be fraudulent. According to records obtained by USCIS from the United States Department of State, the divorce certificate submitted by the applicant is authentic, not fraudulent. *Statement from Phnom Penh Municipal Court*, dated May 8, 2006; *Fraud Verification Memorandum, USCIS*, dated July 11, 2006. The AAO therefore does not find the applicant to have submitted a false document to USCIS.

Regarding the applicant's statement on her OF-156, Non-Immigrant Visa Application that she was married when she was in fact divorced, prior counsel notes that at the time she signed the form in 2001, the applicant was still living with her former spouse, had given birth to his child on [REDACTED] and was holding herself out to be married despite the fact that she was legally divorced. *Rebuttal to Notice of Intent to Deny*, dated March 22, 2006.

The AAO notes that the Supreme Court in *Kungys v. United States*, 485 U.S. 759 (1988) found that the test of whether concealments or misrepresentations were "material" was whether they could be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, i.e., to have had a natural tendency to affect, the legacy Immigration and Naturalization Service's (now USCIS) decisions. In addition, *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements of a material misrepresentation are as follows:

A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

- a. the alien is excludable on the true facts, or
- b. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (AG 1961).

The AAO notes that the applicant's misrepresentation of her marital status was material, as it shut off a line of inquiry that was relevant to her eligibility for a Non-Immigrant Visa. Had she stated she was divorced, the consular officer would have pursued a different line of questioning and her Non-Immigrant Visa application may not have been approved. As such, the AAO finds the applicant to be 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)(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. 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 he resides in Cambodia 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 the adjudication of this case.

If the applicant's spouse joins the applicant in Cambodia, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse is a native of Cambodia. *Naturalization certificate*. His parents are deceased and his siblings and their children live in the United States. *Statement from the applicant's spouse*, dated August 18, 2006. The applicant's spouse has continuously lived in the United States for over 23 years. *Id.* He has three children from a previous relationship whom he believes would experience difficulties in adjusting to life without

him. *Id.* While the children of the applicant's spouse are not qualifying relatives for the purposes of this case, the AAO acknowledges the difficulties the applicant's spouse would face in being separated from his children from a previous relationship. Additionally, the Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[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." (Citations omitted.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. The applicant's spouse notes that relocating back to Cambodia would be devastating for him and overwhelming because he lived through the bloody fall of Phnom Penh and the Communist occupation. *Statement from the applicant's spouse*, dated August 18, 2006. He further states that during the turmoil of the Communist occupation of Cambodia, his family was separated and his father was systematically murdered by the [REDACTED] because of his former government ties and allegiance to the United States. *Id.* The applicant's spouse notes that he was hunted down by the [REDACTED] and lucky to escape alive, as he was shot and almost bled to death. *Id.* A psychological evaluation in the record confirms that the applicant's spouse and his family experienced horrific traumas in Cambodia. *Statement from Marc Fabiano, LCSW*, dated September 19, 2006. The AAO acknowledges the trauma the applicant's spouse experienced in Cambodia and his genuine fear in returning to Cambodia. Given what happened to his family, even though country conditions have changed since that time, his fear of repatriation is understandable. *See Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). When looking at the aforementioned factors, particularly his lack of family ties in Cambodia, his length of residing in the United States, the emotional difficulties that would result in being separated from his three children from a previous relationship, and the trauma he endured in Cambodia, the AAO finds that the applicant's spouse would experience extreme hardship if he returned to Cambodia with the applicant.

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 Cambodia. *Naturalization certificate*. His parents are deceased and his siblings and their children live in the United States. *Statement from the applicant's spouse*, dated August 18, 2006. The applicant's spouse has continuously lived in the United States for over 23 years. *Id.* The applicant's spouse notes that he is in constant need of the applicant's emotional support. *Statement from the applicant's spouse*, dated August 18, 2006. A psychological evaluation included in the record notes that the applicant's spouse reported disturbances of sleep and appetite, decreased concentration and difficulty focusing his attention. *Statement from Marc Fabiano, LCSW*, dated September 19, 2006. The applicant's spouse also reported that he has contemplated suicide should he suffer the loss of his family. *Id.* His therapist notes that his experience with this client suggests that the applicant's spouse's expression of suicidality is not to be considered manipulative but is to be seen, instead, as his unfiltered reaction to the loss of his family. *Id.* His therapist would strongly urge that this intact and effective family not be subject to a loss which would devastate irrevocably all members. *Id.* As previously noted, the Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[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.” (Citations omitted.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. When looking at the aforementioned factors, particularly the documented emotional difficulties a separation would cause the applicant’s spouse and the fact that this case arises within the jurisdiction of the Ninth Circuit, the finds 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, and periods of unlawful employment in the United States. The favorable and mitigating factors are her naturalized U.S. citizen spouse and stepchildren, 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)(i) 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.