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U.S. Department of Justice

Immigration and Naturalization Service

HI

OFFICE OF ADMINISTRATIVE APPEALS
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**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

[REDACTED]

File: [REDACTED] Office: SAN FRANCISCO, CA

Date: **JAN 14 2000**

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]

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 District Director, San Francisco, California, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico 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 the spouse of a United States citizen 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 and child.

The 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 asserts that the district director applied the incorrect standard of law in deciding the applicant's waiver request and failed to utilize the criteria set forth in Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999). Counsel asserts that the district director failed, specifically, to consider the applicant's ties in the United States, the qualifying relative's lack of ties to Mexico, the financial impact of the applicant's removal on the family, and health conditions in Mexico. Counsel further asserts that the district director improperly dismissed hardship to the applicant's child and improperly classified the applicant's spouse and child as "after-acquired equities."

The record reflects that the applicant sought to procure admission into the United States in 1985 by presenting a United States birth certificate belonging to the brother of his sister-in-law, and by claiming to be a citizen of the United States. He subsequently procured admission into the United States without inspection on at least three separate occasions and was employed in the United States without authorization subsequent to his unlawful entries.

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:

* * *

(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 the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. 104-208, 110 Stat. 3009. 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, supra.

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).

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.

On appeal, counsel submits a brief and documentation including affidavits from the applicant and his spouse, information concerning the spouse's medical and psychological problems, medical information concerning the couple's child, a list of the applicant's relatives in the United States, information concerning the couple's finances, and letters of support from the applicant's employer, clients, and friends. On appeal, counsel asserts that although the applicant and his family are not in a poverty situation, the applicant's forced return to Mexico would reduce his spouse and child to the poverty level.

The record reflects that the applicant and his spouse were married in 1998 and have one child born in the United States in July 2000. The applicant is employed as a landscaper and his spouse, previously an office worker, is currently unemployed. The applicant's spouse has no relatives in Mexico and her few relatives reside in the local area. The majority of the applicant's relatives also reside in the local area and all are either citizens or lawful permanent residents of the United States. The applicant has few relatives remaining in Mexico and states that he could not rely upon them for support if he were required to return to that country.

The medical information submitted indicates that the applicant's spouse has been under the care of a physician since August 2001 for depression caused or exacerbated by stress surrounding the uncertainty of the applicant's immigration status. In 2001, the couple's son was diagnosed with familial megalencephaly requiring routine child care plus careful periodic monitoring for signs or symptoms of increasing cranial pressure. There is no evidence contained in the record that the applicant's spouse, or his child,

has a significant condition of health for which treatment is unavailable in Mexico.

In denying the applicant's waiver request, the district director noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in Matter of Tijam, supra, need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter sought to procure admission into the United States in 1985 by fraud, subsequently procured admission without inspection on three separate occasions, was employed without Service authorization while in the United States, and married his spouse in March 1998. He now seeks a waiver of inadmissibility based on that marriage.

On appeal, counsel states that the applicant's marriage is not an "after-acquired equity" because he was not in deportation proceedings at the time. In Matter of Tijam, however, the Board refused to limit the factors that may be considered in the exercise of discretion under section 241(a)(1)(H) of the Act, 8 U.S.C. 1231(a)(1)(H), which the Board stated was analogous to the discretionary determination provided for in section 212(i) of the Act. Id. at 10. As in the matter considered by the Board in Matter of Tijam, this waiver "was intended to afford relief to those aliens whose 'after-acquired family ties' outweighed their fraud, both the initial fraud and other fraud 'arising from' the initial fraud." Id. at 12. This conclusion is pertinent to the present case, as the applicant in Matter of Tijam acquired her family ties or equities after her fraudulent admission to the United States as an immigrant, and not after the initiation of removal proceedings.

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. 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 Shoostary 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."

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.

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 disruptions involved in the removal of a family member. 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 for 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.