

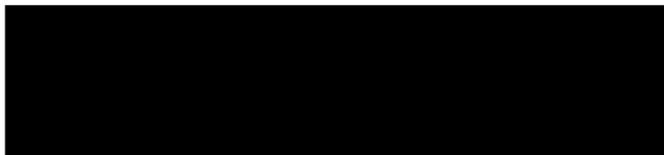
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FILE: [REDACTED]

Office: PHOENIX, AZ

Date:

AUG 06 2007

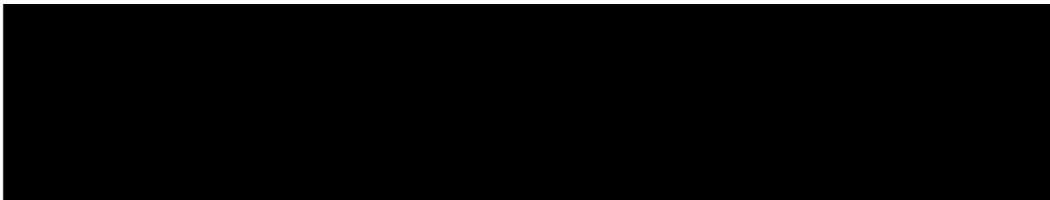
IN RE: Applicant:



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:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Phoenix, AZ and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The waiver application will be approved.

The applicant is a native and citizen of 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 procured entry into the United States by fraud or willful misrepresentation. The record indicates that in August 1987, the applicant made a false claim to U.S. citizenship in order to gain entry in the United States. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his U.S. citizen spouse and two children.

The acting district director concluded that the applicant had failed to establish that extreme hardship would be imposed on any qualifying relatives and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility.

In support of this appeal, counsel submits a letter from the applicant's spouse, a U.S. citizen, detailing the medical disability suffered by their youngest child, a U.S. citizen; photographs of the applicant's youngest child's medical condition; photographs of the applicant and his children; a letter from a medical doctor and clinical notes, dated September 7, 2005, with respect to the youngest child's medical condition and treatment; and copies of the applicant's youngest child's U.S. birth certificate and social security card. The entire record was reviewed and considered in rendering this decision.

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

- (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.

Based on the evidence in the record, the applicant is clearly inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

Section 212(i) of the Act provides 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 contains several references to the hardship that the applicant's children would suffer if the applicant were to depart the United States. However, section 212(i) of the Act provides that a waiver under section 212(a)(6)(C)(i) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Unlike waivers under section 212(h) of the Act, section 212(i) does not mention extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant himself a permissible consideration under the statute. In the present case, the applicant's spouse is the only qualifying relative, and hardship to the applicant or his children cannot be considered, except as it may affect the applicant's spouse.

Thus, the first issue to be addressed is whether the applicant's return to Mexico would impose extreme hardship on a qualifying family member. If extreme hardship is established, the AAO will then make an assessment as to whether it should exercise discretion in granting the waiver.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. 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.

The applicant's youngest child, born in Phoenix, Arizona on March 24, 2005, was born with a congenital birth defect known as bilateral clubfoot. As the applicant's spouse explains,

...Bilateral Clubfoot is when the foot or (feet) are turned to the side and appear that the top of the foot is where the bottom should be. The involved foot or (feet), calf and legs are smaller and shorter than that of a typical foot. It is usually discovered at birth. If left untreated, the deformity does not go away. It gets worse over time, with secondary bony changes developing over years. An uncorrected clubfoot in the older child or adult is very unsightly, and worse, very crippling. The patient walks on the outside of his foot, which is not meant for weight bearing. The skin breaks down, and develops chronic ulceration and infection.

...We discovered the deformation at birth and [redacted] [the applicant's child] was immediately treated by a local pediatric orthopaedic physician and placed in long-legged casts at 23 hours of birth. The orthopaedist continued treating [redacted] with an additional 7 casts and heel-cord tenotomy (cutting of the Achilles tendon at 2 months of age). After all of the casting and surgery of his Achilles tendons, [redacted] feet were not fully corrected...The next alternative was surgery or restarting the casting process. My husband [the applicant] and I began researching treatment of clubfoot deformity without the possibility of surgery and found a world renowned expert in Iowa, [redacted] who was known to achieve full correction of clubfoot without surgery.

...I [the applicant's spouse] flew to Iowa with our son...on August 26, 2005 to meet him [REDACTED]. [REDACTED] discovered that [REDACTED]'s left foot was not fully corrected and recast both our son's feet at the age of 5 months. After 2 ½ weeks in the plaster casts, [REDACTED] had achieved positive results and the left foot was corrected...Our son will continue to wear a brace called a foot abduction brace that will hold his feet at a 70-degree angle to prevent the feet from returning to an inward position. [REDACTED] is currently wearing the brace 23 hours a day for 3 months.

Because we had to pay out of pocket to see [REDACTED] we can no longer afford to see him. We have now located a [REDACTED] trained and certified Orthopaedic physician located in Tucson, Arizona. [REDACTED] sees his specialist every 8 weeks to check for relapses and stiffness of the feet. Eventually Diego will be placed on a reduced time brace schedule at 18 hours a day up until the age of 4 years.

If his deformity relapses in spite of proper brace wear an operation may be needed when [REDACTED] is over two years of age. The operation consists in transferring the tendons and ligaments in his feet for him to be able to walk without a gait and pain free.

[REDACTED] requires special care and I have left my profession as an Educator to care for our son at home. His brace wear cannot be compromised otherwise his feet will relapse and the painful process of casting, stretching and manipulations will have to be repeated with the possibility of surgery.

Our son will have to see his orthopaedic specialist throughout his childhood and possibly into his teenage years...There are but one Ponseti trained and certified Orthopaedic Specialists in Arizona that could provide [REDACTED] with the necessary and adequate care that he requires and deserves regarding his bilateral clubfoot deformity. We are on an extremely limited income and my husband's employment provides health insurance...*Letter from [REDACTED]*

The record indicates that the applicant's spouse earned a Bachelor of Arts in Education from Arizona State University on December 14, 2000 and was gainfully employed by Avondale Elementary School District as a teacher, earning \$31,983 per year, since September 29, 2003. *Letter from [REDACTED] Assistant Human Resource Manager, Avondale Elementary School District, dated January 20, 2004.* Due to her child's medical condition, the applicant's spouse had to leave her position as a teacher to take care of her child at home full-time, to ensure that her child's condition does not worsen. The loss of her teaching income and the costs of the child's medical care, as referenced in the applicant's spouse's statement, have created a financial hardship to the applicant's spouse and children. In addition, the applicant's spouse has suffered emotional hardship and stress directly bearing to her child's medical condition. She has had to leave her profession, and resume full-time child care duties for her disabled child.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

This matter arises in the Phoenix district office, which is within the jurisdiction of the Ninth Circuit Court of Appeals. That court has stated, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (BIA)) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted). Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case.

Based on the record, the AAO has determined that the applicant’s spouse would experience extreme hardship if she and the children remained in the United States while the applicant returned to Mexico. Due to the extraordinary demands placed upon the family by the youngest child’s medical disability, the applicant’s spouse would be required to find an alternate source of employment, as the applicant would no longer be working in the United States, providing financial support and health insurance for the family while the applicant’s spouse remained at home full-time to care for the disabled child. In addition, the applicant’s spouse would need to locate a childcare provider who could provide the constant monitoring and supervision the youngest child requires while the applicant’s spouse assists financially in supporting the family. The applicant’s spouse would have to assume the role of primary caregiver and breadwinner to two young children, one with a disability, without the complete emotional, physical, financial and psychological support of the applicant. Thus, the applicant’s spouse would face hardship beyond that normally expected of one facing the removal of a spouse.

The applicant’s spouse would also experience extreme hardship if she accompanied the applicant and the children to Mexico. As documented in the applicant’s spouse’s statement, “... [redacted] would not be able to receive the medical attention that he deserves in Mexico because treatment for clubfoot is not comparable to the treatment he is currently receiving in the United States. We would not be able to financially afford healthcare insurance for him or pay physicians here in the United States for his treatment. There is no medical funding in Mexico and if you do not have the money upfront no care is provided. If [redacted] does not receive the care that he deserves he will never walk, run or play like a typical child should.” *Supra* at 2.

Given the pay disparity that exists between the United States and Mexico, it would be extremely difficult for the applicant’s spouse and/or the applicant to locate sufficient employment that would permit the family to obtain the medical services and care needed by their youngest child. Limitations on the applicant’s spouse’s youngest child’s future development based on a move to Mexico would directly affect the applicant’s spouse in that the child may be able to establish a certain degree of independence in the future if he is able to continue progressing. In the alternative, he may become utterly dependent upon the applicant and his spouse as an adult if positive progression ceases, which would likely occur if the entire family relocated to Mexico.

Moreover, the record indicates that the applicant's spouse was born and raised in the United States. Her parents, siblings, nieces and nephews live in Arizona. Relocating to Mexico would require the applicant's spouse to leave her family and all that is familiar to her. Thus, the applicant's spouse would face hardship beyond that normally expected of one facing the removal of a spouse.

Accordingly, 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 he may by regulations prescribe.

The favorable factors in this matter are the extreme hardship the applicant's spouse would face if the applicant were to return to Mexico, regardless of whether she accompanied the applicant or remained in the United States, the U.S. citizenship status of the two children, the applicant spouse's extended family's residence in the Phoenix, Arizona metropolitan area, the applicant's apparent lack of a criminal record, property ownership, the applicant's history of gainful employment, the number of letters of support provided on behalf of the applicant, payment of taxes and the passage of twenty years since the applicant's immigration violation. The unfavorable factors in this matter are the applicant's willful misrepresentation to an official of the United States Government in seeking to obtain admission to the United States, and periods of unauthorized presence.

While the AAO does not condone the applicant's actions, the AAO finds that the hardship imposed on the applicant's spouse as a result of his inadmissibility outweighs the unfavorable factors in this application. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i), 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 application approved.

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