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

[redacted]

H4

DATE: MAY 31 2012 Office: PHOENIX, AZ File: [redacted]

IN RE: Applicant: [redacted]

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

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, Phoenix, Arizona. 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. She was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of her last departure. She is married to a United States citizen and has three children, two of whom are U.S. citizens and the third is a Lawful Permanent Resident. She 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).

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on January 29, 2010.

On appeal, counsel for the applicant states that the record contains sufficient evidence to establish extreme hardship to a qualifying relative and that the Field Office Director failed to give proper weight to the submitted evidence. *Form I-290B*, received on March 3, 2010.

The record includes, but is not limited to, counsel's brief; statements from the applicant's spouse, the applicant's spouse's children and his parents; statements of support from friends of the applicant and her spouse; medical records pertaining to the applicant's daughter and younger son; business records for the family business managed by the applicant's spouse; a copy of a Mexican adoption decree relating to the applicant's older son; copies of custody and child support agreements relating to the applicant's spouse's children from a prior relationship; country conditions information on Mexico; photographs of the applicant's daughter; and photographs of the applicant, her spouse and their children.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

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.
>
> . . . .

The record indicates that the applicant entered the United States as a nonimmigrant visitor on January 19, 2003, admitted until July 18, 2003, and that she remained in the United States until July 2007, when she traveled to Mexico. As the applicant resided unlawfully in the United States for over a year and is seeking admission within ten years of her last departure, she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

Beyond the decision of the Field Office Director, the AAO also finds the applicant to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), which states in pertinent part:

> (i) **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 chapter is inadmissible.

In his November 13, 2009 statement, the applicant's spouse reports that he brought the applicant to the United States to live on January 19, 2003, and that she entered the United States using her Border Crossing Card., i.e., a nonimmigrant visa The record also reflects that the applicant used her Border Crossing Card to return to her residence in the United States in July 2007, after a brief trip to Mexico. Accordingly, the record demonstrates that the applicant twice sought admission to the United States as a nonimmigrant when it was her intention to reside permanently in the United States. She is, therefore, inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, for having obtained a benefit under the Act through fraud or the willful misrepresentation of a material fact.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

> The Attorney General [now Secretary of Homeland Security] 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 . . . 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(i) of the Act provides for a waiver of section 212(a)(6)(C)(i) inadmissibility and states:

> 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.

Waivers of inadmissibility under section 212(a)(9)(B)(v) and section 212(i) of the Act are 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 his 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-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, the AAO considers the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

To establish that relocation would result in extreme hardship for the applicant's spouse, counsel states that the applicant's daughter has been diagnosed with medical conditions arising from her premature birth, that she has a compromised immune system and that she must remain in the United States where she can receive competent medical care. *Statement in Support of Appeal*, dated March 28, 2010. Counsel also contends that the applicant's spouse's family ties are to the United States, that he has few family ties in Mexico, and that he would be separated from his children from a prior relationship if he relocated to Mexico. She further states that the applicant's spouse runs his family's business, which would collapse without him and that his U.S. family members are dependent on the income generated by the business. Counsel also maintains that the applicant's spouse would not be able to honor his financial obligations to his children from a prior relationship if he relocated.

The applicant's spouse has submitted a November 13, 2009 statement detailing the medical conditions of his younger son and daughter, explaining that his daughter has been diagnosed with hydrophenosis and cellulitis dermatitis and that his son has been diagnosed with asthma. He also states that the applicant's former partner has made threats against him, the applicant and her son. He further indicates that he has legally adopted the applicant's older son in order to hide him from his biological father. The applicant's spouse also maintains that as a result of intense drug activity, Sinaloa is one of the most dangerous places in Mexico and the applicant's and his adopted son's lives would be at risk if they returned.

An examination of the record reveals substantial evidence demonstrating that the applicant's daughter has been diagnosed with hydrophenosis, a condition that, according to the submitted medical records, results in frequent urinary tract infections and must be monitored. *Statement from* [redacted], dated February 17, 2010; *Final Report, Discharge Summary*, by [redacted]. [redacted], dated July 30, 2008. A February 18, 2010 medical statement from [redacted] physician's notes, examination reports, a progress report and photographs corroborate that the

applicant's daughter suffers from cellulitis dermatitis and demonstrate the physical impact that the condition has had on her. With regard to the applicant's son, the record contains medical records, including copies of a prescription for an inhaler and background information on the medication, that substantiate that he has asthma. The record also documents that the applicant's spouse's employment provides healthcare coverage for his daughter's and son's medical treatment in the United States.

The record contains numerous news articles on drug-related violence in Mexico. These articles indicate that the State of Sinaloa, Mexico, where the applicant previously lived, where her parents continue to live and where her spouse was born is significantly affected by this violence. The AAO also notes that the U.S. Department of State has issued a travel warning for Mexico, last updated on February 8, 2012, that advises U.S. citizens against traveling to or in Sinaloa because of the significant increase in drug-related violence.

Having reviewed the evidence of record, the AAO has taken note of the applicant's children's health concerns; the impact that relocating two young children with medical conditions would have on the applicant's spouse; the applicant's spouse's lack of family ties to Mexico; his family ties to the United States, including his two children from a previous relationship who reside in the custody of their mother; his monthly child support payments for these children, which would be at least temporarily disrupted by his loss of employment upon relocation; his departure from his family's business; and the pervading drug-related violence in the State of Sinaloa. We find that when these specific hardship factors and the hardships normally created by relocation are considered in the aggregate, the applicant has established that relocation would result in extreme hardship for her spouse.

With regard to hardship upon separation, counsel asserts that the applicant's spouse would experience emotional hardship based on his concerns about the safety of the applicant and his adopted son if they returned to a country immersed in violence and to a location where they would be subject to harm from the applicant's former partner. *Statement in Support of Appeal*, dated March 28, 2010.

The applicant's spouse contends that without the applicant, he would be damaged emotionally and physically. He states that the State of Sinaloa is one of the most dangerous places in Mexico and that the applicant and his adopted son would also be at risk from his adopted son's biological father. The applicant's spouse further asserts that his daughter is chronically ill and that his son has asthma, and that it is the applicant who sees that both children receive the medical treatment they need. He states that he needs the applicant to care for the family's home and his children so that he can earn the family's living. *Statements of the Applicant's Spouse*, dated November 13, 2009 and undated.

As previously noted, the record establishes the medical conditions of the applicant's daughter and son. It also contains country conditions materials detailing the serious violence in Sinaloa, Mexico, where the applicant's family resides and, as previously noted, the high levels of drug-related violence in Sinaloa are specifically noted in the travel warning for Mexico that has been issued by the U.S. Department of State.

When the hardships of being a single parent for two young children, one of whom suffers from serious medical conditions requiring frequent treatment, and the legitimate concerns the applicant's spouse would have regarding the safety of his spouse and adopted son in Sinaloa are considered in the aggregate with the common hardships created by separation, the AAO concludes that the applicant's spouse would experience hardship rising to the level of extreme if the waiver application is denied and he remains in the United States.

As the applicant has established that a qualifying relative would experience extreme hardship upon relocation and separation, the AAO will now move to a consideration of whether the applicant warrants a waiver 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 AAO finds that the unfavorable factors in this case include the applicant's unlawful presence and her misrepresentation in using a Border Crossing Card to enter the United States when she was an intending immigrant. The favorable factors in this case include the applicant's U.S. citizen spouse and her three children, two of whom are U.S. citizens and the third is a Lawful Permanent Resident; the extreme hardship to her spouse if the waiver application is denied; the medical conditions of her youngest children, particularly that of her daughter; the absence of a criminal

record in the United States; and the numerous positive statements made regarding her character, including one from the President of her church.

Although the AAO finds the applicant's immigration violations to be serious, we conclude that the favorable factors in this case outweigh the negative factors. Therefore, favorable discretion will be exercised.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.