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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



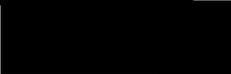
U.S. Citizenship
and Immigration
Services

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FILE:



Office: PROVIDENCE, RI

Date:

MAR 03 2010

IN RE:



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:

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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 Field Office Director, Providence, Rhode Island and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The AAO will *sua sponte* reopen the proceeding and review the applicant's waiver request. The appeal will be sustained. The Field Office Director shall reopen the applicant's Form I-485, Application to Register Permanent Residence or Adjust Status for action consistent with this decision.

The applicant is a native and a citizen of Haiti who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C). He is the spouse of a Lawful Permanent Resident (LPR) and has two U.S. citizen children. The applicant is seeking a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i) in order to reside in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, or that a favorable exercise of discretion was warranted, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), date of service May 14, 2007.

On appeal, counsel for the applicant asserts that U.S. Citizenship and Immigration Services (USCIS) failed to consider all the relevant factors in the applicant's case and, further, did not consider them in the aggregate. She contends that the applicant's spouse and children will suffer extreme hardship due to the exclusion of the applicant.

Section 212(a)(6)(C) Misrepresentation, states in pertinent part:

- (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 chapter is inadmissible.

Section 212(a)(6)(C)(iii) authorizes a waiver, in the discretion of the Attorney General, as proscribed by Section 212(i):

- (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) of this section 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 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 indicates that the applicant entered the United States with a B-2 nonimmigrant visa in October of 1987. He subsequently obtained a counterfeit "Processed for I-551" stamp in his passport, which he used to obtain a social security number for employment purposes. The Field Office Director concluded that the applicant was inadmissible under Section 212(a)(6)(C) of the Act for having obtained an immigration benefit through fraud or the willful misrepresentation of a material fact.

Although the applicant used a counterfeit I-551 stamp in his passport to obtain a social security number in order to seek employment, seeking employment is not a benefit as defined under the Act. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). As the applicant did not use the fraudulent stamp in his passport to seek an immigration benefit, he is not inadmissible under section 212(a)(6)(C) of the Act on this basis. *See Matter of D-L- & A-M-*, 20 I&N 409 (1991)(holding that an alien is not inadmissible for seeking entry by fraud or willful misrepresentation of a material fact where there is no evidence that the alien attempted to use the fraudulently procured documents to enter the United States.)

However, the applicant is inadmissible under section 212(a)(6)(C) for misrepresentations related to obtaining his nonimmigrant visa to come to the United States in 1987. The record contains transcripts from a previous immigration proceeding in which the applicant testified before an immigration judge that, at the time of his nonimmigrant visa interview, he lied to a Department of State consular officer about the length of his intended stay in the United States, stating that he was planning a visit of 11 days when it was his intention to remain permanently in the United States. As such, the applicant is inadmissible under section 212(a)(6)(C) of the Act for having obtained admission to the United States through fraud or the willful misrepresentation of a material fact.

A waiver of inadmissibility under section 212(i) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, in this case the lawfully resident spouse of the applicant. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(a)(9)(B)(v) of the Act; *see also Matter of Mendez-Morales*, 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 *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals 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.

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).

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established whether he or she relocates with the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record of proceeding contains, but is not limited to, counsel's brief; statements from the applicant and his spouse; a copy of the section on Haiti from Country Reports on Human Rights Practices - 2006, published by the U.S. Department of State; a copy of the section on Haiti from the CIA World Factbook; a copy of the section on Haiti from Amnesty International's Report 2006; a copy of a mortgage statement for the applicant's home; birth certificates for the applicant's children; a copy of the applicant and his spouse's marriage certificate; bank statements; tax returns; school records for the applicant's children and W-2 forms for the applicant and his spouse.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

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 that 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 applicant's spouse would suffer extreme hardship if she relocated to Haiti.

For the same reasons, the AAO finds that the applicant's spouse 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 that she would experience due to the emotional stress resulting from the applicant's return to Haiti, a country in a state of national emergency. The emotional stress that would result from a family member having to re-enter a country in Haiti's condition at this time is well beyond the common results of removal or inadmissibility to most aliens facing exclusion, and therefore constitutes an extreme hardship.

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).

In evaluating whether section 212(h)(1)(B) 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 discretionary factors for the applicant in this case include the applicant’s U.S. citizen spouse and children, the extreme hardship that would be experienced by his spouse if his waiver application were to be denied and the absence of a criminal record during his residence in the United States. The negative factors are the applicant’s use of a fraudulent I-551 stamp to obtain a social security card, his misrepresentation in obtaining a nonimmigrant visa, and his periods of unlawful residence and employment in the United States.

Although the AAO does not condone the applicant’s immigration violations, it, nevertheless, finds that the favorable factors in this matter outweigh the negative. Therefore, the applicant qualifies for a 212(h) waiver of his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden. The appeal will be sustained.

ORDER: The appeal is sustained. The Field Office Director shall reopen the denial of the Form I-485 application for action consistent with this decision.