U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

PUBLIC COPY

[redacted]

FEB 28 2003

File: [redacted] Office: MIAMI, FLORIDA Date:

IN RE: Applicant: [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)

IN BEHALF OF APPLICANT:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Miami, Florida, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Haiti 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 sought to procure admission into the United States by fraud or willful misrepresentation. The applicant is married to a naturalized citizen of the United States and is the beneficiary of an approved petition for alien relative. He seeks the above waiver in order to remain in the United States and reside with his spouse, child, and step-children.

The acting district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly.

On appeal, counsel states that a major factor in the district director's decision to deny the applicant's waiver request was based on the applicant's apparent lack of rehabilitation, as evidenced by his recent misrepresentation of status to the U.S. Postal Service. Counsel asserts that this conclusion is erroneous. In addition, counsel asserts that the district director gave insufficient weight to the totality of the evidence of extreme hardship presented and focused only on the factor of economic hardship. Counsel requests that, on the basis of both factual and legal errors, the matter be treated by the acting district director as a motion to reopen and reconsider or forwarded to the Administrative Appeals Unit (AAU) on appeal. The acting district director has forwarded the record of proceeding to the Associate Commissioner to be treated as an appeal.

The record reflects that the applicant sought to procure admission into the United States on January 7, 1996 by presenting a U.S. passport belonging to another person. On July 23, 1996, an exclusion hearing before an immigration judge was held in which the applicant was found, *in absentia*, to be inadmissible to the United States. The acting district director also notes that the applicant misrepresented his status in the United States when applying for employment with the U.S. Postal Service in late 2001/early 2002.

Section 212(a) of the Act states:

> CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.- Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
>
> * * *

 [redacted]

(6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-

* * *

(C) MISREPRESENTATION.-

(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.

Section 212(i) of the Act states:

ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

(1) The Attorney General may, in the discretion of the Attorney General, 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 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.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Sections 212(a)(6)(C) and 212(i) of the Act were amended by IIRIRA. There is no longer any alternative provision for waiver of a section 212(a)(6)(C)(i) violation due to passage of time. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999).

If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. *Matter of George and Lopez-Alvarez*, 11 I&N Dec. 419 (BIA 1965); *Matter of Leveque*, 12 I&N Dec. 633 (BIA 1968).

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Although extreme hardship is a requirement for section 212(i) relief, once established, it is

but one favorable discretionary factor to be considered. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

On appeal, counsel has cited case law relating to the issue of "extreme hardship" as that term applied in matters involving suspension of deportation under section 244 of the Act, 8 U.S.C. § 1254, prior to its amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), recodification under section 240A of the Act, 8 U.S.C. § 1230A, and redesignation as "cancellation of removal." *Matter of Piltch*, 21 I&N Dec. 627 (BIA 1996); *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

In *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), the Board stated that, for the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *See also Matter of Mendez, supra*. In those matters, the alien was seeking relief from removal. In the matter at hand, the alien is seeking relief from inadmissibility. It is more suitable to use case law references relating to the application of the term "extreme hardship" as found in case law relating to waivers of grounds inadmissibility under section 212(h) of the Act than in case law relating to cancellation of removal.

Although the former application for suspension of deportation and the present and past applications for waiver of grounds of inadmissibility require a showing of "extreme hardship," the parameters for applying such hardship are somewhat narrower in section 212(h) proceedings. In such proceedings, the applicant may only show that such hardship would be imposed on a spouse, parent, or child who is a citizen or lawful permanent resident of the United States. In former suspension of deportation proceedings, the alien could show hardship to himself or herself as well as the condition of his or her health, age, length of residence beyond the minimum requirement of seven years, family ties abroad, country conditions, etc. In the present amended cancellation of removal proceedings, hardship to a nonpermanent resident alien is no longer a consideration, the alien must have been physically present for a continuous period of not less than 10 years, and the hardship to the spouse, parent, or child must be exceptional and extremely unusual. In section 212(i) proceedings, hardship to an applicant's children is not a consideration.

In *Matter of Cervantes-Gonzalez, supra*, the Board of Immigration Appeals (BIA) stipulated that the factors deemed relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act include, but are not limited to, the following: 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 finally, 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 applicant and his spouse, also a native of Haiti who naturalized as a citizen of the United States in 1992, were married in 1996. The couple has one child together, a daughter was born in the United States in 1998, and the spouse has two children from two prior marriages who were born in 1991 and 1994. The record reflects that the applicant's spouse has been employed as a full-time certified nursing assistant since 1990 at an hourly rate of $10.70. A divorce document contained in the record indicates that the spouse's second ex-husband was ordered to pay $150.00 weekly in support of their minor child. On appeal, counsel asserts that the applicant is the principal provider of financial support for his family, however, no evidence concerning the applicant's employment and/or salary is contained in the record of proceeding.

On appeal, counsel submits a brief, affidavits from the applicant and his spouse, a school conference report concerning one of the applicant's step-children, and documentation relating to the applicant's misrepresentation to the U.S. Postal Service. Counsel, the applicant, and the applicant's spouse explain the facts surrounding the alleged misrepresentation. They assert that it was the applicant's spouse who filled out the applicant's employment application for the applicant and that the applicant did not intend to misrepresent his status.

The applicant indicates on appeal that the applicant and his spouse work different shifts to enable them to care for their children; that the applicant provides substantial financial support to the household; that the fathers of the applicant's step-children do not provide child support nor do they have any contact with the children; that the applicant is a role model and father figure for the children; and that the couple's two youngest children are having emotional and behavioral problems in school because of the possibility of the applicant's removal from the United States. If the applicant were unable to care for the children, his spouse believes she would have to stop working or accept government assistance because she does not earn a sufficient amount to cover the family's living expenses, as well as pay for day-care.

The court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the court stated that "extreme hardship" is hardship that is unusual or beyond that which would normally be expected upon deportation.

On appeal, counsel states that the applicant's spouse is faced with relocating to Haiti with her children in order to be with the applicant, or raising her children in the United States in a fatherless home. It is noted that there are no laws that require

the applicant's family members to leave the United States and live abroad. Further, the common results of deportation are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465 (9th Cir. 1991). The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. *See Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994). In *Silverman v. Rogers*, 437 F.2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that his spouse (the only qualifying relative in this matter) would suffer extreme hardship over and above the normal social and economic disruptions involved in the removal of a family member. Hardship to the applicant himself, his child, or his step-children is not a consideration in section 212(i) proceedings. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application of waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.