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U.S. Citizenship
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FILE:

Office: MIAMI, FL

Date: NOV 10 2005

IN RE:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT: SELF-REPRESENTED

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, Director
Administrative Appeals Office

DISCUSSION: The District Director, San Francisco, CA denied the application for waiver. The matter 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 gained admission to the United States on or about January 1, 1997 using a fraudulent resident alien card. The applicant 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 attempting to gain admission to the United States by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her U.S. citizen spouse.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on her husband, the only qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the District Director*, November 12, 2002.

On appeal, the applicant asserts that her husband would experience extreme hardship if she were removed.

The record includes a statement from the applicant's husband, [REDACTED] notices of doctor's appointments and prescriptions related to [REDACTED] a notice regarding [REDACTED] application for social security disability benefits, a copy of [REDACTED] resident alien card, various birth, marriage and citizenship documents related to the applicant, her spouse, their three U.S. citizen children, the applicant's brother and his family, and letters from past employers, friends and acquaintances, as well as immigration documents submitted by applicant and her spouse. The entire record was considered in rendering this decision.

The applicant admitted to entering the United States with a resident alien card that did not belong to her in 1996 or 1997. *See*, Form I-601, *Application for Waiver of Grounds of Inadmissibility*. 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.

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.

A section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident

spouse or parent of the applicant. Hardship the alien herself experiences upon deportation is irrelevant to section 212(i) waiver proceedings; the only relevant hardship in the present case is that suffered by the applicant's husband. Therefore, assertions regarding hardship to the applicant's children are only considered to the extent that they reflect hardship to the applicant's husband. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Bureau of Immigration Appeals (BIA) deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include 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 significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

This matter arises in the San Francisco district office, which is within the jurisdiction of the Ninth Circuit Court of Appeals. That court has stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[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). Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case.

The applicant and her husband were married in Mexico in November 1992 and have lived together in Kerman, California since then. Their three children, born in 1994, 1995 and 1998, attend school in Kerman. One child, [REDACTED] has a learning disability and is in special education. He also has been treated for asthma and hepatitis. Another child, [REDACTED], was seriously burned for which he was hospitalized and experiences emotional problems. The applicant and her spouse have 24 close family members in the United States. The father of applicant's husband, who has heart disease, lives in Mexico. The record does not indicate that the applicant's husband has any other ties to Mexico. He and his wife have now lived in Kerman for 13 years. Applicant's husband has lived in the United States, in the Fresno, California area, since 1983. He has been a temporary resident since 1988 and a lawful permanent resident since December 1, 1990. Affidavits provided in support of the application indicate that their U.S. citizen children attend school in Kerman and that the applicant has supported them by volunteering at the school and helping with homework. See *Letter of Miss [REDACTED] 1st Grade Teacher*, *Letter of Mrs. [REDACTED] State Preschool Teacher* and *Letter of [REDACTED] Director State and Federal Programs, Kerman Unified School District*. The applicant's husband has taken and passed the English and Citizenship examination provided by Education Testing Service.

The applicant's husband has both physical and psychological problems. He is under regular medical care and takes prescription medication. He has experienced a medical breakdown, is suicidal, suffers from severe depression and was arranging to be treated by a therapist when the appeal was filed in December 2003. He

has a serious stuttering problem and relies upon the applicant to help him communicate. He also relies upon her to ensure that he takes his medication. He has problems urinating that cause severe pain, is being treated by an urologist and might need an operation to remove his testicles. His wife supports him through this ailment and will continue to support him if he needs the operation. He fears being unable to deal with both the physical and emotional ramifications of surgery without her support. *See Letter of [REDACTED], December 14, 2003.* He also fears returning to Mexico because he was attacked, beaten severely and left on the street in Mexico. *See Letter of [REDACTED].* The applicant's husband also relies upon his wife to care for his children, two of whom have special physical and psychological needs. One of his children has a learning disability and is being provided special education in the United States. Another has been treated for physical and emotional problems. *See Addendum for Form I-601, Application for Waiver of Grounds of Inadmissibility.*

The applicant's husband has lived in the United States since 1983 and has a support network of family and friends that he does not have in Mexico. His extended family in the United States is very close. Both he and his wife have worked as farm laborers in California and he has worked for the same employer for several years. In addition to the fact that they have not lived in Mexico for years and have no connections that might lead to employment, the applicant's spouse is disabled and may not be able to work or be entitled to benefits and medical care comparable to the care he receives in the United States. He is under medical care for both physical and psychological disorders in the United States and relies upon the support of his wife to deal with these issues. It is not clear that comparable medical care would be available, or that he would qualify for or be able to afford such care in Mexico. The applicant's spouse relies upon his wife to care for and support the education of his children, who attend public school in California. If the Applicant's husband chose to return to Mexico with his wife and children, he would experience the difficulty of putting his children into school and a life in a country that they have never been to, which might compound the emotional, physical and learning disabilities that the children already experience. Given how close the family is, putting the children into a more difficult situation would cause additional hardship to the applicant's spouse. Given the physical and emotional difficulties of the applicant's husband, the closeness of the family and the reliance upon the applicant for physical, emotional and psychological support, separation from the applicant and possibly the children if the applicant's husband remained in the United States would also be a hardship. The AAO recognizes that any spouse would endure hardship as a result of separation from his spouse. However, the cumulative effect of the applicant's departure from the United States amounts to extreme hardship to her husband because the record demonstrates that the applicant's husband is incapable of caring for himself and his children, maintaining his life and livelihood, in the absence of the applicant and because he is reliant upon the medical and psychological care and support of his extended family that is available only in the United States.

The grant or denial of a waiver of inadmissibility does not turn only on the issue of the meaning of "extreme hardship." It is also dependent upon a positive exercise of discretion. The favorable factors in this matter are the extreme hardship to the applicant's husband, the needs of the applicant's U.S. citizen children, the applicant's acknowledgement of and remorse for using a fraudulent resident alien card to gain admission, the passage of almost nine (9) years since her use of the fraudulent resident alien card occurred, her otherwise positive record of contribution to her community and the United States. The unfavorable factors in this matter are the applicant's willful misrepresentation to U.S. government officials in gaining admission, her lengthy presence in the United States without lawful status and her unauthorized employment in the United States.

Although the applicant's actions in gaining admission, remaining in the United States without lawful status and working without authorization cannot be condoned, it is concluded that the favorable factors outweigh the unfavorable ones. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i), the burden of establishing that the application merits approval remains entirely with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.