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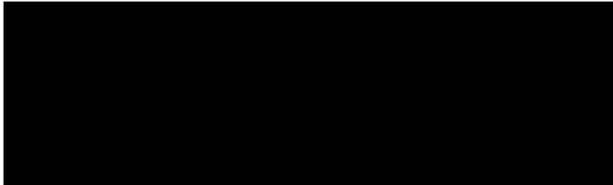
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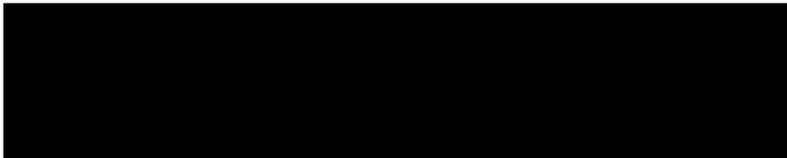
IN RE:



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:



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, Mexico City, Mexico and 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 Colombia who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to gain immigration benefits through fraud or willful misrepresentation. The applicant is the wife of a U.S. citizen and the mother of a U.S. citizen son. She seeks a waiver of inadmissibility in order to reside in the United States with her family.

The district director found that the record failed to establish that the applicant's spouse would suffer hardship beyond that normally experienced as a result of the removal of a family member. He also concluded that the applicant did not merit the favorable exercise of the Secretary of Homeland Security's discretion. The district director denied the application accordingly. *Decision of the District Director*, dated October 6, 2006.

On appeal, counsel contends that the applicant was the victim of ineffective assistance of counsel, that the misrepresentations noted by the district director resulted from a lack of understanding on the part of the applicant and her spouse, [REDACTED], and that the district director failed to conduct an objective analysis of the positive and negative factors in the applicant's case. *Attorney's Letters*, dated October 29, 2006; November 10, 2006 and March 5, 2008.

The record indicates that the applicant entered the United States without inspection in September 1978. On August 24, 2001, [REDACTED] filed a Form I-130, Petition for Alien Relative, on her behalf, which was denied. [REDACTED] appealed to the Board of Immigration Appeals (BIA), which dismissed the appeal on June 16, 2003. On September 3, 2003, [REDACTED] filed a second Form I-130 on the applicant's behalf, which was approved on July 22, 2004. In September 2005, the applicant returned to Colombia to obtain an immigrant visa. On October 3, 2005, a consular officer at the U.S. embassy in Bogota found the applicant to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking admission within ten years of her last departure from the United States. The applicant filed the Form I-601, Application for Waiver of Grounds of Excludability on January 17, 2006.

The AAO notes that the district director also found the applicant to be inadmissible under section 212(a)(6)(C)(i) for having provided misleading information regarding her first marriage based on the failure of [REDACTED] to list her first marriage on either of the Form I-130s he filed on her behalf. Counsel contends that [REDACTED] was unaware of the applicant's previous marriage prior to her 2005 consular interview.

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.

While the AAO notes the absence of any information regarding the applicant's marriage on the second Form I-130 filed by [REDACTED]¹ it does not find his failure to provide this information to constitute willful misrepresentation on the part of the applicant to obtain an immigration benefit. Although the applicant may have failed to inform [REDACTED] of her first marriage prior to his filing of the second Form I-130 benefiting her, she, at the time of her consular interview, submitted marriage and divorce certificates documenting her marriage to [REDACTED], her first husband. Accordingly, the AAO does not find the applicant to have made a willful misrepresentation of a material fact to an authorized official of the U.S. Government, as required to establish inadmissibility under section 212(a)(6)(C)(i) of the Act. See *Matter of Y—G—20* I&N Dec. 794 (BIA 1994); see also *Matter of D—L— & A—M— 20* I&N Dec. 409 (BIA 1991). However, even if [REDACTED] failure to note the applicant's prior marriage on the Form I-130 were found to be willful misrepresentation, it would not constitute the willful misrepresentation of a material fact and render her inadmissible under section 212(a)(6)(C)(i) of the Act.

A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. See *Kungys v. United States*, 485 US 759 (1988); see also *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964) and *Matter of S— and C—*, 9 I&N Dec. 436 (BIA 1950; AG 1961).

At the time [REDACTED] filed the second Form I-130, he and the applicant were married, with both of their prior marriages lawfully terminated. Therefore, the fact that he indicated that the applicant had not been previously married on the Form I-130 does not represent the misrepresentation of a material fact, as it would not have affected the outcome of the Citizenship and Immigration Service's adjudication of the Form I-130. At the time of filing, the applicant was eligible to benefit from the Form I-130 based on the true facts of the case. Accordingly, the AAO does not find the applicant to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act.²

The AAO now turns to a consideration of the applicant's inadmissibility based on her unlawful presence in the United States. As defined in section 212(a)(9)(B)(ii) of the Act, an alien is deemed to be unlawfully present in the United States if:

The alien is present in the United States after the expiration of the period of stay authorized by the Attorney General [now Secretary of Homeland Security] or is present in the United States without being admitted or paroled.

¹ While the initial Form I-130 is referenced in the record, it is not part of the record before the AAO.

² The AAO notes counsel's claim that the applicant was the victim of ineffective assistance of counsel and that the matter was to be referred immediately to the bar. An appeal or motion based upon a claim of ineffective assistance of counsel requires that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard; that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him or her and be given an opportunity to respond; and that the appeal or motion reflect whether a complaint has been filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities and, if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The record does not contain this evidence. Accordingly, the AAO has not considered counsel's assertions regarding the inferior representation provided by the applicant's former counsel.

In the present case, the applicant accrued unlawful presence from the effective date of the unlawful presence provisions of the Act, April 1, 1997, until she departed the United States in September 2005, a period of approximately eight years. In applying for an immigrant visa, the applicant is seeking admission within ten years of the date she returned to Colombia for her consular interview and is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

...

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar would impose an extreme hardship on the U.S. citizen or lawful permanent resident spouse and/or parent of the applicant. Hardship that the applicant or other family members experience as a result of separation is not considered in section 212(a)(9)(B)(v) waiver proceedings, except to the extent that it would create hardship for the applicant's spouse and/or parent. In the present case, the applicant's only qualifying relative is [REDACTED].

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)].

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS*, *supra*, held further that 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.

The AAO notes that extreme hardship to _____ must be established whether he resides in Colombia or remains 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 now consider the relevant factors in the adjudication of this case.

The applicant must first establish that _____ would experience extreme hardship if he were to join her in Colombia.

On appeal, counsel contends that _____ will not find employment should he relocate to Colombia as he is over 50 years of age and is not proficient in the Spanish language. He further asserts that _____ does not have sufficient financial assets and equities to finance a move to Colombia. Mr. _____, who has submitted three statements for the record, one filed with the Form I-601, one dated October 30, 2006 and a third dated March 5, 2008, also asserts that he is too old to find a new career in a new country and does not speak Spanish fluently enough to maintain a position. He contends that his work experience in the United States would be meaningless in Colombia and that, if he were fortunate enough to find employment in Colombia, his wages would be too low to maintain his family. _____ also asserts that neither he nor his son can relocate to Colombia because they have lived in the United States their entire lives and that Colombia is foreign to them. He further points out that, as a U.S. citizen, he could run the risk of becoming the hostage of an anti-American group in Colombia.

Although the applicant has submitted no documentary evidence to support his statements that he would be at risk if he moved to Colombia, the AAO notes that the Department of State, on August 7, 2008, updated a February 5, 2008 traveling warning for Colombia. In its latest advisory, the State Department warns U.S. citizens against travel to Colombia as the potential for violence by terrorists and other criminal elements exists in all parts of the country. When the security situation in Colombia is considered in combination with the impediments faced by the applicant in obtaining employment in Colombia, i.e., his age and his inability to speak Spanish fluently, his

lack of any ties to Colombia, and his long-term residence in the United States, the AAO finds that [REDACTED] would face extreme hardship if he were to join the applicant in Colombia.

The second part of the analysis requires the applicant to prove that [REDACTED] would suffer extreme hardship if he remains in the United States without the applicant. In his statements, [REDACTED] asserts that since his wife's return to Colombia, he has experienced extreme emotional hardship, which has resulted in a 45-pound weight loss, an inability to sleep or concentrate at work, and irritability. He states that his life is out of control and that he is collapsing mentally and physically, and is experiencing panic attacks. Mr. [REDACTED] also states that he is worried about his 21-year-old son, who despite his age, needs the applicant's attention and love. He indicates that he is constantly worried about his wife's well-being, particularly as Colombia's relations with Venezuela and Ecuador have worsened. He further reports that his savings account is being depleted as he must support the applicant in Colombia and maintain himself in the United States. The applicant's son, in a statement written prior to the applicant's departure for Colombia, notes the many ways in which his mother influences and supports his daily life. He indicates that he does not believe he will be able to manage without the applicant.

The AAO notes that the record contains a December 2005 psychological evaluation, prepared by [REDACTED], a licensed psychologist, who reports that the applicant's son is experiencing symptoms that are indicative of acute stress disorder and major depression. According to [REDACTED] one month after the applicant's departure, the applicant's son had lost 20 pounds and his grades had declined. She found that a Personality Assessment Inventory test substantiated his feelings of sadness and turmoil, and that failure to reunite him with his mother might result in life-long problems with depression and feelings of abandonment. The AAO notes, however, that the applicant's son is not a qualifying relative for the purposes of a 212(9)(B)(v) waiver proceeding. In that the record fails to offer evidence as to how the emotional problems being experienced by the applicant's son have affected [REDACTED], the AAO will not consider them in this proceeding.

In support of [REDACTED] statements concerning the impact that the applicant's absence has had on his mental and physical health, the record offers a second psychological evaluation prepared by [REDACTED], a licensed psychologist. Based on an October 31, 2006 interview, [REDACTED] states that [REDACTED] suffers from a stomach ulcer that predates the applicant's departure, has never been hospitalized, is taking no medications and has no history of mental health intervention. However, [REDACTED] also reports that [REDACTED], since the applicant's departure, has felt depressed, anxious, and insecure and has developed symptoms such as sleep disturbance, muscular fatigue, lack of motivation and feelings of hopelessness.

[REDACTED] evaluation indicates that he administered a series of tests to [REDACTED]: a Family Stress Questionnaire (FSQ), a Beck Depression Inventory (BDI), a Beck Anxiety Inventory (BAI) and a Vignette of a Deportation/Deported Scene. He reports that the FSQ indicated that there was high stress in the applicant's family and that the emotional climate was "sad and worried." The BDI found [REDACTED] to have moderate symptoms of depression and the BAI indicated moderate to severe anxiety. [REDACTED] reports, had the most severe anxiety reaction in response to the vignette of deportation, which required him to listen to a detailed presentation of what occurs during an actual removal.

[REDACTED] diagnoses [REDACTED] with mild depressive disorder and an acute anxiety reaction, which, to Dr. [REDACTED] indicates that his stress levels are beginning to impair his social and occupational functioning. Dr. [REDACTED] concludes that continued separation from the applicant will result in worsening symptoms requiring immediate psychiatric attention, e.g., medication and supportive psychotherapy. He predicts that over the next 12

months, [REDACTED]'s symptoms can be expected to develop into a full-blown depressive disorder and generalized anxiety that will impair his ability to function at his job and that his ability to support himself will be compromised as his disability will likely be of a permanent nature.

While the AAO notes that [REDACTED] conducted only one interview with [REDACTED] it also observes that he administered three standardized psychological tests to [REDACTED]. As [REDACTED]'s diagnosis is, in part, based on the results of these examinations and he, as a licensed psychologist, is trained to administer these tests and to interpret their results, the AAO will accept [REDACTED] findings regarding [REDACTED] emotional state should he continue to be separated from the applicant. Based on these findings, the AAO concludes that the record establishes that [REDACTED] will experience extreme hardship if he remains in the United States following the denial of the applicant's waiver request.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's armed forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives). *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The main adverse factors in the present case are the applicant's unlawful entry into the United States and her extended unlawful presence.

The favorable factors include the applicant's U.S. citizen spouse and son, and the extreme hardship to her spouse if her waiver application is denied. In evaluating the favorable factors in relation to the adverse factors, paramount weight will be given to extreme hardship due to the nature of the facts which lead to the finding of extreme hardship.

The AAO finds that the applicant's immigration violations are serious in nature and cannot be condoned. Nevertheless, the AAO finds that 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.