U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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DEC 21 2004

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FILE: [redacted] Office: LOS ANGELES DISTRICT OFFICE Date:

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act (INA), 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.

Ellen L. Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Mexico. The applicant was found inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(6)(C)(i). The record reflects that the applicant is the spouse of a U.S. citizen, father of two U.S. citizen children, and four U.S. citizen stepchildren. The applicant seeks a waiver of inadmissibility in order to remain in the United States with his family.

The district director found that the applicant had failed to establish extreme hardship to his U.S. citizen spouse and denied the application accordingly.

On appeal, counsel contends that the applicant established extreme hardship to his U.S. citizen spouse on the record below. In support of the appeal, counsel submits a brief. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C)(i) of the Act provides:

> In general.—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.

8 U.S.C. § 1182(a)(6)(C)(i). The district director based the finding of inadmissibility under this section on the applicant's misrepresentation of his nationality on an application for asylum in the United States. *Decision of the District Director* (June 23, 2004) at 2. The district director's determination of inadmissibility is not contested by the applicant. Section 212(i) provides, in pertinent part:

> (i) (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien . . ."

8 U.S.C. § 1182(i)(1). A section 212(i) waiver is therefore 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. Hardship to the alien himself is not a permissible consideration under the statute. Further, hardship to the applicant's children may be taken into account only as it contributes to the overall hardship faced by the only qualifying relative in this case for whose benefit the waiver can be granted, the applicant's U.S. spouse.

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).

As indicated above, the applicant's household includes his U.S. citizen wife [redacted] four U.S. citizen stepchildren aged 12-15, and two U.S. citizen children aged 5 and 7. The applicant's wife has been a U.S. citizen since 1997. The children have lived in the United States for their entire lives. [redacted] mother lives in California and her brother indicates that he is currently serving in the U.S. Marine Corps. Evidence of their immigration status or the brother's military service is not in the record. Counsel asserts that the applicant is the sole breadwinner for the family and that his wife [redacted] stays home to care for the children. Counsel states that he is solely responsible for paying the $1059 monthly mortgage payment on the family home. Counsel states that if the applicant were not available to support his family, his wife and children would lose the family home and would likely require government financial and other assistance to subsist. The most recent financial information on the record appears to be 1999 tax returns. Earnings information for that tax year indicates that the applicant provided approximately 84% of the modest household income, $16,565, not including any child support received from Ms. Olivares' ex-husband.[1] Ms.

[1] This amount was approximately 60% of the 1999 HHS poverty line of $27,980 for a family of eight. *U.S. Department of Health and Human Services Poverty Guidelines, Federal Register*, Vol. 64, No. 52, March 18, 1999, pp. 13428-13430.

works or worked at Wal-Mart. The applicant works two jobs, as a "puller and packer" and another unspecified position for $6.50 an hour for a produce company. His education level is listed as having completed 12 years of school. *County of Los Angeles License and Certificate of Confidential Marriage* (June 21, 1997). indicated that she completed 10 years of school. *Id.*

The record reflects that ex-husband was granted twice weekly visitation with their four children, plus every fourth weekend of the month. *Judgment of Dissolution* (April 3, 1997), at 2. Although she was awarded physical custody, shares legal custody with the father. The record does not contain evidence of whether the children would be permitted to relocate to Mexico and/or disrupt the visitation schedule, although states that their father was very difficult and disinterested in the welfare of the children during their marriage. *See Affidavit of* (October 24, 2000), at 2. She appears to contemplate relocating with her husband and the children to Mexico, but fears that she and the applicant would be unable to provide for the family of eight in such a poor economy. *Id.* at 8. Counsel asserts that, if his wife and family relocated to Mexico, they would be reduced to poverty and may even be required to put their children to work in order to help the family economically. In support of this contention, counsel submits the 1999 U.S. Department of State, *Country Reports on Human Rights Practices* (February 25, 2000). Counsel fails to specify which part of the 33-page report is particularly relevant to the hardship the applicant's spouse would face if she relocated to Mexico. The updated release of this report (February 2004), provides, in part:

> During the year, the market-based economy began to show tentative signs of recovery. . . . Tourism and remittances from citizens living abroad were respectively the second and third largest earners of foreign exchange after petroleum. . . . *Average manufacturing wages increased by 1.7 percent during 2002, much less than the 5.2 percent rate of inflation in the same period, and less than the government's target rate of 4.5 percent.* . . . Income distribution remained skewed: in 2000, the top 10 percent of the population earned 37.8 percent of total income, while the bottom 20 percent earned only an estimated 3.6 percent.

2003 U.S. Department of State, *Country Reports on Human Rights Practices* (February 2004) (emphasis added).

Courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS,* 794 F.2d 491, 497 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient."); *Shooshtary v. INS,* 39 F.3d 1049 (9th Cir. 1994) (stating, "the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances."); *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); *INS v. Jong Ha Wang,* 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

However, particularly in the Ninth Circuit, courts have recognized that, in certain cases, economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme. "Included among these are the personal hardships which flow naturally from an economic loss decreased health care, educational opportunities, and general material welfare." *Mejia-Carrillo v. INS,* 656 F.2d 520, 522 (9th cir. 1981) (citations omitted); *see also Santana-Figueroa v. INS*, 644 F.2d 1354, 1358 (9th cir. 1981) ("Economic loss often accompanies deportation. Even a significant reduction in standard of living is not, by itself, a basis for relief. . . . But deportation may also result in the loss of all that makes life possible. When an alien would be deprived of the means to survive, or condemned to exist in life-threatening squalor, the "economic" character of the hardship makes it no less severe.")

The hardship presented in this case is primarily economic. The applicant and his wife are responsible for the care of six children. With an extremely modest income, they have managed to purchase a home in the United States. As relatively unskilled and uneducated individuals, the couple's prospects for adequate employment in Mexico are somewhat dim. If she remained in the United States, would face trying to subsist alone in a household with six young children on well below-poverty wages without the financial and general household assistance her spouse currently provides. In Mexico, she would also likely face poverty and the strenuous difficulty of assisting her six U.S. citizen children to adjust to life in a country they have never known, after having been uprooted from a stable home and school environment in the United States. The hardship would face is substantially greater than that in *Ramirez-Durazo, supra.* The hardship in that case, which involved suspension of deportation under former INA § 244, 8 U.S.C. § 1254, rather than a waiver of inadmissibility, involved a family of five, only one of whom, the youngest child, was a U.S. citizen. The Ninth Circuit noted in that case that the Board of Immigration Appeals (BIA) had properly significantly discounted the hardship that family would face if removed, due to their illegal presence in the United States, their accumulation of equities in the United States as a result of and during their illegal presence, and the relative ease of transition back into their home country, where they had an abundance of family ties. The record is silent as to family ties in Mexico. The applicant's father is deceased and it appears his mother may be living in the United States. *See U.S. Individual Tax Return 1999, 1998* (listing applicant's mother as dependent, including her Social Security number). has significant family ties in the United States, including her six U.S. citizen children, her mother, and her brother. Although it is not clear whether her mother and brother are U.S. citizens or lawful permanent residents, it does appear they live in the United States and are not available in Mexico to potentially assist in readjusting to life there and help reduce the substantial burden of caring for six children, unlike the applicants in *Ramirez-Durazo, supra.* Also unlike the situation in *Ramirez-Durazo,* the family in the instant case includes seven U.S. citizens with equities established years prior to when the applicant was notified that he required a waiver of inadmissibility, and many years before such waiver was denied. *See District Director Letter of Inadmissibility* (August 31, 2000); *Decision of the District Director* (June 23, 2004); *Grant Deed* (June 19, 1997) (recording sale of home); *Certified Abstract of Birth for Jerry Olivares* (April 3, 1997); *Certified Abstract of Birth for Oscar Olivares* (February 19, 1999). *See Carnalla-Nunoz v. INS,* 627 F.2d 1004 (9th Cir. 1980); *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) (after-acquired equities are entitled to less discretionary

weight). A discounting of the hardship Ms. Olivares would face in either the United States or Mexico if her husband were refused admission is therefore not appropriate. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that Ms. Olivares faces extreme hardship if the applicant is refused admission.

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 wife if he were refused admission, his otherwise clean background, his *bona fide* marriage to a U.S. citizen including caring for her four children by a previous marriage, and the letters of support from his family, attesting to the strength of his relationship with his children and step-children.

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.