



U.S. Citizenship
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[REDACTED]

FILE:

Office: LOS ANGELES

Date: JUN 14 2006

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Los Angeles, California, denied the waiver application. The matter is now before the Administrative Appeals Office, Washington DC (AAO) 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 pursuant to 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 used fraud or misrepresentation of a material fact to gain admission into the United States. She seeks a waiver pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with her U.S. citizen spouse.

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 for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated January 12, 2005.

The record reflects that, on March 26, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on a Petition for Alien Relative (Form I-130) filed by the applicant's U.S. citizen spouse. On February 22, 2002, the applicant appeared at Citizenship and Immigration Services' (CIS) Los Angeles District Office. The applicant admitted that she had had procured admission to the United States by falsely claiming to be a U.S. citizen by presenting a U.S. Birth Certificate belonging to another, to the immigration officer at the San Ysidro, California, Port of Entry in April 1993.

On April 1, 2002, the applicant filed the Form I-601 with documentation supporting her claim that the denial of the waiver would result in extreme hardship to her family members.

On appeal, counsel contends that the district director erred in not finding that the applicant's application for a waiver should be considered under the pre-IIRIRA section 212(i) of the Act and that there is no evidence in the record to support a finding that the applicant's spouse would experience extreme hardship if the applicant were to be removed Mexico. *Brief In Support of Appeal*, dated March 23, 2005. In support of his contentions, counsel submits the above-referenced brief and copies of documentation previously provided. The entire record was reviewed and considered in rendering a decision on the appeal.

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.
- (ii) Falsely claiming citizenship. --

(I) In General --

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act . . . is inadmissible.

- (iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides:

- (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 AAO notes that aliens making false claims to U.S. citizenship on or after September 30, 1996 are ineligible to apply for a Form I-601 waiver. *See* Sections 212(a)(6)(C)(ii) and (iii) of the Act.

In considering a case where a false claim to U.S. citizenship has been made, Service [CIS] officers should review the information on the alien to determine whether the false claim to U.S. citizenship was made before, on, or after September 30, 1996. If the false claim was made before the enactment of IIRIRA, Service [CIS] officers should then determine whether (1) the false claim was made to procure an immigration benefit under the Act; and (2) whether such claim was made before a U.S. Government official. If these two additional requirements are met, the alien should be inadmissible under section 212(a)(6)(C)(i) of the Act and advised of the waiver requirements under section 212(i) of the Act. *Memorandum by Joseph R. Greene, Acting Associate Commissioner, Office of Programs, Immigration and Naturalization Service, dated April 8, 1998 at 3.*

The district director based the finding of inadmissibility under section 212(a)(6)(C) of the Act on the applicant's admitted fraudulent use of U.S. Birth Certificate belonging to another to procure admission into the United States in 1993. Counsel does not contest the district director's determination of inadmissibility.

Counsel contends that the applicant's application for a waiver should be considered under the pre-IIRIRA section 212(i) of the Act because the conduct that caused the applicant to be inadmissible occurred prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996). Counsel asserts that, as provided in *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the law that existed at the time of the applicant's conduct should apply.

In *INS v. St. Cyr*, when considering the retroactive application of IIRIRA provisions that made an section 212(c) of the Act waiver unavailable to the applicant, the U.S. Supreme Court stated:

IIRIRA's elimination of § 212(c) relief for people who entered into plea agreements expecting that they would be eligible for such relief clearly attaches a new disability to past transactions or considerations. Plea agreements involve a *quid pro quo* between a criminal defendant and the government, and there is little doubt that alien defendants considering whether to enter into such agreements are acutely aware of their convictions' immigration consequences. The potential for unfairness to people like St. Cyr is significant and manifest. Now that prosecutors have received the benefit of plea agreements, facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would be contrary to considerations of fair notice, reasonable reliance, and settled expectations to hold that IIRIRA deprives them of any possibility of such relief. *INS v. St. Cyr, Id.* at 291.

The key to the reasoning in *St. Cyr* is the applicant's reliance upon the then existing statute when he made the plea agreement. The record in the instant case does not include conduct influenced by reliance upon prior law. There is no indication that the applicant had any awareness at all about the relationship between her conduct and inadmissibility or the availability of waiver relief.

Counsel cites to the dissenting opinion in *Cervantes-Gonzalez* to support his argument that section 212(a)(6)(C) of the Act is impermissibly retroactive. Citing to *Matter of Soriano*, 21 I. & N. 516 (BIA, AG 1996) the precedent opinion in *Cervantes-Gonzalez*, stated that a statute is not retroactive if:

[I]t does not impair rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. More specifically, an intervening statute that either alters jurisdiction or affects prospective injunctive relief generally does not raise retroactivity concerns, and, thus, presumptively is to be applied in pending cases. [citation omitted]. Likewise, the Attorney General concluded [in *Soriano*] that the new provisions in section 212(c) applied to pending cases because the new legislation acted to withdraw her authority to grant prospective relief; it did not speak to the rights of the affected party. [citation omitted]. The effect was therefore to alter both jurisdiction and the availability of prospective relief to the alien. [citation omitted]. *Cervantes-Gonzalez, Id.*

The BIA held in *Cervantes-Gonzalez* that a request for an section 212(i) of the Act waiver is a request for prospective relief and as such its restrictions may be applied to conduct which predates passage of the current statute. As is required, the AAO will rely on the majority opinion of *Cervantes-Gonzalez* here.

Hardship to the alien herself is not a permissible consideration under the statute. A section 212(i) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. It is noted that Congress *specifically* did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. Thus, hardship to

the applicant's U.S. citizen children will not be considered in this decision, except as it may affect the applicant's spouse, the only qualifying relative.

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, Supra.* at 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 alien 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. The BIA has held:

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).

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).

The record reflects that, on September 10, 1994, the applicant married her spouse, [REDACTED] (Mr. [REDACTED]) s a native of Mexico who became a lawful permanent resident in 1977 and a naturalized citizen of the United States in 2000. The applicant has a 19-year old son who is a U.S. citizen by birth, from a previous relationship. The applicant and Mr. [REDACTED] have an 18-year old son and a 12-year old daughter who are both U.S. citizens by birth. The record reflects further that the applicant is in her 40's, Mr. [REDACTED] is in his 50's, and Mr. [REDACTED] and the children have no health concerns.

Counsel asserts that Mr. [REDACTED] would suffer extreme hardship if he were to remain in the United States without the applicant. Mr. [REDACTED] in his affidavit, states "she is the pillar and foundation of our home . . . she has guided and raised our children with spiritual, moral, cultural, and social principles in life . . . if we were separated we would all suffer greatly . . . no one, not even me, would be able to take my wife's important place in our children's and my own life . . . I would never be able to support two households financially, but at the same time, I cannot allow my wife to suffer in a struggling country."

Financial records reflect that Mr. [REDACTED] salary is approximately \$24,700 and that, in 2001, he contributed roughly 80% to the household income, or approximately \$21,043. The record reflects that Mr. [REDACTED] has family members in the United States who may be able to support him financially in the absence of the applicant. The record contains no evidence to suggest that the applicant would be unable to find any employment in Mexico. The record reflects that the applicant has family members in Mexico, such

as her parents, who may be able to ease the applicant and Mr. [REDACTED]'s financial concerns. The record shows that, even without assistance from family members, Mr. [REDACTED] has, in the past, earned sufficient income to exceed the poverty guidelines for his family. *Federal Poverty Guidelines*, <http://aspe.hhs.gov/poverty/figures-fed-reg.shtml>.

There is no evidence in the record to suggest that Mr. [REDACTED] would suffer extreme hardship if he were required to support the family without financial assistance from the applicant, even when combined with the below-discussed emotional hardship. There is no evidence in the record to suggest that Mr. [REDACTED] or the children suffer from a physical or mental illness that would cause them to suffer emotional hardship beyond that commonly suffered by aliens and families upon deportation. While it is unfortunate that Mr. [REDACTED] would essentially become a single parent and professional childcare may not equate to the care of a mother, this is not a hardship that is beyond those commonly suffered by aliens and families upon deportation. Moreover, the record reflects that, since at least 1999, the applicant has worked away from the home, indicating that the children may already have alternative care during the periods in which the applicant and Mr. [REDACTED] are absent from the home due to work commitments. Moreover, according to the record, Mr. [REDACTED] has family members in the United States to support him emotionally in the absence of the applicant.

Counsel asserts that the applicant's spouse would face extreme hardship if he relocated to Mexico in order to remain with the applicant. Mr. [REDACTED] in his affidavit, states "if she is denied her stay in this country with her family I would have to go with her, and because of my age it would be very difficult to find work, also, I don't have a career I can just start over in Mexico, I have lived over thirty years in this country, I have children, nephews, grandchildren, and even a great granddaughter . . . they are not accustomed to travel to Mexico and they will not be able to go visit me regularly . . . it would be truly depressing. It would be very difficult for our family to adapt to another country." There is no evidence in the record to suggest that Mr. [REDACTED] or the children suffer from a physical or mental illness that would cause him to suffer emotional hardship beyond that commonly suffered by aliens and families upon deportation. The record contains no evidence to suggest that the applicant or Mr. [REDACTED] would be unable to find any employment in Mexico. The record reflects that the applicant has family members in Mexico, such as her parents, who may be able to assist the applicant and Mr. [REDACTED] financially and emotionally. While the hardships Mr. [REDACTED] faces are unfortunate, the hardships faced by him with regard to adjusting to a lower standard of living and separation from friends and family, are what would normally be expected with any spouse accompanying a deported alien to a foreign country. Finally, the AAO notes that, as U.S. citizens, the applicant's spouse and children are not required to reside outside of the United States as a result of denial of the applicant's waiver request.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse would face extreme hardship if the applicant were refused admission. Rather, the record demonstrates that Mr. [REDACTED] will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of

inadmissibility to cases of “*extreme hardship*,” Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(i) of the Act, be above and beyond the normal, expected hardship involved in such cases. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). “[O]nly in cases of great actual or prospective injury . . . will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under section 212(i) of the Act, 8 U.S.C. § 1182(i). Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.