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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]

MAR 15 2011

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, 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 pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure admission to the United States by fraud or willful misrepresentation of a material fact. The applicant is married to a lawful permanent resident. He seeks a waiver of inadmissibility in order to reside in the United States with his family.

The director found that the applicant had failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *Decision of the Director*, dated January 16, 2008.

On appeal, counsel states that director's decision is contrary to the applicable law and facts of record. *Form I-290B*, received February 15, 2008.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statement, educational documents for the applicant's youngest child, a psychological evaluation of the applicant's spouse, financial documents for the applicant and his spouse and photographs of the applicant's family. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant attempted to procure admission to the United States on September 5, 1976 by presenting documents reflecting that he was a U.S. citizen. As such, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.[1]

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.

[1] The AAO notes that as the applicant's false claim to U.S. citizenship occurred prior to September 30, 1996, he is inadmissible under section 212(a)(6)(C)(i) of the Act, not section 212(a)(6)(C)(ii) of the Act.

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 children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's 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,* 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 (BIA) 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 BIA 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 BIA 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 BIA 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 BIA 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 an applicant, 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. *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 part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event of relocation to Mexico. Counsel states that the applicant and his spouse have no close ties to Mexico and no one to care for them as they age; they have five sons; they are actively raising their two youngest children, 17 and 13 years old; they reside with their lawful permanent resident son, who has two U.S. citizen children; their U.S. citizen son resides in Chicago and he has three U.S. citizen children; they have another son in Chicago, who has a U.S. citizen child; and they see their children and grandchildren on a regular basis. *Brief in Support of Appeal*, undated. The applicant's spouse states that the most upsetting thing to her would be the separation from her children and grandchildren, she and the applicant would not be able to afford to travel to see them, and there would be no place for them to stay if they visited her and the applicant. *Applicant's Spouse's Statement*, dated December 27, 2007. A clinical psychologist evaluated the applicant's spouse and states that everybody in the family is invested in the functionality of the family, and perhaps this is attributed to the applicant's personal and emotional difficulties and his closeness to death as a result of being stabbed. *Psychological Evaluation*, dated November 12, 2007. The applicant's spouse states that she was born in Mexico and she is the oldest of eleven children. *Applicant's Spouse's Statement*, dated December 27, 2007. The record is not clear as to where her siblings currently reside.

Counsel states that the applicant's spouse would have to abandon her lawful permanent residence to live in Mexico, her two youngest children would remain in the United States to finish their education, and she would be forced to live with the regret of abandoning her children and the resentment of these two children. *Brief in Support of Appeal.* The applicant's spouse states that her two youngest children would suffer tremendously and this would greatly impact her. *Applicant's Spouse's Statement.* In the alternative, the applicant's spouse states that her youngest son will fall farther behind as he will not have access to the education services offered in the United States, and her dreams will be shattered if her children have to return to Mexico and sacrifice their studies. *Id.* Counsel states that the second to last child is a senior in high school, plans to attend college and is on his school's soccer team; and the youngest child is in eighth grade and is on the track team. *Brief in*

Support of Appeal. Counsel states that the youngest child has a learning disability and is enrolled in special education courses. *Id.* The record includes documentation reflecting that the applicant's youngest son receives special education services.

Counsel states that the applicant's family owns and operates two Mexican restaurants, he and his spouse would have a very difficult time finding work, and the applicant's spouse would feel shame for passing the financial burden of her two youngest sons to her eldest sons. *Id.* The applicant's spouse states that there is no work in Mexico, especially for 50 year-old men; most work in Mexico involves manual labor and long, difficult days; the applicant could not handle this type of work nor would he be hired; neither she or the applicant have an education; she may be able to earn $50 a week selling food; and rent would cost $150 per month and utilities another $100 per month. *Applicant's Spouse's Statement.* The record does not include supporting documentary evidence of the applicant's spouse's claims of financial hardship if she returns to Mexico. Going on record without supporting documentation will not meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

When considering the applicant's spouse's extensive family ties to the United States, the abandonment of her permanent resident status, her son's disability, and the common hardships associated with relocation, the AAO finds that she would experience extreme hardship upon relocation to Mexico.

The second part of the analysis requires the applicant to establish extreme hardship in the event that a qualifying relative remains in the United States. Counsel states that the applicant and his spouse have been married for 33 years; they have five sons; the applicant's spouse relies on the applicant for emotional and financial support, and she would not be able to support their two youngest sons without him. *Brief in Support of Appeal.* The applicant's spouse states that she relies on the applicant emotionally, physically, and financially; the applicant is the head of the household and she does not think they can function without him; their two youngest children's morale would be completely destroyed without the applicant and it would break her heart to see this; and the applicant has a wonderful relationship with the boys, he is a terrific inspiration to them, he plays soccer with their youngest son, and he is the disciplinarian in the family. *Applicant's Spouse's Statement.* A clinical psychologist evaluated the applicant's spouse and states that she is experiencing crying episodes and free-floating anxiety; everybody in the family is invested in the functionality of the family, perhaps attributed to the applicant's personal and emotional difficulties and his closeness to death as a result of being stabbed. *Psychological Evaluation.*

Counsel states that the applicant's family owns and operates two Mexican restaurants, the applicant earns $1,200 per month, the applicant's spouse earns $1,200 per month, and the applicant's spouse would have to work longer hours without the applicant to the detriment of her two youngest children. *Brief in Support of Appeal.* The AAO notes that the record is not clear as to the financial hardship that the applicant's spouse would experience without the applicant.

Counsel states that the youngest child has a learning disability, is enrolled in special education courses, the applicant and his spouse put a lot of joint effort into seeing that their youngest son

completes his work and receives the needed specialized attention, and their child has significant emotional and psychological issues which require active involvement by both parents. *Id.* The record includes documentation reflecting that the applicant's youngest son receives special education services.

Considering the totality of the hardship factors presented, the AAO finds that the applicant's spouse would suffer extreme hardship if she remained in the United States.

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 section 212(h)(1)(B) 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 "[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 adverse factors in the present case are the applicant's misrepresentation, unauthorized period of stay and unauthorized employment.

The favorable factors include the presence of the applicant's lawful permanent resident spouse, U.S. citizen family members, the extreme hardship to his spouse if his waiver request is denied and his lack of a criminal record.

The AAO finds that the immigration violations committed by the applicant cannot be condoned. Nevertheless, the AAO finds that 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.