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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: PHILADELPHIA, PA

Date: JUL 01 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:

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.

A handwritten signature in cursive script, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Philadelphia, Pennsylvania and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of the Ukraine 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 procured admission into the United States by fraud or willful misrepresentation. The applicant is married to a naturalized United States citizen and has a U.S. citizen stepson and a U.S. citizen child. He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, U.S.C. § 1182(i), in order to reside in the United States with his spouse and children.

The Acting 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. *Decision of the Acting District Director*, dated November 14, 2007.

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

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 the applicant was denied a visa by the U.S. Consulate in Kiev, Ukraine. He then reapplied using a passport issued under a different name in order to conceal the fact that he had previously been denied. The applicant obtained a visa under the alternate name and entered the United States on January 14, 2000. *I-94 Departure Record; Form I-601*, received April 24, 2006.

On March 15, 2006, the applicant provided sworn testimony at the USCIS Philadelphia District Office in connection with a Form I-485 application to adjust his status to permanent resident. The applicant stated that he had entered the United States without inspection by crossing the United States–Mexico border on foot in 2000, misrepresenting his true manner of entry. *Form I-485*, filed September 21, 2005. Thus, the applicant entered the United States through fraud or the willful misrepresentation of a material fact and, at the time of his adjustment interview, again made a willful misrepresentation of a material fact in order to procure an immigration benefit. Accordingly, the applicant is 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).

The AAO notes that, on September 13, 2006, the District Director, Philadelphia, Pennsylvania issued a decision denying a prior Form I-601 application filed by the applicant. The applicant timely appealed the District Director's decision and, on May 12, 2008, the Administrative Appeals Office (AAO) dismissed the appeal. The applicant filed a second Form I-601 on May 21, 2007, which the Acting District Director, Philadelphia, Pennsylvania denied on November 14, 2007. The applicant has again timely appealed to the AAO. The AAO observes that the appeal consists of the same documentation submitted with the first appeal to the AAO, as well as a statement from the applicant's spouse, a medical letter for the applicant's spouse's father; medical statements for the applicant's spouse; and a statement from the applicant's stepchild.

The record also contains an unadjudicated Form I-601 filed by the applicant on July 11, 2008. Documentation submitted in support of the applicant's 2008 waiver application includes, but is not limited to, statements from the applicant and his spouse; a statement from the applicant's mother- and father-in-law; a statement from the applicant's spouse's former husband; a medical statement regarding the applicant's father-in-law; a second psychological evaluation of the applicant's spouse; statements from the applicant's spouse's cousin and coworkers; medical documentation regarding the applicant's newborn son; financial documentation and tax records for the applicant and his spouse; and published country conditions materials on the Ukraine. The AAO will consider the record in light of this additional evidence and base its decision accordingly.¹

A section 212(i) waiver of the bar to admission resulting from a violation of section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on the citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant or his children 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. Hardship to a non-qualifying relative will be considered only to the extent that it results in hardship to the applicant's spouse. If extreme hardship

¹ The AAO notes that the record indicates that the applicant may have retained new counsel since filing the appeal of the Acting District Director's decision. However, the newly submitted Form G-28, Notice of Appearance as Attorney or Representative, is not signed by counsel and his representation of the applicant will, therefore, not be recognized in this proceeding.

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 the Ukraine 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 relocates to Ukraine, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in Ukraine. *Naturalization certificate*. The parents and sibling of the applicant's spouse live in the United States. *Attorney's brief*. Counsel asserts that if the applicant's spouse were to relocate to the Ukraine, she would have to give up her proximity to her parents, her home, her financial stability and her health insurance, and force her son to give up the education he is receiving in the only home he has known. *Id.* Counsel also notes that the applicant's spouse is expecting a child, which is supported by medical statements. *Id.*, *Statements from [REDACTED] and Gynecology*, dated August 25, 2007 and November 28, 2007 respectively. The applicant's spouse notes that employment is not good in Ukraine, and that she and her family would not have the same opportunities. *Statement from the applicant's spouse*, dated September 11, 2007.

On appeal, counsel also resubmits a psychological evaluation of the applicant's spouse, dated September 30, 2006, which was originally provided in support of the applicant's previously filed Form I-601. The psychologist who evaluated the applicant's spouse concludes that relocation would deprive the applicant's spouse and her son of health care, and the occupational and economic benefits available to them in the United States. The evaluation also posits that the applicant's spouse would be unable to find adequate academic services for her son and that he would have an exceptionally difficult time adjusting to a different culture based on his unfamiliarity with that culture and his Attention Deficit Disorder. *Psychological evaluation*, dated September 30, 2006.

While the AAO acknowledges these statements, it notes that the record does not include documentation to support them. Although the applicant's spouse states that employment opportunities in Ukraine are not good, the record contains no published country conditions reports to establish that the applicant and his spouse would be unable to obtain satisfactory employment in Ukraine. Going on record without supporting documentary evidence will not meet the burden of

proof of this proceeding. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). With respect to counsel's assertion that the applicant's spouse's son would be giving up the education he is receiving in the United States, the AAO notes that the applicant's child is not a qualifying relative for the purposes of this case and the record fails to document how any hardship he might encounter in Ukraine would affect his mother, the only qualifying relative. The record also fails to include documentation that demonstrates that the applicant's stepson would not have educational opportunities in Ukraine. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO notes, however, that the applicant's spouse's father has been diagnosed with prostate cancer. *Statement from* [REDACTED] dated August 3, 2007. He continues to be under medical care and needs the support of his family so that they can assist him with monitoring his medical problems and his prostate cancer. *Statement from* [REDACTED] dated November 19, 2008. The AAO further notes that the record includes a statement from the applicant's spouse's first husband stating that he will not give permission for his son to reside permanently in a foreign country. *Statement from* [REDACTED] dated November 30, 2008. The record also includes documentation showing that the applicant's newborn child has a birth defect that requires close follow-up care by a cardiologist and urologists. *Statement from* [REDACTED] MD, dated November 25, 2008. The child's physician asserts that medical care comparable to that in the United States is not available in the former Soviet Union. *Id.* A country conditions report included in the record states that no Ukrainian hospitals provide medical care equal to that found in American hospitals or accept American health insurance plans for payment. *OSAC-Ukraine 2008 Crime Safety Report* (U.S. Department of State, Office of Security and Cooperation in Ukraine, ID: 07000). When looking at the aforementioned factors in the aggregate, particularly the emotional stress of leaving a parent with a potentially fatal illness, the inability of the applicant's spouse to relocate with her older child, and the added responsibilities of caring for a child with a serious birth defect, the AAO finds that the applicant's spouse would suffer extreme hardship if she relocated to the Ukraine with the applicant.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse was born in Ukraine. *Naturalization certificate*. The parents and sibling of the applicant's spouse live in the United States. *Attorney's brief*. The father of the applicant's spouse has been diagnosed with cancer. *Statement from* [REDACTED] MD, dated August 3, 2007. The applicant's spouse states that this has been devastating news for her and her family. *Statement from the applicant's spouse*, dated September 11, 2007. She states that this will greatly impact her mental health, and will also require that she have a strong support system. *Id.*

The applicant's spouse also states that she will experience financial hardship if the applicant is removed from the United States. She states that she will be unable to cover their daily expenses on her salary and lists the family's monthly expenses, a total of \$3,000-\$3,200, including a \$500

payment for the applicant's son. The applicant's spouse further states that, without the applicant's income, she would be forced to sell their home and would probably have to move to a less expensive area that would be further away from her employment and might require her son to leave his current school for one less suitable for his needs. She asserts that it would cause her great distress if she had to remove her son from his current school and that the farther she lives from work, the less time she will be able to spend with her son. *Id.* The applicant's spouse further notes that she would find it very difficult to cope with providing for her child's needs and education as a single parent. *Statement from the applicant's spouse*, dated September 11, 2007. The applicant's spouse also states that without the applicant, her dream of getting a degree in computer science and information technology will not be realized as she will have neither the time nor money to go to school.

In the 2006 psychological evaluation submitted on appeal, the licensed healthcare professional diagnoses the applicant's spouse as having Adjustment Disorder with Anxiety due to the uncertainty over the applicant's immigration status, and he recommends that the applicant's spouse undergo short-term psychotherapy. *Statement from [REDACTED] M.S.W., Psy.D.*, dated September 30, 2006. An additional psychological evaluation of the applicant's spouse was conducted on November 19, 2008. *Statement from [REDACTED]* dated November 19, 2008. In this assessment, the evaluator indicates that he has reviewed the prior evaluation and concurs with its findings. *Id.* He further notes that the applicant's spouse is suffering from Major Depression with recurrent partial remission, Anxiety Disorder NOS, and PTSD associated with an abusive relationship with her first spouse. *Id.* He notes that her current stable relationship is helpful to her ability to function socially and emotionally. *Id.* The record also includes two statements from coworkers of the applicant's spouse that indicate her emotional/mental state is affecting her in the workplace. *Statement from [REDACTED]* dated December 5, 2008; *Statement from [REDACTED]* undated. The AAO also notes the birth of the applicant's spouse's second child on April 16, 2008 and the fact that he was born with a birth defect requiring close follow-up care by a cardiologist and urologists. *Statement from [REDACTED]*, dated November 25, 2008. When looking at the aforementioned factors, particularly the applicant's spouse's responsibility for caring for and supporting a child with a serious birth defect as a single parent, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in the United States without him.

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 misrepresentations for which he now seeks a waiver and his unauthorized employment while in the United States. The favorable and mitigating factors are his U.S. citizen spouse and children, the extreme hardship to his spouse if he were to be refused admission, the health problems of his newborn child, and his supportive relationship with his 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.