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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H5

[redacted]

Date: APR 19 2011 Office: CLEVELAND, OH FILE: [redacted]

IN RE: Applicant: [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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Cleveland, Ohio. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a combined motion to reopen and reconsider. The motion to reopen will be granted and the waiver application will be approved. The matter will be returned to the district director for continued processing.

The record establishes that in August 1994, the applicant, a native and citizen of Mexico, applied for and obtained a B2 visitor visa by declaring that she was single on the nonimmigrant visa application form, when in fact she was married to a lawful permanent resident. She was thus 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 having procured a nonimmigrant visa and subsequent entry into the United States by fraud or willful misrepresentation. The applicant does not contest this finding of inadmissibility. Rather, she 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 lawful permanent resident spouse and U.S. citizen children, born in 1996 and 2001.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the District Director,* dated February 1, 2006.

On appeal, the AAO concurred with the district director that extreme hardship to a qualifying relative had not been established, as required by section 212(i) of the Act. Consequently, the appeal was dismissed. *Decision of the AAO* dated July 28, 2008.

In support of the instant motion, counsel for the applicant submits a brief and referenced exhibits. The entire record was reviewed and considered in rendering this decision.

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 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 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 waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or their children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang,* 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other

decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on a qualifying relative, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *See Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The first step required to obtain a waiver is to establish that the applicant's lawful permanent resident spouse would suffer extreme hardship if he remained in the United States while the applicant relocates abroad due to her inadmissibility. The AAO, in its decision dated July 28, 2008, concluded that extreme hardship had not been established. *Supra* at 4. On motion, the applicant's spouse contends that he will suffer emotional, physical and financial hardship if he remains in the United States while the applicant resides abroad due to her inadmissibility. In a declaration the applicant's spouse explains that his wife is his partner and his right arm, who takes him to the doctor, interprets the doctors' instructions or questions, takes care of the children, pays the bills, is a role model in the community and is his life's mate. In addition, the applicant's spouse notes that he has been diagnosed with degenerative disease in the lower lumbar and has extensive knee problems and he consequently needs his wife to help care for him and drive him to his medical and chiropractic appointments. Finally, the applicant's spouse explains that due to his medical problems, he is in excruciating pain and is unable to work full-time anymore. Consequently, he is getting paid less and as such, he needs his wife to work to assist in the finances of the household *Sworn Statement of* [redacted] dated August 25, 2008.

In support, medical documentation has been provided establishing that the applicant's spouse is suffering from numerous medical conditions, including degenerative disc disease and associated orthopedic problems. Dr. [redacted] confirms that the applicant's spouse meets with him every 3 weeks for treatment and further outlines the applicant's spouse's physical limitations. Dr. [redacted] concludes that the applicant plays an integral role in providing financial and emotional support to her spouse. *Letter from* [redacted] dated August 21, 2008 and *Letter from* [redacted] dated August 25, 2008. In addition, a letter has been provided from the applicant's spouse's employer, confirming that he is only working 15 hours a week at this time because of his back and knee problems, and further noting that the applicant fills in for her husband when he is unable to work. *Letter from* [redacted] dated August 25, 2008. Further, letters have been provided from the applicant's family and friends and community members, establishing the critical role the applicant plays in her husband's and children's lives.

The record reflects that the cumulative effect of the emotional, physical and financial hardship the applicant's spouse would experience due to the applicant's inadmissibly rises to the level of extreme. The AAO thus concludes that were the applicant unable to reside in the United States due to her inadmissibility, the applicant's spouse would suffer extreme hardship.

The second step required to obtain a waiver is to establish that the applicant's lawful permanent resident spouse would suffer extreme hardship if he relocated abroad to reside with the applicant due to her inadmissibility. The AAO, in its decision dated July 28, 2008, concluded that extreme hardship had not been established. *Supra* at 4. On motion, counsel explains that due to the applicant's spouse's medical problems, he would suffer physical hardship in Mexico as he would not be able to continue treatment with the physicians and chiropractors that are familiar with his conditions. Counsel further notes that the majority of the applicant's spouse's family resides in the United States and relocating abroad would cause him emotional hardship. *Brief in Support of Appeal,* dated August 27, 2008. Finally, [redacted] references the substandard economy and the problematic crime rate in Mexico. *Affidavit of* [redacted]

The record reflects that the applicant's lawful permanent resident spouse has been residing in the United States for over twenty years. Were he to relocate abroad to reside with the applicant, he would have to adjust to a country to which he is no longer familiar. The applicant's spouse would have to leave his community, his long-term employment, the medical professionals familiar with his diagnosis and treatment plan, and his family, including three siblings, and he would be concerned about his and his children's safety and well-being in Mexico. Moreover, the applicant's spouse would not be able to maintain his quality of living due to the substandard economy in Mexico.[1] Finally, the U.S. Department of State has issued a travel warning, advising U.S. citizens and lawful permanent residents of the high rates of crime and violence in Mexico. *Travel Warning-Mexico, U.S. Department of State,* dated September 10, 2010. It has thus been established on motion that the applicant's spouse would suffer extreme hardship were he to relocate abroad to reside with the applicant due to his inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that on motion the applicant has established that her lawful permanent resident spouse would suffer extreme hardship were the applicant unable to reside in the United States. Moreover, it has been established that the applicant's lawful permanent resident spouse would suffer extreme hardship were he to relocate abroad to reside with the applicant. Accordingly, the AAO finds that the situation presented in this application rises to

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[1] As noted by the U.S. Department of State,

> Poverty is widespread (around 44% of the population lives below the poverty line) and high rates of economic growth are needed to create legitimate economic opportunities for new entrants to the work force. The Mexican economy in 2009 experienced its deepest recession since the 1930s. Gross domestic product (GDP) contracted by 6.5%, driven by weaker exports to the United States; lower remittances and investment from abroad; a decline in oil revenues; and the impact of H1N1 influenza on tourism.

Background Note-Mexico, U.S. Department of State, dated December 14, 2010.

the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. 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-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance 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 favorable factors in this matter are the extreme hardship the applicant's lawful permanent resident spouse and U.S. citizen children would face if the applicant were to reside in Mexico, regardless of whether they accompanied the applicant or stayed in the United States; the applicant's community ties, including her extensive involvement with the Hispanic community; the applicant's apparent lack of a criminal record; her gainful employment prior to departing the United States; home and business ownership; support letters from the applicant's family; friends and community members, including the Mayor of the City of Mount Vernon, Ohio; payment of taxes; and the passage of more than sixteen years since the applicant's fraud or misrepresentation when procuring a nonimmigrant visa and subsequent entry to the United States. The unfavorable factors in this matter are the applicant's fraud or willful misrepresentation, as discussed in detail above, and period of unlawful presence and unlawful employment while in the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in her application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, the motion to reopen will be granted and the waiver application approved.

ORDER: The instant motion to reopen will be granted and the waiver application will be approved. The district director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.