

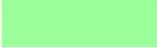
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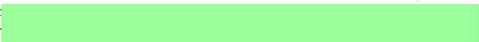


U.S. Citizenship
and Immigration
Services



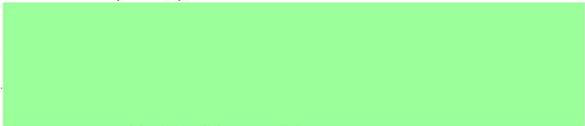
Date: **JAN 10 2013**

Office: MEXICO CITY (CIUDAD JUAREZ) FILE: 

IN RE: Applicant: 

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

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,

 Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Mexico City, Mexico. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the underlying application is approved.

The applicant is a native and citizen Mexico, who 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 having attempted to procure admission to the United States through fraud or misrepresentation. The applicant attempted to enter the United States in 1995 and again in 1996 using documentation that belonged to other persons. The applicant was also 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 more than one year and seeking readmission within 10 years of his last departure from the United States. The record indicates that the applicant entered the United States without inspection in 1996, and did not depart until March 2007, and thus the applicant was unlawfully present in the United States from April 1, 1997 until 2007,¹ a period of more than one year. The applicant was additionally found to be inadmissible under section 212(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iii), for having a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others (Alcohol abuse). The applicant does not contest these findings of inadmissibility, but rather seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v), 212(g) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(g) and 1182(i), in order to reside in the United States with his family.

The Acting District Director found that the applicant had not demonstrated that denial of the waiver application would result in extreme hardship to a qualifying relative as described in section 212(i) of the Act, and denied the application accordingly. *Decision of the Acting District Director*, dated June 9, 2008.

The AAO, reviewing the applicant's Form I-601 on appeal, found that the applicant established that his qualifying relative would suffer extreme hardship due to separation from the applicant, but that the applicant did not claim hardship to his spouse if she joined him in Mexico, thereby failing to establish the applicant's qualifying relative would suffer extreme hardship due to relocation. The AAO thus concurred with the Acting District Director that extreme hardship to a qualifying relative had not been established, and the appeal was dismissed. *Decision of the AAO*, dated February 2, 2011.

On motion to reopen, counsel for the applicant submits new evidence in the form of documentation showing that the applicant's elder child is experiencing difficulties at school, a letter regarding the psychological hardships that the applicant's spouse and children are experiencing, and letters from the applicant's mother and the brother of the applicant's spouse.

¹ No period of unlawful presence prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, is counted when determining inadmissibility under section 212(a)(9)(B) of the Act.

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, in pertinent part:

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....

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

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)(1)(A) of the Act provides, in pertinent part:

- (A) In general.-Any alien-

.....

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)-

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict, is inadmissible.

(B) Waiver authorized.-For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

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

(g) The Attorney General may waive the application of-

.....

(3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

A waiver of inadmissibility under section 212(i) of the Act and under section 212(a)(9)(B)(v) 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. Under these two provisions of the law, children are not deemed to be "qualifying relatives." However, although children are not qualifying relatives under the statute, USCIS does consider that a child's hardship can be a factor in the determination whether a qualifying relative experiences extreme hardship. 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 v. I.N.S.*, 138 F.3d 1292, 1293 (9th Cir.

1993), (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 AAO, in its previous decision dated February 2, 2011, found that the applicant's spouse was experiencing financial stress that was determined to be beyond what would normally be expected as a result of separation. The AAO further found that the applicant's spouse was left alone to care for her children, both of whom, according to a psychological assessment, exhibited symptoms of depression, and one whom was having developmental learning difficulties, and thus the emotional impact on the applicant's spouse resulted in emotional hardship beyond what would normally be expected as a result of separation. The AAO thus determined that the applicant has established that his spouse would suffer extreme emotional and financial hardship in the United States as a result of his inadmissibility.

However, in the previous decision of February 2, 2011, the AAO found that the applicant made no claim of hardship to his spouse if she joined him in Mexico.

In the motion, counsel contends that the situation with the children of the applicant and the applicant's spouse has become more acute and critical. Counsel states that the applicant's older child is repeating the 10th grade for the third time, and is in jeopardy of being expelled. The record includes an academic and attendance agreement from a high school which indicates that the applicant's son has a record of unexcused absences from school and that past scholastic records indicate little or no interest in school.

Counsel further contends that the applicant's younger child is also experiencing emotional difficulties. The record includes a statement from a therapist at [REDACTED] Inc., in Hyattsville, Maryland, which states that both children exhibited symptoms of depression, and that they are seriously impacted by the applicant's relocation to Mexico.

A letter from the director of [REDACTED] in College Park, Maryland, confirms that the two children of the applicant and his spouse are experiencing psychological hardship related to their separation from the applicant. The letter states that the extended separation from the applicant has caused significant emotional distress to the applicant's spouse and children, which would be exacerbated if the applicant's spouse returned to Mexico with or without her children.

In addition, the record includes a statement from the applicant's mother, indicating that she and the applicant live on a ranch in rural Mexico, and that there are no schools nearby and almost no means of transportation for the applicant's children to continue their education. The record also contains a statement from the brother of the applicant's spouse, stating that he would be unable to support the applicant's children if the applicant's spouse were to relocate to Mexico to be with the applicant.

Based on the evidence on the record, the applicant has established that his spouse would suffer hardship beyond the common results of removal if she were to relocate to Mexico to reside with the applicant.

The applicant also seeks a waiver under section 212(g)(3) of the Act for having a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others (alcohol abuse). Regulations at 8 C.F.R. § 212.7(b) govern aliens with certain mental conditions who are eligible for immigrant visas but require the approval of waivers of grounds of inadmissibility. The regulations require that the applicant submit the waiver application and a statement to the appropriate Service office indicating that arrangements have been made to provide the alien's complete medical history, including details of any hospitalization or institutional care or treatment for any physical or mental condition; the alien's current physical and mental condition, including prognosis and life expectancy; and a psychiatric examination. 8 C.F.R. § 212.7(b)(4). "For an alien with a past history of mental illness, the medical report shall also contain available information on which the U.S. Public Health Service can base a finding as to whether the alien has been free of such mental illness for a period of time sufficient in the light of such history to demonstrate recovery." *Id.* The medical report must then be forwarded to the U.S. Public Health Service for review. *Id.* These regulations further provide:

(ii) *Submission of statement.* Upon being notified that the medical report has been reviewed by the U.S. Public Health Service and determined to be acceptable, the alien or the alien's sponsoring family member shall submit a statement to the consular or Service office. The statement must be from a clinic, hospital, institution, specialized facility, or specialist in the United States approved by the U.S. Public Health Service. The alien or alien's sponsor may be referred to the mental retardation or mental health agency of the state of proposed residence for guidance in selecting a post-arrival medical examining authority who will complete the evaluation and provide an evaluation report to the Centers for Disease Control. . . .

The record contains documentation indicating that the applicant was arrested in March 2000 for driving under the influence and a psychological evaluation of the applicant indicating that he continued to drink alcohol and that he admitted to having driven under the influence of alcohol on several occasions. The report states that he should abstain from alcohol consumption and complete an Alcoholics Anonymous program. *Psychological Report from* [REDACTED] dated March 20, 2007. Further, the applicant has complied with the requirements of 8 C.F.R. § 212.7(b)(4) through the submission of a Statement in Support of Application for Waiver of Inadmissibility signed by a Public Health Service reviewing official indicating that the applicant will be evaluated by a physician within 30 days of his arrival in the United States, the physician will submit an initial report to the Centers for Disease Control and Prevention, and the applicant will be in outpatient or other status for appropriate clinical follow up and/or medical supervision.

Based on the forgoing, the AAO finds that the applicant has complied with the requirement for a waiver under section 212(g) of the Act for the Class A mental disorder of alcohol abuse. Further, as noted above, the applicant has shown that a qualifying relative would suffer extreme hardship if he is

denied admission to the United States. 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 and U.S. citizen children would face if the applicant were to reside in Mexico, regardless of whether they accompanied the applicant or remained in the United States; the fact that the applicant resided in the United States for more than 20 years; the passage of more than 10 years since the applicant's arrest for Driving Under the Influence on March 4, 2000; and letters of reference written on behalf of the applicant. The unfavorable factor in this matter is the applicant's attempts to procure admission to the United States through fraud or misrepresentation, and unlawful presence 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

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in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.²

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, the motion to reopen will be granted and the application approved.

ORDER: The motion to reopen is granted and the underlying application is approved.

² The AAO notes that the applicant was ordered excluded on December 22, 1995, and departed the United States in March 2007, and thus is required to apply for permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii). The AAO notes that the applicant filed a Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212), which was conditionally approved on January 14, 2003.