U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

[redacted]

#6

FILE: [redacted] Office: MEXICO CITY (CIUDAD JUAREZ) Date: APR 0 6 2010

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(i)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City. The matter 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)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present for more than one year and seeking readmission within 10 years of her last departure. The record shows that the applicant is further inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen husband and son.

The district director found that the applicant failed to establish extreme hardship to her U.S. citizen husband and denied the Form I-601 application for a waiver accordingly. *Decision of the District Director,* dated April 9, 2007.

On appeal, the applicant's husband asserts that he will endure extreme hardship if the applicant is prohibited from returning to the United States. *Statement from the Applicant's Husband on Form I-290B*, dated May 10, 2007.

The record contains statements from the applicant's husband, the applicant's son, and the applicant's husband's landlord; a copy of the applicant's husband's naturalization certificate; a copy of the applicant's son's birth certificate; a copy of the applicant's marriage certificate; psychological evaluations of the applicant's son; documentation from the applicant's son's school; copies of photographs of the applicant and her family; documentation of the applicant's husband's transfer of funds to the applicant in Mexico; copies of tax records for the applicant's husband; and information regarding the applicant's unlawful presence in the United States and her prior attempted entry using a fraudulent Form I-551 card. The applicant further provided documents in a foreign language. Because the applicant failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the waiver application. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. With the exception of the untranslated documents, the entire record was reviewed and considered in rendering this decision.

Section 212(a)(9) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> . . . .

> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
>
> . . . .
>
> (v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

Section 212(a)(6)(C)(i) of the Act provides, in pertinent part, that:

> 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, in pertinent part, 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 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[.]

The record reflects that the applicant entered the United States without inspection in or about January 1989. She remained until she voluntarily departed in January 2000 to attend her son's baptism in Mexico. On or about May 20, 2000 she attempted to return the United States by presenting a counterfeit Form I-551 card at the San Ysidro point of entry. She was apprehended and placed into the expedited removal process. She voluntarily departed the United States in December 2000.

Based on the foregoing, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions in the Act took effect, until she departed in January 2000. This period totals over two years. She now seeks reentry as an immigrant pursuant to an approved Form I-130 relative petition filed by her husband on her behalf. She was deemed inadmissible to the United

States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of her last departure. It is noted that the applicant did not accrue over one year of unlawful presence during her stay from May to December 2000, when she was in removal proceedings and granted voluntary departure. However, as her last departure was in December 2000, 10 years have not passed since the date of her last departure and she remains inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest her inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on appeal, and she requires a waiver under section 212(a)(9)(B)(v) of the Act.

As noted above, on or about May 20, 2000 the applicant attempted to enter the United States by presenting a counterfeit Form I-551 card at the San Ysidro point of entry. Thus, the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for seeking to procure admission into the United States by fraud or willful misrepresentation.

The district director did not identify this ground of inadmissibility. However, the AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Accordingly, the applicant also requires a waiver of inadmissibility under section 212(i) of the Act.

Waivers under sections 212(a)(9)(B)(v) and 212(i) of the Act are dependent first upon a showing that a bar to admission imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant experiences upon being found inadmissible is not a basis for a waiver under section 212(a)(9)(B)(v) or 212(i) of the Act. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship to a qualifying relative. These 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.

On appeal, the applicant's husband asserts that he will endure extreme hardship if the applicant is prohibited from returning to the United States. *Statement from the Applicant's Husband on Form I-290B*, dated May 10, 2007. He explains that he met the applicant in their hometown in Santa Cruz, Papalutla, Oaxaca, Mexico, and they resided together beginning in December 1988. *Statement from the Applicant's Husband on Appeal*, undated. He provides that he and the applicant relocated to the United States in January 1989. *Id.* at 1. He explains that he and the applicant had difficulty conceiving a child, but that after fertility treatments their son was born on January 27, 1999. *Id.* The applicant's husband states that the applicant departed for Mexico with their son in order for her to apply for an immigrant visa, and that she took their son because he would be unable to work and provide proper care for their son in the United States. *Id.* He explains that he is suffering significant emotional hardship due to separation from his son and missing the opportunity to engage in common parenting tasks. *Id.* at 2.

The applicant's husband explains that he is suffering physical hardship in the applicant's absence, and he was hospitalized due to a lack of proper nutrition. *Id.* He states that he has become nervous and anxious and that he cannot sleep well. *Id.* He indicates that he suffered a panic attack due to his excessive concern for the applicant and their son and the melancholy he feels due to their absence. *Id.*

The applicant's husband asserts that the economic situation in his hometown in Mexico is poor, and thus he must remain in the United States to work. *Id.* He explains that he must meet his own expenses as a self-employed painter, as well as meet the expenses of the applicant and their son in Mexico. *Id.* He states that he travels to Mexico every two or three months to visit the applicant and their son, and that the expense creates additional economic burden for him. *Id.* He asserts that costs in Mexico have risen and that the funds he sends to the applicant are not enough to meet her and their son's needs. *Id.* He contends that it would be nearly impossible for him to find employment in Mexico. *Id.* He states that the skills he has acquired in the United States are not marketable in Mexico. *Id.* at 3. He expresses concern for his ability to offer education, medical care, and future opportunities to his son. *Id.* He indicates that he wishes for his son to study in the United States. *Id.*

The applicant's husband states that the applicant worked and contributed to their income when she was in the United States. *Id.*

The applicant's husband states that his son is suffering due to the separation of their family, and that he is not doing well in school and having behavioral problems. *Id.* He explains that he brought his son to the United States to live with him in 2004, but that his son missed the applicant too much and he had to return to Mexico. *Id.*

The applicant's son states that he is sad because the applicant's husband is not with him. *Statement from the Applicant's Son*, dated April 24, 2007. He expresses that he wishes to reside with both of his parents in Los Angeles. *Id.* at 1.

The applicant submits a letter from a clinical psychologist, [redacted]. [redacted] evaluates the circumstances of the applicant's son, as recounted by the applicant's husband. *Letter from* [redacted] dated April 28, 2007. [redacted] posits that the applicant's son is

experiencing depression based on the separation of his family. *Id.* at 1. [redacted] states that, left untreated, the applicant's son's behavior could worsen to the degree of delinquency, substance abuse, and, in the extreme case, suicide. *Id.* at 2. [redacted] reports that she has worked in a hospital in Mexico and knows firsthand that the quality of care is not equal to that in the United States. *Id.* She provides that she travels to Mexico each year and the level of improvement is not significant. *Id.* [redacted] concludes that the applicant's and her son's return to the United States is in the best interest of the applicant's son. *Id.* [redacted] observed that family separation is causing the applicant's husband to suffer a depressed mood with anxious features. *Id.* at 1.

The applicant provides a letter from her son's school that reports that he performs below the level of his classmates, and he has an inconsistent, low level of motivation, low grades, isolation, and disobedience. *Letter from the Applicant's Son's School*, dated April 18, 2007. The principal of the applicant's son's school requested that the applicant obtain a psychological evaluation of her son by a certified psychologist specialized in children to determine if the problems with her son's conduct are related to separation from the applicant's husband. *Letter from Principal of the Applicant's Son's School*, dated April 19, 2007. The applicant provided a report regarding her son's prior performance at a school in the United States which indicates that he had no behavioral problems. *Record of the Applicant's Son's Kindergarten Performance*, dated October 4, 2004.

The applicant provides a letter from child psychologist, [redacted] who concludes that the applicant's son needs to live in a united family where his emotional and material needs are satisfied. *Letter from* [redacted], dated April 24, 2007. [redacted] reports that the applicant's son has a feeling of abandonment which is causing him to feel depressed and anxious, and is interfering with his academic performance. *Id.* at 1. The applicant provides a detailed report from [redacted] in which she interprets tests that were administered to the applicant's son. *Report from* [redacted], dated April 24, 2007. She identifies emotional and developmental problems that the applicant's son is experiencing, and she concludes that the applicant's son would benefit from spending his time with both of his parents. *Id.* at 6-7.

Upon review, the applicant has shown that her husband will endure extreme hardship should she be prohibited from entering the United States. The applicant has established that her husband will endure extreme hardship should he remain in the United States without her.

The record contains references to hardships experienced by the applicant's son. Direct hardship to an applicant's child is not a basis for a waiver under section 212(a)(9)(B)(v) of the Act. However, all instances of hardship to qualifying relatives must be considered in aggregate. Hardship to a family unit or non-qualifying family member should be considered to the extent that it has an impact on qualifying family members. The applicant has provided documentation to show that her son is experiencing an unusual level of emotional hardship due to separation from the applicant's husband and residing in Mexico. The applicant's son is suffering feelings of abandonment which is causing him to endure depression and anxiety, as well as poor performance in school. The record shows that the applicant's son suffered a marked decline in his behavior at school after he went to Mexico and was separated from his father. The applicant's son's behavior is alarming enough to prompt his school officials to recommend that he be evaluated by a child psychologist. A psychologist observed

emotional and developmental problems, and concluded that the applicant's son's difficulty is related to the separation of his family. Accordingly, the applicant has shown that her son is suffering significant hardship that requires professional attention and is impacting his development. [redacted] established a basis for her knowledge of available medical services in Mexico, and she indicated that the applicant's son would lack access to adequate treatment for his mental health needs in Mexico.

The applicant's husband indicated that he attempted to have his son reside with him in the United States. Yet, he reported that his son's emotional hardship was greater when he was separated from the applicant, thus he returned to Mexico. Accordingly, family separation is having a greater emotional impact on the applicant's son than commonly experienced when children reside apart from a parent due to inadmissibility.

The applicant's son's emotional hardship is having a significant impact on her husband. The applicant's husband indicated that he suffered a panic attack due to his excessive concern for the applicant and their son and the melancholy he feels due to their absence. He added that he has become nervous, anxious, and he suffers sleep disturbances. [redacted] confirmed that family separation is causing the applicant's husband to suffer a depressed mood with anxious features. The applicant's husband explained that he has suffered physical health problems due to his emotional suffering, including hospitalization in 2004 for a lack of nutrition. The applicant submits medical records for her husband that show that he underwent a radiological procedure in December 2004. Thus, the applicant has shown that her husband is enduring significant emotional and physical hardship as a result of their son's challenges.

The applicant's husband expressed that he is close with the applicant and their son, and that the record establishes that he is enduring emotional hardship due to residing separately from them. The AAO acknowledges that family separation often results in considerable psychological suffering.

The applicant's husband stated that he is enduring financial hardship due to separation from the applicant. The applicant presented evidence to show that her husband earned approximately $20,000 in 2006, and that he had two sons as dependents. The applicant's husband regularly transfers a significant portion of his income to support the applicant and their son in Mexico, and he indicated that he travels there frequently. Thus, the record shows that living separately from the applicant is having a serious economic impact on the applicant's husband that he would not face should they reside together in the United States.

Considering all elements of hardship to the applicant's husband in aggregate, the applicant has shown by a preponderance of the evidence that her husband will suffer extreme hardship if he remains in the United States without her and their son.

The applicant has also shown that her husband will endure extreme hardship should he relocate to Mexico to maintain family unity. The applicant's husband immigrated to the United States in 1989 and he has steadily built his business and life here. The applicant provided copies of tax documents for her husband that show that his business income increased every year from 2001 to 2006. The applicant's husband asserted that he would be unable to successfully continue his trade in Mexico

because wages are low and the market for painters is saturated. Thus, relocating to Mexico would end the applicant's husband's consistent efforts to build his business in the United States, and would separate him from his country and community where he has resided for a lengthy period. The separation from friends, family, community, and employment is a common result when an individual relocates abroad due to the inadmissibility of a spouse. However, the AAO observes that the applicant's husband's lengthy residence and economic investment in the United States elevate the emotional and financial hardship he would experience should he now depart.

While the record shows that the applicant's son would benefit from the unification of his family in Mexico, it is noted that he expressed that he wishes to reside in the United States with his parents and relatives. Thus he would continue to experience some emotional hardship due to his family's inability to return to the United States. The applicant's son is presently suffering difficulty in his school in Mexico, and the record supports that he requires mental health services. As noted above, [redacted] indicated that the applicant's son would lack access to adequate treatment for his mental health needs in Mexico. The applicant's husband would be affected by the emotional hardship his son would continue to experience in Mexico, as the record demonstrates that the applicant's husband has a deep concern for his son's well-being and he suffers anxiety due to his son's challenges.

Considering all elements of hardship to the applicant's husband in aggregate, should he relocate to Mexico, the record shows by a preponderance of the evidence that he will endure extreme hardship.

Based on the foregoing, the applicant has established that denial of the present waiver application "would result in extreme hardship" to her husband, as required for waivers of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act. This finding is largely based on the unusual emotional difficulty presently experienced by the applicant's son and the resulting impact on the applicant's husband, as well as the applicant's husband's long duration of residence in the United States.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. All negative factors may be considered when deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra,* at 12.

The negative factors in this case consist of the following:

The applicant entered the United States without inspection and remained for a lengthy duration without a legal immigration status. The applicant subsequently attempted to enter the United States using fraud and misrepresentation.

The positive factors in this case include:

The record does not reflect that the applicant has been convicted a crime; the applicant's U.S. citizen husband would experience extreme hardship if she is prohibited from residing in the United States;

the applicant's U.S. citizen son will experience significant hardship if he resides in the United States without the applicant or remains in Mexico without his father, and; the applicant has cared for her U.S. citizen son and cultivated a strong family.

While the applicant's violations of U.S. immigration law cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for waivers of grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act, the applicant bears the burden of establishing that she is eligible for a waiver and she merits approval of her request. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burdens.

ORDER: The appeal is sustained.