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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

[redacted]

H5

Date: JUL 0 3 2012 Office: NEWARK 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant, a native and citizen of Peru, was 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 procuring admission to the United States through fraud or misrepresentation. The applicant entered the United States on November 14, 1996 using a falsified passport and non-immigrant visa. The applicant does not contest this finding of inadmissibility, but rather seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), to reside in the United States with her U.S. Citizen spouse.

The Field Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the Field Office Director*, dated August 3, 2011.

The record contains the following documentation: briefs filed by the applicant's attorney; statements by the applicant and the applicant's spouse; psychological reports for the applicant's spouse; medical reports for the applicant's spouse; and financial documentation. 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:

> 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.

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 husband is the only qualifying relative in this case. The record contains references to hardships that the applicant's U.S. Citizen children would face if the waiver is not approved. Under this provision of the law, children

are not deemed to be qualifying relatives. USCIS can only consider a child's hardship to be a factor when it has the effect of causing 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.

Counsel asserts that the applicant's spouse will suffer emotional and psychological hardship if the applicant is not permitted to remain in the United States. The record includes four separate psychological evaluations for the applicant's spouse between April 2005 and August 2011. In the report dated April 11, 2005, a psychologist diagnosed the applicant's spouse with Adjustment Disorder with Mixed Anxiety and Depressed Mood, and stated the applicant's spouse is experiencing both depression and anxiety as a result of the fear that his wife might have to leave the United States at some point. In a psychological report dated December 18, 2006, a psychologist diagnosed the applicant's spouse with Major Depressive Episode and Generalized Anxiety Disorder. This same psychologist re-examined the applicant's spouse on February 8, 2007, and indicated that the applicant's spouse was experiencing severe levels of depression as a result of learning that the applicant's waiver application was denied. The psychologist noted that during the previous examination, the applicant's spouse was experiencing moderate depression, but that had deteriorated into severe depression, and recommended psychotherapeutic treatment. In the fourth psychiatric report, dated August 23, 2011, the applicant was diagnosed with Major Depressive Disorder Recurrent, was prescribed antidepressants, and was recommended for individual therapy on a weekly basis.

Counsel also asserts that the applicant's spouse will suffer medical hardship if the applicant's waiver is denied. Medical reports in the record indicate that the applicant's spouse has several chronic diagnoses, such as Hypertension, Hypercholesterolemia, Gerds, and Benign prostatic hypertrophy. The record further indicates that the applicant has a diagnosis of gastric ulcer, and a diagnosis of borderline diabetes.

Counsel further asserts that the applicant's spouse would suffer financial hardship if the applicant is not permitted to remain in the United States. The record indicates that although the applicant's spouse was gainfully employed until 2007, the applicant's spouse was unemployed in 2008. According to counsel, the applicant's spouse was unemployed for an entire year, and is currently employed only part time as a bus driver.

The record reflects that the cumulative effect of the emotional, psychological, medical, and financial hardships that the applicant's spouse is experiencing due to his wife's inadmissibility rises to the level of extreme. The AAO thus concludes that were the applicant's spouse to remain in the United

States without the applicant due to her inadmissibility, the applicant's spouse would suffer extreme hardship.

The record further establishes that the applicant's spouse would experience hardship were he were to relocate to Peru to be with the applicant. The applicant's spouse has lived in the United States since 1987, and became a US Citizen in 2004. The applicant's spouse has community ties to the United States. Counsel asserts that although the applicant and her spouse have relatives in Peru, they are all very poor and could not assist the family. *See Brief in Support of Appeal*, dated September 27, 2011.

The record indicates that the applicant and her spouse have two children who were born in the United States, and have lived all their lives in the United States. The children are well integrated into American society, and both are being educated, with the older child now attending college. Court decisions have found extreme hardship in cases where children have lived all their lives in the United States, spent their formative years in the United States, have succeeded in their studies in the American school system, and have clearly been integrated into the American lifestyle. *See Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001). In addition, counsel further states that the applicant's two children would suffer hardship if the applicant's wavier is denied, and submitted evidence that the two children were being treated for medical conditions as a result of a traffic accident that occurred on March 19, 2011. As noted above, under section 212(i) of the Act, children are not deemed to be qualifying relatives. However, USCIS can consider a child's hardship to be a factor when it has the effect of causing hardship to a qualifying relative. In this particular situation, uprooting the children to be relocated to Peru will cause additional hardship to the applicant's spouse.

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 hardships the applicant's U.S. citizen spouse would face if the applicant were to reside in Peru, regardless of whether he and his children accompanied the applicant or remained in the United States; the fact that the applicant resided in the United States for over 20 years; and the applicant's apparent lack of a criminal record. The unfavorable factors in this matter are the applicant's unlawful entry into 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 on the I-601 application 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 application will be approved.

ORDER: The appeal is sustained. The waiver application is approved.