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FILE:

Office: CHICAGO

Date: NOV 14 2008

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:

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 black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The District Director, Chicago, Illinois, denied the waiver application and it is now before the Administrative Appeals Office (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 attempted to procure admission to the United States by fraud or willful misrepresentation. The applicant is the spouse and mother of U.S. citizens. She seeks a waiver of inadmissibility in order to reside in the United States with her spouse and children.

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 Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated February 23, 2005.

The record reflects that, on May 13, 1994, the applicant attempted to enter the United States at the Laredo, Texas, Port of Entry, by presenting a U.S. Birth Certificate belonging to another, under the name '██████████' The applicant was placed into immigration proceedings and charged with attempted illegal entry in violation of 8 U.S.C. § 1325(a)(3). On May 16, 1994, the applicant was convicted of illegal entry and was sentenced to 3 years of probation. On September 27, 1994, the applicant failed to appear for her immigration hearing and her application for admission was deemed withdrawn. On August 3, 1995, the applicant's spouse, a lawful permanent resident at the time, filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On September 23, 1995, the Form I-130 was approved. On May 21, 2002, the applicant's spouse became a naturalized citizen of the United States. On June 5, 2002, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130. The record shows that the applicant appeared at Citizenship and Immigration Services' (CIS) Chicago District Office on May 5, 2004. The applicant admitted that she had tried to enter the United States using a U.S. birth certificate belonging to another in 1994. The applicant further testified that she re-entered the United States without inspection in June 1994.

On August 3, 2004, the applicant filed the Form I-601 and documentation supporting her claim that the denial of the waiver would result in extreme hardship to her family members.

On appeal, counsel asserts that the district director was incorrect in retroactively applying the current version of section 212(i) of the Act to the applicant and, alternatively, the applicant's spouse will suffer great and irreparable harm and extreme hardship if the applicant were denied the waiver. *Applicant's Brief*, dated April 27, 2005. In support of these assertions, counsel submitted the above-referenced brief and a psychological report for the family. The entire record was reviewed and considered in rendering a decision in this case.

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)(i) of the Act on the applicant's admitted use of using a U.S. birth certificate belonging to another to attempt to enter the United States in 1994. 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 contends that, since the U.S. Supreme Court held in *Landgraf v USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed. 2d. 229 (1994), that there is a presumption against retroactive application of statutes, the applicant's application for a waiver should be considered under the pre-IIRIRA section 212(i) of the Act.

Counsel's argument is not persuasive. *Landgraf* held that a statute has a retroactive effect when:

[I]t would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. *Landgraf* at 280.

Counsel additionally asserts that, as provided in *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271 (2001), the law that existed at the time of the applicant's conduct should apply and that to permit applicants seeking relief pursuant to section 212(c) of the Act to apply under pre-IIRIRA section 212(c) of the Act and not permit an applicant to apply for a waiver under the pre-IIRIRA section 212(i) of the Act results in a violation of equal protection.

In *INS v. St. Cyr*, when considering the retroactive application of IIRIRA provisions that made a 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.

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*, 22 I&N Dec. 560 at 564 (BIA 1999).

The BIA held in *Cervantes-Gonzalez* that a request for a section 212(i) waiver of the Act 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 *Cervantes-Gonzalez* here.

Hardship the alien herself experiences upon deportation is irrelevant to section 212(i) waiver proceedings. 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*, *Id.* at 565. 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 the applicant's spouse, [REDACTED], is a native of Mexico who became a lawful permanent resident in 1989 and a naturalized U.S. citizen in 2002. Mr. [REDACTED] has a 23-year old son from a previous relationship who is a U.S. citizen by birth. The applicant and Mr. [REDACTED] have an eleven-year old son and a ten-year old daughter who are both U.S. citizens by birth. The record reflects

further that the applicant is in her 30's, Mr. [REDACTED] is in his 40's, and Mr. [REDACTED] and the applicant's daughter may have some health concerns.

Counsel asserts that Mr. [REDACTED] would suffer extreme hardship if he were to remain in the United States without the applicant because he is self-employed, working long hours to support the family, which requires the applicant's presence to care for the children, he would suffer emotionally from the separation from his wife and witnessing the children's separation from their mother as well as suffering empathy for his wife's separation from the family. Mr. [REDACTED] in his affidavit, states he would suffer emotionally if his children accompanied his wife to Mexico because they would grow up without a father. In the psychological report for the family, Mr. [REDACTED] is concerned that he would be unable to support the family and care for the children and does not want to leave his children in the care of others because he was molested as a child and he fears others will mistreat his children. Mr. [REDACTED] is concerned that he would be unable to maintain the house, his business and the two properties that he rents out to tenants without the assistance of the applicant. Mr. [REDACTED] states he is suffering from pain in his back and stomach, frequent headaches, dry skin, losing his hair, restless sleep, irritability and numbness in his hands and problems seeing due to the stress placed upon him from the denial of his wife's waiver application.

The record indicates that, from 1989 until at least 1999, Mr. [REDACTED] was employed as a foreman with [REDACTED] Inc. The record reflects that, in 1999, Mr. [REDACTED] earned an income of approximately \$53,430. There is no evidence in the record to suggest that Mr. [REDACTED] would be unable to earn sufficient income to support himself and his children should he choose to resume employment as a foreman. While it is unfortunate that, if the children remain with Mr. [REDACTED] while the applicant returns to Mexico, Mr. [REDACTED] will essentially become a single parent and professional childcare may be an added expense and not equate to the care of a parent, this is not a hardship that is beyond those commonly suffered by aliens and families upon deportation. While it is unfortunate that Mr. [REDACTED] may be unable to maintain his own business and the two properties that the family currently own and he may have to lower the family's standard of living, the record does not contain any evidence to suggest that Mr. [REDACTED] would be unable to find employment sufficient to support him and the children. The record does not support a finding of financial loss that would result in an extreme hardship to Mr. [REDACTED] if he had to support himself and the children without additional income or physical support from the applicant, even when combined with the emotional hardship described below.

The record does not contain evidence that Mr. [REDACTED] has received psychological treatment or evaluation other than during the two appointments used to write the psychological report. Therefore, the psychological reports may be given little weight. Additionally, the AAO notes that the psychological report was conducted after the Form I-601 was denied and that there was no mention of any psychological problems in the affidavit, which the applicant submitted with the Form I-601. While the psychological report diagnoses Mr. [REDACTED] with Dysthymia and Post Traumatic Stress Disorder and recommends continued treatment, there is no evidence in the record to indicate that Mr. [REDACTED] continues to require or receive treatment for these diagnoses. While it is understandable that a parent would be concerned with mistreatment of their children in the care of professionals, this is not a hardship beyond that commonly suffered by aliens and families. The psychological report indicates that Mr. [REDACTED] is a survivor of child sexual abuse which may exacerbate his fear of mistreatment of his children by professionals. However, there is no other evidence in the record to indicate that Mr. [REDACTED] has ever been diagnosed with Post Traumatic Stress Disorder or received treatment for any psychological consequences of such a background. There is no evidence in the record, besides the

psychological report, that Mr. [REDACTED] suffers from a physical or mental illness that would cause him to suffer hardship beyond that commonly suffered by aliens and families upon deportation.

If the children were to accompany the applicant to Mexico, the psychological report indicates that Mr. [REDACTED] is concerned that his children would have difficulties with the language, they would have to travel far in order to attend a university and they may be unable to find suitable medical care. The psychological report also indicates that Mr. [REDACTED] daughter may have a learning disorder for which she is receiving special tutoring and sees a psychologist through the school, which may not be available to her in Mexico. Besides the psychological report, there is no evidence in the record to confirm that Mr. [REDACTED] daughter suffers from a learning disorder for which she receives tutoring and psychological evaluation. There is no evidence in the record to indicate that Mr. [REDACTED] children suffer from a mental or physical illness for which they may be unable to receive treatment in Mexico. While it is unfortunate that Mr. [REDACTED] children may be separated from their father and may have to travel far to attend university or may not have the same opportunities they would have in the United States, this is not a hardship that is beyond those commonly suffered by aliens and families upon deportation.

Counsel does not assert that Mr. [REDACTED] would face extreme hardship if he relocated to Mexico in order to remain with the applicant. However, in his affidavit, Mr. [REDACTED] asserts he would suffer extreme hardship in such a situation because he is Americanized, the life and culture of Mexico is now foreign to him and he fears there would be no employment opportunities for him in Mexico. The psychological report indicates Mr. [REDACTED] stated he would suffer extreme hardship if he returned to Mexico because he has no family members in Mexico except for his parents who are in the process of applying for status in the United States, he would find it difficult to return to his hometown because of his experiences growing up there, he may be unable to find employment and his children would not have the educational, employment, medical and standard of living opportunities that they would have in the United States. As discussed above, there is no evidence in the record to suggest that Mr. [REDACTED] or his children suffer from a mental or physical illness for which they would be unable to receive treatment in Mexico. There is no evidence in the record to suggest that the applicant and Mr. [REDACTED] would be unable to find *any* employment in Mexico. While the hardships faced by Mr. [REDACTED] with regard to re-adjusting to the culture, economy and environment and the loss of his children's educational, employment, medical and standard of living opportunities in the United States are unfortunate; they are what would normally be expected with any spouse accompanying a deported alien to a foreign country. Additionally, the AAO notes that, as citizens of the United States, 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 and, as discussed above, Mr. [REDACTED] would not experience extreme hardship if he remained in the United States without the applicant.

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. Medina 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 (9<sup>th</sup> Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> 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.