identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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: OCT 31 2011 Office: WASHINGTON FIELD OFFICE 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Washington Field Office, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The waiver application is approved. The matter will be returned to the field office director for continued processing.

The record establishes that the applicant is a native and citizen of Bolivia 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 having procured entry with a nonimmigrant visa and subsequent entry to the United States by fraud or willful misrepresentation. The applicant is applying for 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 field office director concluded that extreme hardship to a qualifying relative had not been established and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director,* dated July 24, 2009.

In support of the appeal, counsel for the applicant submits a brief. The entire record was reviewed and considered in rendering a decision on the appeal.

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....

On appeal, counsel explains that the applicant entered on a B-1/B-2 nonimmigrant visa in August 1995 as a domestic employee of a Bolivian family that employed her as a housekeeper and nanny. Counsel asserts that the applicant made clear to the consular officer that she intended to enter the United States to work as a Domestic Worker and thus, she did not make a willful misrepresentation of her intent. *See Brief in Support of Appeal.*

As noted by the field office director, the record indicates that at the applicant's Form I-485 interview, the applicant admitted that when she procured entry to the United States in August 1995, she had the intention of residing in the United States permanently. She explained that she left all her possessions in Bolivia and quit her long-term job two months before entering the United States. She further noted that her mother had recently died and she wanted to forget the pain. Finally, the applicant stated that she did not intend to return to Bolivia until she was a permanent resident of the United States. *Record of Sworn Statement in Administrative Proceedings,* dated August 25, 2008.

The principal elements of a misrepresentation that renders an alien inadmissible under section 212(a)(6)(C)(i) of the Act are willfulness and materiality. In *Matter of S- and B-C-*, 9 I&N Dec 436 (BIA 1960 AG 1961), the Attorney General established the following test to determine whether a misrepresentation is material:

> A misrepresentation . . . is material if either (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded. *Id.* at 447.

The Supreme Court has addressed the issue of material misrepresentations in its decision in *Kungys v. United States*, 485 U.S. 759 (1988). In that case, which involved misrepresentations made in the context of naturalization proceedings, the Supreme Court held that the applicant's misrepresentations were material if either the applicant was ineligible on the true facts, or if the misrepresentations had a natural tendency to influence the decision of the Immigration and Naturalization Service. *Id.* at 771.

To establish eligibility for a non-immigrant B1 visa for a domestic servant, section 274.a.12(c) of Title 8 of the Code of Federal Regulations states, in pertinent part:

> (17) A nonimmigrant visitor for business (B-1) who:
>
> 1. Is a personal or domestic servant who is accompanying or following to join an employer who seeks admitssion into, or is already in, the United States as a nonimmigrant. The personal or domestic servant shall have a residence abroad which he or she has no intention of abandoning....

The Department of State's Foreign Affairs Manual further provides:

> Personal or domestic employees who accompany or follow to join U.S. citizen employers who have a permanent home or are stationed in a foreign country and who are visiting the United States temporarily. The employer-employee relationship existed prior to the commencement of the employer's visit to the United States.

DOS Foreign Affairs Manual, 9 FAM 41.31 N9.3-1

The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). In this case, it has not been established, by a preponderance of the evidence, that the applicant did not materially misrepresent herself to obtain a nonimmigrant visa to enter the United States as a Domestic Employee. Had the applicant admitted that she had quit her job, she was leaving all her possessions in Bolivia and she did not intend to return to Bolivia until she was a permanent resident of the United States, further inquiry may have resulted in a determination that she was not eligible for a nonimmigrant visa due to a lack of a strong inducement to return to Bolivia. By her own admission, the applicant's admitted intention was to relocate to the United States permanently. Said intention is in direct contradiction to the required intent for B-1 domestic employees, which requires that the individual have no intention of abandoning their residence abroad. As such, based on the evidence in the record, the AAO concurs with the field office director that the applicant is inadmissible under section 212(a)(6)(C)(i) 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. The applicant's U.S. citizen spouse is the only qualifying relative in this case. Hardship to the applicant or her spouse's children from a previous marriage can be considered only insofar as it results in hardship to a qualifying relative. 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).

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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The applicant's U.S. citizen spouse asserts that he will suffer extreme hardship were he to remain in the United States while the applicant resides abroad due to her inadmissibility. In a declaration he explains that his wife is a great support to him as a mother to his two children from a previous marriage, as his companion, and as his caregiver since he suffers from diabetes and its negative side effects. He explains that she cooks for him according to his diet, reminds him of his medical appointments and when to take his medication, and helps him when his body is shaking due to low sugar levels. *Letter from* [redacted] Counsel further notes that the applicant's spouse needs to have surgery to correct his carpal tunnel syndrome, but without his wife to help provide financially while he is out of work and assist in his recovery, he cannot cooperate with the recommendations for his medical care and has to continue to live in pain. *Supra* at 6-7.

In support, medical documentation has been provided establishing that the applicant's spouse suffers from insulin-dependent diabetes and has experienced numerous negative side effects as a result of his medical condition. Said documentation also establishes the multiple medications prescribed to the applicant's spouse for his medical conditions. In addition, documentation has been provided establishing the applicant's spouse's moderately severe carpal tunnel syndrome diagnosis. *Letter from* [redacted] *M.D., Neurological Institute of Northern* [redacted] dated January 8, 2007. Moreover, evidence of the applicant's financial contributions to the household has been submitted. 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 his inadmissibility, the applicant's spouse would suffer extreme hardship.

In regards to extreme hardship were the applicant's spouse to relocate abroad, the applicant's spouse explains that his children from a previous marriage, born in 1995 and 2001, are completely assimilated to the U.S. lifestyle and a relocation abroad, were his previous wife to even permit the relocation of her children, would cause them hardship. Alternatively, were he to relocate abroad while his children remained in the United States, he contends that he would suffer emotional hardship due to long-term separation from them. In addition, the applicant's spouse explains that he was born in El Salvador and has no ties to Bolivia. Moreover, the applicant's spouse asserts that he has lived in the United States since 1985 and were he to relocate abroad, he would experience hardship as a result of long-term separation from his home, his community, his friends and his church. Further, the applicant's spouse references that were he to relocate abroad, he would not be able to obtain affordable and effective treatment for his medical conditions. *Supra* at 2. Finally, the applicant's spouse documents that he has been gainfully employed as a Porter/Detailer with Passport Nissan since July 1992, earning over $51,000 per year, and a relocation abroad would cause him professional and financial hardship. *See Letter from* [redacted] *Human Resources Manager, Passport Nissan,* dated August 18, 2008.

The record establishes that the applicant's step-children, natives and citizens of the United States, are integrated into the United States lifestyle and educational system. The Board of Immigration Appeals (BIA) found that a fifteen-year-old child who lived her entire life in the United States, who was completely integrated into the American lifestyle, and who was not fluent in Chinese, would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). The AAO finds *Matter of Kao and Lin* to be persuasive in this case due to the similar fact pattern. To uproot the applicant's children at this stage of their education and social development and relocate them to Bolivia would constitute extreme hardship to them, and by extension, to the applicant's spouse, the only qualifying relative in this case. Alternatively, were they to remain in the United States, the applicant's spouse would experience hardship due to long-term separation from his children. In addition, the record reflects that the applicant's U.S. citizen spouse, who was born in Bolivia and has lived in the United States for over 25 years, would be relocating to a country with which he is no longer familiar. He would have to leave his community, his extended family, including his mother and sister, his gainful employment, and the medical professionals familiar with his condition and treatment plan.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that her U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Accordingly, the AAO finds that the situation presented in this application rises to 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 U.S. citizen spouse and step-children would face if the applicant were to reside in Bolivia, regardless of whether they accompanied the applicant or stayed in the United States; support letters; her community ties; church membership; volunteer work in the Hispanic Ministry of her church; the applicant's apparent lack of a criminal record; her gainful employment; and the payment of taxes. The unfavorable factors in this matter are the applicant's fraud or willful misrepresentation and periods 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, this appeal will be sustained and the I-601 waiver application approved.

ORDER: The appeal is sustained. The waiver application is approved. The field office director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.