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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: PORT-AU-PRINCE, HAITI

Date: **MAR 15 2010**

IN RE:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(i) and 1182(a)(9)(B)(v)

ON BEHALF OF PETITIONER:



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 Field Office Director, Port-au-Prince, Haiti, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Haiti who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of one year or more, and 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 sought to procure an immigration benefit by fraud or willful misrepresentation of a material fact (submission of an altered birth certificate with an application for asylum). The applicant is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i), in order to return to the United States and reside with his wife and children.

The field office director concluded that the applicant had failed to establish extreme hardship would be imposed on a qualifying relative. The application was denied accordingly. *See Decision of the Field Office Director* dated January 30, 2009. The AAO notes that an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212) was denied on the same date as the waiver application, but the denial is not mentioned in the decision denying the waiver application and the record does not contain a separate decision denying the Application for Permission to Reapply for Admission.

On appeal, counsel for the applicant asserts that U.S. Citizenship and Immigration Services (USCIS) failed to consider all of the factors establishing extreme hardship to the applicant's spouse and failed to recognize that one of the central purposes of the waiver is to provide unification for families. *See Notice of Appeal to the AAO (Form I-290B)*. Specifically, counsel asserts that the applicant's wife is suffering emotional and financial hardship due to separation from the applicant and would suffer extreme hardship if she relocated to Haiti due to her son's medical condition, for which medication would not be available in Haiti, and her strong family ties in the United States. *See Counsel's Memorandum in Support of Appeal* at 5-11.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

- (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who –
  - (II) Has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
- . . . .
- (v) Waiver. – The Attorney General [now Secretary, Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant

who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

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

(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:

(1) The [Secretary] may, in the discretion of the [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 [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.

A waiver of the bar to admission resulting from sections 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. 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).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included 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. *Id.* at 566. The BIA has further stated:

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).

In addition, the Ninth Circuit Court of Appeals has held, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[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). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the 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). 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).

In the present case, the record reflects that the applicant is a thirty-two year-old native and citizen of Haiti who resided in the United States from February 2001, when he entered without inspection, to March 3, 2007, when he returned to Haiti. He applied for asylum in December 2001 and was later placed in removal proceedings. His asylum application was denied by the immigration judge and an appeal of that denial was dismissed on December 13, 2004. The applicant is therefore inadmissible under section 212(a)(9)(B)(i)(II) for having been unlawfully present in the United States for a period on one year or more.<sup>1</sup> The applicant’s wife is a twenty-six year-old native and citizen of the United States whom the applicant married on January 20, 2004. The applicant currently resides in Haiti and his wife resides in Malden, Massachusetts with their two children.

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 that occurred on January 12, 2010 and continuing aftershocks. As a result, Haitian citizens 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 requiring the applicant’s wife to join the applicant in 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 would experience due to concern about the applicant’s

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<sup>1</sup> The application was also found by the Field Office Director to be inadmissible under section 212(a)(6)(C)(i) of the Act for having submitted an altered birth certificate with his application for asylum, but it is not clear from the record what information on the birth certificate was altered and whether the altered information was material to his asylum claim.

well-being and safety in Haiti, a concern that is beyond the common results of removal or inadmissibility.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. 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(a)(9)(B)(v) 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 "balance 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 adverse factors in the present case are the applicant's immigration violations, entering the United States without inspection and remaining unlawfully in the United States. The favorable factors in the present case are the hardship to the applicant if he remains in Haiti, hardship to his wife and children due to conditions in Haiti and other factors mentioned in the waiver application, and the applicant's lack of a criminal record.

The AAO finds that applicant's violation of the immigration laws cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained. The Field Office Director shall reopen the denial of the Applicant's Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212) and continue processing that application.