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



**U.S. Citizenship
and Immigration
Services**



tlc

Date: **JUN 29 2011** Office: SAN FRANCISCO, CA FILE:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:



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, San Francisco, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that 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 in the United States for more than one year, and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willful misrepresentation of a material fact in order to procure an immigration benefit. The applicant is married to a U.S. citizen and is the daughter of lawful permanent resident parents and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside with her husband, children, and parents in the United States.

The field office director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the waiver application accordingly. *Decision of the Field Office Director*, dated November 5, 2010.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and her husband, [REDACTED], indicating they were married on March 3, 2009; two declarations from [REDACTED]; a declaration from the applicant; letters from the couple's children; a letter from [REDACTED] physician; copies of [REDACTED]'s medical records and car accident reports; a declaration from the applicant's parents; a letter from the applicant's parents' physician; numerous letters of support; copies of tax returns and other financial documents; a mental health assessment of the couple's child, [REDACTED]; a copy of [REDACTED]; a letter from [REDACTED] physician; a copy of the U.S. Department of State's Country Specific Information for Mexico and other background material; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

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

(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 general.—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) provides:

(1) The Attorney General [now Secretary of Homeland Security] 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien. . . .

In this case, the record shows, and the applicant concedes, that she entered the United States in August 1997, February 1998, and April 2000, as a visitor when she was, in fact, residing in the United States and, therefore, an intending immigrant. *Record of Sworn Statement in Affidavit Form*, dated May 14, 2010. Therefore, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willful misrepresentation of a material fact in order to procure an immigration benefit. In addition, the record shows, and the applicant does not contest, that when she entered the United States in February 1998, she remained until March 2000 without filing for an extension to extend her authorized stay. Therefore, the applicant accrued unlawful presence from August 1998 when her visa expired until her departure in March 2000, a period of over one year. Accordingly, she is also inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for being unlawfully present in the United States for a period of one year or more.

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.

In this case, the applicant's husband, [REDACTED], states that he has two children, ages sixteen and eighteen, from his previous marriage. [REDACTED] states that his first wife passed away and that it was the most tragic event of his life. A copy of [REDACTED] first wife's death certificate is contained in the record and indicates she died of stomach cancer. According to [REDACTED], the applicant helped him through tough times and bouts of depression. He states that if she is sent back to Mexico, he would be crushed emotionally. [REDACTED] contends he has not had a good night's sleep because he is worried about losing his wife which is affecting him at work. [REDACTED] states he is a police officer and loves his job. He contends that he would be very hard for him to continue to work and take care of his two children as well as the applicant's two children if his wife departed the United States. [REDACTED] states that his wife's son, [REDACTED], has had psychological issues for most of his life, often cannot sleep without medication, and is in a special education class. In addition, [REDACTED] states that his wife is the primary caretaker of her elderly parents. According to [REDACTED], the applicant's mother is in the beginning stages of Alzheimer's and her father has back pain. Moreover, [REDACTED] states that his wife does not eat and is incapable of sleeping. He states his wife is "wither[ing] away to bones," "can't keep any food down," and "is slowly losing her mind" due to her immigration problems. He contends he is tortured watching her suffer. Furthermore, [REDACTED] states that if he moved to Mexico to be with his wife, he would bring their children, but it would be difficult for his kids to live there. [REDACTED] states that he and his daughter would need to learn Spanish and that he worries about kidnappings in Mexico. He also fears being unable to obtain employment in Mexico. *Declaration of [REDACTED]*, dated December 30, 2010.

A more recent declaration from [REDACTED] states that on December 29, 2010, while he was crossing the street, he was struck by a car and hospitalized for two days. A copy of the accident report in the record indicates that [REDACTED] and his daughter, [REDACTED], were both struck by a car and rolled off of the hood of the car. Moreover, [REDACTED] states that on January 14, 2011, while he was driving, he had a seizure, blacked out, and later found out that he had hit four cars. A copy of the accident report in the record indicates [REDACTED] "tried to put his car in park before he passed out, but it apparently went in reverse," hitting a car, a tree, and two parked cars. According to [REDACTED] he suffered another seizure on January 14, 2011. He contends his surgeon told him that his December 2010 accident may have triggered the seizures. [REDACTED] states he is taking anti-seizure medication and will undergo surgery on February 7, 2011. He states he is on medical leave from work, cannot drive, and needs his wife for emotional support, care, and assistance. *Declaration of [REDACTED]*, dated January 28, 2011.

The applicant states that her husband lost his first wife to cancer after nineteen years of marriage. According to the applicant, [REDACTED] and his children had a very hard time dealing with the loss and were afraid to love anyone again. The applicant states that if she had to depart the United States, [REDACTED] kids would be devastated and emotionally scarred. In addition, the applicant states that her husband would have a hard time taking care of her son, [REDACTED], without her presence because [REDACTED] has emotional detachment issues and a learning disability and is seeing a psychiatrist for his emotional issues. Moreover, the applicant states her parents would suffer extreme hardship if she returned to Mexico because they are both elderly and have health problems. The applicant contends she takes her parents to medical appointments and takes care of anything else they need. Furthermore, the applicant

states that her husband would want to move with her to Mexico, but she knows they would not do well in Mexico, particularly considering her husband and his children do not speak Spanish. *Declaration of* [REDACTED] dated December 30, 2010.

The applicant's parents state that they frequently stay with the applicant and [REDACTED]. The applicant's parents contend they have medical problems, that they do not drive, and that they rely on the applicant to care for them. They state that Mexico is becoming more and more violent and that their neighbors in Mexico have been harassed several times for money and had their lives threatened. *Declaration of* [REDACTED] & [REDACTED], dated January 3, 2011. A letter from the applicant's parents' physician in Mexico states that they have chronic, degenerative illnesses. Specifically, the physician states that the applicant's mother has systemic arterial hypertension, insomnia, and degenerative osteoarthritis. The physician states the applicant's father presented with a hernia which gives him persistent problems with gastritis, dyspepsia, and abdominal strain. He also has insomnia, a digestive disorder, and degenerative osteoarthritis. *Letters from* [REDACTED], dated December 21 and 22, 2010.

The record contains a copy of [REDACTED] Individualized Education Program (IEP) which indicates he has a learning disability, detachment issues, and fears of isolation, and that he suffers from insomnia which prescription medication has not helped. The IEP also indicates Andres has a truancy problem and fears attending school. *Individualized Education Program for* [REDACTED] dated October 28, 2010. A mental health assessment of Andres indicates he has been in special education since 2004 when he was in second grade. According to the social worker, Andres's teachers describe him as presenting in an oppositional/defiant manner. The social worker states that [REDACTED] behavior has escalated to include aggression and violence against peers, that he has been on "informal probation or home detention since November 2007," and that he was last in juvenile detention in February 2008. According to the social worker, [REDACTED]'s mother, the applicant, contends he has exhibited out of control behaviors and tantrums since he was in preschool. [REDACTED] reportedly does not know why he gets angry and tells his mother that he does not remember his behaviors during his fits of anger. The social worker reports that two weeks prior, [REDACTED] ran onto the roof of his apartment building in a fit of anger, scaring the applicant who thought he might hurt himself. In addition, the social worker states that [REDACTED] reports experiencing headaches at night, preventing him from concentrating during the day and sleeping at night. [REDACTED] also reportedly "hear[s] noises and mak[es] up 'stories' about fictitious characters [that h]e asserts . . . are true." He also reportedly experiences unusual tactile sensations, such as the sensation of being "pulled." *Mental Health Assessment*, dated March 24, 2008.

After a careful review of the evidence, the AAO finds that the applicant has established her husband will suffer extreme hardship as a result of the applicant's waiver being denied. The record shows that [REDACTED] and his children have already suffered an emotional loss due to the death of his first wife to cancer. According to [REDACTED], if he remained in the United States without the applicant, he and his children would be crushed emotionally. The record further shows that [REDACTED] and his daughter, [REDACTED], were struck by a car when they were crossing the street. The record indicates that [REDACTED] was hospitalized for two days with a concussion and that approximately two weeks later, he

experienced a seizure while driving. According to [REDACTED] he suffered another seizure a few weeks later, is taking anti-seizure medication, and will undergo surgery. He contends he cannot drive and is on medical leave from his job as a police officer. The record shows that due to his accident and resulting seizures, [REDACTED] relies on his wife for emotional support, care, and assistance. Considering these unique factors cumulatively, the AAO finds that remaining in the United States without his wife would result in extreme hardship to [REDACTED] taking this case beyond those hardships ordinarily associated with inadmissibility.

The AAO also finds that if [REDACTED] relocated to Mexico to be with his wife, he would experience extreme hardship. Relocating to Mexico would disrupt the continuity of his health care and the procedures his doctors have in place to monitor and treat his health problems. In addition, the record shows that [REDACTED] was born in the United States and has served as a police officer since April 2006. Letter from [REDACTED] dated December 6, 2010. Furthermore, according to the applicant, [REDACTED] and his children do not speak Spanish. [REDACTED] would need to adjust to a life in Mexico, a difficult situation made even more complicated given his serious medical problems and close family ties in the United States. In sum, the AAO finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. See *Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case are the applicant's willful misrepresentation of a material fact in order to procure an immigration benefit and the applicant's unlawful presence in the United States. The favorable and mitigating factors in the present case include: the applicant's significant family ties in the United States including her U.S. citizen husband and their four U.S. citizen children; the extreme hardship to the applicant's husband, their children, and her parents if she were refused admission; letters of support describing the applicant as caring, kind, and compassionate; and the applicant's lack of any arrests or criminal convictions.

The AAO finds that, although the applicant's immigration violations are serious and cannot be condoned, when 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.¹

ORDER: The appeal is sustained.

¹ The AAO notes that counsel filed a motion to reopen the applicant's Form I-485 at the same time as the appeal of the Form I-601. That motion remains adjudicated in the record. As the motion is within the jurisdiction of the San Francisco Field Office any further action on that application must come from the San Francisco office.