



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

[REDACTED]

H2

FILE: [REDACTED]

Office: PHOENIX, AZ

Date: **JAN 23 2007**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Phoenix, AZ, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States (U.S.) 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 attempted to procure admission into the United States by fraud or willful misrepresentation on March 24, 1989. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i) in order to reside in the United States with her family.

The district director concluded that the issues cited by the applicant's spouse as extreme hardship issues appear to be common in relocating from one country to another and the hardships stated upon separation are normal and do not rise to the level of extreme. The application was denied accordingly. *Decision of the District Director*, dated March 16, 2005.

On appeal, counsel states that the Service abused its discretion in denying the applicant's waiver application and that the applicant's spouse will suffer extreme hardship if he is separated from his spouse or forced to move to Mexico to be with his spouse. *Counsel's Appeals Brief*, dated April 29, 2005.

The record indicates that on March 24, 1989 the applicant presented her sister's passport in an attempt to gain entry into the United States.

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

- (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 that:

- (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.

A 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. Hardship the alien herself experiences or her children experience due to separation is irrelevant to section 212(i) waiver proceedings unless it causes hardship to the applicant's spouse. 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 AAO notes that extreme hardship to the applicant's spouse must be established in the event that he resides in Mexico or in the event that he resides in the United States, as he is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

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*, 22 I&N Dec. 560, 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). 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 Board of Immigration Appeals (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). The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case. 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 is a 44 year old naturalized U.S. citizen who has been living in the United States for most of his life. His family lives in the United States and he has no remaining immediate relatives in Mexico. He and the applicant married in 1979 and have two U.S. citizen children and one child who is a lawful permanent resident. The children are ages 15-21.

In regards to the applicant's spouse relocating to Mexico with the applicant and their minor child, the AAO finds that the applicant's spouse would suffer extreme hardship. The applicant has been a lawful permanent resident in the United States for 15 years. In his statement, dated May 12, 2004, he expresses his fears concerning relocating to Mexico and leaving his home, company and children's education. He also states that

the applicant's situation is personally affecting him and there are moments when he feels very depressed and does not want to go to work. In addition, the applicant's daughter, [REDACTED] is now 18 years old. In the psychological report submitted by Ms. [REDACTED] she states that [REDACTED] had stopped going to school at the age of 15 years old. The applicant would be leaving [REDACTED] and his other two adult children in the United States if he relocated to Mexico. In addition, the applicant's spouse states that his children do not read or write Spanish because they lived all or most of their lives in the United States. *Spouse's Declaration*, dated May 12, 2004. Relocating the applicant's 15-year-old son to Mexico could have a severe impact on his education and ability to prosper because he does not know the Spanish language. In *Matter of Kao*, 23 I&N Dec. 45 (BIA 2001), the Board of Immigration Appeals found that adolescents would suffer extreme hardship as a result of relocating to a country where they do not know the culture or the language. The AAO notes that hardship to the applicant's children cannot be considered in Section 212(i) waiver applications unless it causes hardship to the applicant's spouse. However, through his declaration, the applicant's spouse expressed the emotional hardships this situation is having on him. The AAO finds that taking the applicant's spouse's hardships in the aggregate he would suffer extreme hardship upon relocation to Mexico. He would be forced to leave his country of residence of the last 15 years, he would have to relocate his adolescent son to Mexico and he would be separated from his other children in the United States. The AAO finds that the applicant's spouse would suffer extreme hardship as a result of experiencing his youngest son's suffering.

The second part of the analysis requires the applicant to establish extreme hardship in the event that her spouse remains in the United States. The applicant's spouse states that he is suffering emotionally as a result of the applicant's inadmissibility. He states that he is very depressed and cannot sleep. In a psychological report by Ms. [REDACTED] she states that the applicant's spouse is dependant on the applicant. Ms. [REDACTED] states that the applicant's spouse is able to work long hours because he knows the applicant is at home caring for their children. In addition, the applicant's spouse will suffer extreme hardship as a result of experiencing his children suffer. The applicant's 18 year old daughter quit high school because of behavioral problems and the applicant's 15 year old son suffers from asthma, which requires ongoing medical care. Ms. [REDACTED] Report, undated. In support of these assertions the applicant submitted medical notes for her youngest son. The record includes notes from the Health Coordinator at the child's school and the child's physician, Dr. [REDACTED]. The Health Coordinator at the child's school states that the applicant's child has been to the nurse's office several times in the last two years with breathing difficulties. The applicant's child's physician states that the child has been a patient in his office for asthma since March 18, 2002 until the present. The AAO finds that family separation is the source of extreme hardship in this case. If the applicant is separated from the family, her spouse will suffer extreme hardship as a result. The applicant and her spouse have been married for 23 years, they have three children together and have no significant family ties outside of the United States. The problems surrounding the couple's two youngest children exacerbate the hardships involved in separating the family. Therefore, the AAO finds that separation of the family and the hardships that follow this separation rise to the level of extreme hardship.

In addition, the AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factor in the present case is the fraud for which the applicant seeks a waiver. The favorable and mitigating factors in the present case are

the extreme hardship to the applicant's husband if she were refused admission, the presence of three U.S. citizens, and the absence of any criminal record.

The AAO finds that, although the immigration violation committed by the applicant was serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.