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U.S. Citizenship
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MAR 16 2007

FILE: [REDACTED] Office: Chicago, IL

Date:

IN RE: [REDACTED]

PETITION: 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 PETITIONER:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Chicago, Illinois, and 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)(6)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(ii), for falsely claiming United States citizenship so as to procure admission to the United States. The applicant is the spouse of a naturalized citizen. She seeks a waiver of inadmissibility so as to remain in the United States with her husband.

The district director stated that immigration records reflect that on February 13, 1986, the applicant entered the United States by claiming to be a citizen of the United States. On the basis of the false claim of U.S. citizenship, the director found the applicant inadmissible under section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii), and he denied the applicant's waiver of inadmissibility, which is provided under section 212(a)(6)(C)(iii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(iii). *Decision of the District Director*, dated April 22, 2005.

On appeal, counsel states that the applicant concedes that she claimed to be a U.S. citizen in an attempt to enter the United States. However, counsel states that the director failed to properly consider the impact that denying the waiver would have on the applicant's husband and his children; or the issues of separation, finances, the health of the applicant's husband, the possibility of a permanent separation of the applicant and her husband, and the education of the children. Counsel asserts that, considering all of the factors cumulatively, the applicant's husband would suffer extreme hardship if the applicant's waiver is not granted; and he further states that the exercise of discretion in favor of the applicant is warranted. *Counsel's Brief in Support of the Appeal*.

Counsel describes the facts in the case as follows. The applicant and her husband have three children, two of whom were born in the United States. Their children have been educated in the United States, beginning with kindergarten. Their eldest son, who has a pending application for lawful permanent residency, graduated from high school and is studying to be an electronic systems technician; the eldest daughter, aged 17, completed the 10th grade, is an "A" student, and is very active in school; and the youngest daughter was born in 1993 (aged 13). The applicant's husband is the primary breadwinner of the family. The applicant works to help meet expenses, due to the husband's temporary disability from back surgery in July 2001. After the surgery the applicant's husband had difficulty walking for three months and was not able to work for six months; during that period, the applicant was depended on by her husband and children. The applicant's husband is unable to perform the kind of work he previously engaged in, which had caused his back injury. The new job of the applicant's husband pays \$12.60 per hour, whereas his prior job paid \$15.00 per hour. The applicant's husband continues to require medical care as he feels back pain; he is considering another surgery to "fuse" his back. The applicant and her husband are practicing Catholics and do not believe in divorce. The family ties of the applicant's husband are in the United States: his two brothers are U.S. citizens and live in the United States; his sister lives in Chicago; and his father is a lawful permanent resident residing in the United States. The applicant's husband has lived here for many years and his closest ties are in this country. The applicant's husband has suffered extreme anxiety from the uncertainty of his wife's fate. The applicant and her husband support each other and the applicant is relied upon to care for the children and

home. If the applicant is forced to leave the country and her husband stays here, he would be forced to separate from his wife, who he has loved for 23 years. The applicant and her husband are from poor families. In 2004, the gross national income per capita in Mexico was \$6,230; in the United States, it was \$37,610. The applicant's husband will remain working in the United States to support his family. The applicant does not work because she does not have employment authorization. If the applicant leaves the country, her husband would rely on his children to help with household tasks. With an income of a little less than \$20,000 in 2004, it would be difficult for the applicant's husband to maintain the home, care for the children, and help his wife in Mexico. With all of these expenses, the applicant's husband would lose the family home and not be able to travel with his children on a regular basis to visit his wife. If he were to join his wife in Mexico, the applicant's husband, who is 45 years old, would not find a well-paying job as a laborer. The applicant's husband realizes that he could not provide his children with the kind of education they will need to live in the United States. The school instruction of the applicant's children is in the English language. *Counsel's Brief in Support of the Appeal.*

Counsel states that the decision in *Matter of Ngai*, 19 I&N Dec. 245 (Commissioner 1984), is instructive here as the case involves extreme hardship under section 212(i) of the Act. Counsel states that in *Matter of Ngai* the applicant's allegation of extreme financial hardship was refuted by her employment in Hong Kong, which made her self-supporting. Counsel states that the applicant in the case was not able to prove that separation would cause extreme hardship as there was a 28-year voluntary separation between the applicant and her husband. Counsel further states that in *Matter of Ngai* the allegations regarding medical conditions of the son and husband were found to be untrue. Counsel asserts that the facts in the instant case are distinguishable from those in *Matter of Ngai*. Counsel states that in the instant petition the applicant and her husband have been married for nearly 23 years; they have lived together as husband and wife since 1982. Their separation would not be voluntary, and due to their religious beliefs, divorce or ending their marriage would not be acceptable or an option, counsel contends. *Counsel's Brief in Support of the Appeal*

Counsel states that the facts in *Perez v. INS*, 96 F. 3d 390 (9th Cir. 1996), *Matter of Chumpitazi*, 16 I&N Dec. 629 (BIA 1978), and *Jong Ha Wang*, 450 US 144 (1981), the cases cited by the director in his decision, differ from those presented here. According to counsel, *Matter of Chumpitazi* analyzes hardship endured by the applicant, and the hardship is that of minor economic hardship and the difficulty of readjusting of the applicant to his country of origin. Counsel notes that in *Perez* the Ninth Circuit Court of Appeals states that the claim of hardship due to family separation as a result of parental choice needs to be considered in determining suspension of deportation. According to counsel, the facts in the instant case differ from those in *Perez*: the applicant and her husband are not in deportation or removal proceedings; the applicant's husband and two of her children are U.S. citizens; the applicant and her husband have not alleged that they will leave the United States and that they will leave their children here. Counsel states that the applicant's husband feels that he must remain in the United States so as to work and support his family, and maintain medical insurance because he could not get the medical care he needs in Mexico. Counsel asserts that the cases cited by the director do not involve the forced separation of spouses, as is the case here. *Counsel's Brief in Support of the Appeal.* Counsel also distinguishes the facts in the instant case from those in *Jong Ha Wang*, 450 US 144 (1981). *Form I-290B.* According to counsel, the applicant's husband and children are not inadmissible or removable, and their hardships are more than economic or psychological. Counsel asserts that the director did not apply the standard set forth in *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) correctly. *Id.*

The record of proceeding before the AAO contains, in addition to other documentation: (1) the Form I-485 and supporting documentation; the Form I-601 and supporting materials; (2) the request for evidence; (3) the director's decision on the application for waiver of grounds of inadmissibility; (4) the decision on the application for adjustment of status; and (5) the Form I-290B, the appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The director found the applicant inadmissible under section 212(a)(6)(C)(ii) of the Act based on her falsely claiming citizenship before an immigration inspector in order to gain admission into the United States.

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 chapter is inadmissible.

(ii) Falsely claiming citizenship

(I) In general

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter . . . is inadmissible.

....

(iii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (i) of this section.

Section 212(i) of the Act provides:

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) of this section 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 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 AAO notes that aliens making false claims to U.S. citizenship on or after September 30, 1996 are ineligible to apply for a Form I-601 waiver. *See* Sections 212(a)(6)(C)(ii) and (iii) of the Act. Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 afford aliens in the applicant's position, those making false claims to U.S. citizenship prior to September 30, 1996, the eligibility to apply for a waiver.

In considering a case where a false claim to U.S. citizenship has been made, Service [CIS] officers should review the information on the alien to determine whether the false claim to U.S. citizenship was made before, on, or after September 30, 1996. If the false claim was made before the enactment of IIRIRA, Service [CIS] officers should then determine whether (1) the false claim was made to procure an immigration benefit under the Act; and (2) whether such claim was made before a U.S. Government official. If these two additional requirements are met, the alien should be inadmissible under section 212(a)(6)(C)(i) of the Act and advised of the waiver requirements under section 212(i) of the Act.

Memorandum by Joseph R. Greene, Acting Associate Commissioner, Office of Programs, Immigration and Naturalization Service, dated April 8, 1998 at 3. The decision of the acting district director therefore erred in finding the applicant ineligible for a waiver pursuant to section 212(i) of the Act.

A waiver of inadmissibility under section 212(i) of the Act is dependent upon showing that the bar to admission imposes an extreme hardship on a qualifying relative, which is the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or to his or her children is not a consideration under the statute; it will be considered here only to the extent that it results in hardship to a qualifying relative in the application. The applicant's naturalized spouse is the only qualifying relative. If extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The evidence in the record relating to the hardship of family separation if the applicant leaves the country includes the applicant's affidavit; her husband's affidavit; letters from their children, friends, relatives, and school personnel; wage statements; photographs; school records; and other materials.

In her affidavit, the applicant states that she has been living in the United States since 1986 and that her three children have received their education in the English language here. Her eldest daughter is in high school, her youngest daughter is in middle school, and her son is studying to be an electronic systems technician. She explains that her husband had been employed by Tinston Company as a punch press operator and in dye set-up until he had surgery on his back for a herniated disc in 2001. She states that her husband is often in pain and that he cannot do the heavy work that he previously performed. She indicates that her husband is paid less than before, earning \$12.60 instead of \$15.00, and that he takes pain medication for his back. She states that she is afraid that he may have the same problem. The applicant states that she needs to work and care for her husband if he undergoes surgery, which previously rendered him unable to work for six months and unable to walk for three months. She states that her husband would not have proper care in Mexico and could not afford medication there. *Affidavit of Applicant*, dated June 3, 2005.

In his affidavit, the applicant's husband states that he is very close to his family. He states that his mother is deceased and that his father, a lawful permanent resident, and his two U.S. citizen brothers and their families, live in Chicago. He states that he has been married 23 years to the applicant and that they have three children that were born in 1985, 1989, and 1993. He states that his children have been educated in the United States. He describes his employment history and back problem. The applicant's husband states that he cannot imagine his family apart, and that he does not know how he would support them in Mexico, especially because he cannot do heavy labor. He indicates that he studied eight years in Mexico, and does not have job skills other than those of a laborer. He states that he does not think that he could afford the medical care for his back in Mexico, and that he has health insurance in the United States. He states that his children do not know any life other than the one they have in the United States, that their instruction in school has been in the English language, and that they would suffer terribly in Mexico. He indicates that he would emotionally suffer from not being able to provide a home or education for them in Mexico. He states that he is a practicing Catholic and does not believe in divorce or separation and that he cannot imagine life without his wife. *Affidavit of Applicant's Husband*, dated June 3, 2005.

In her letter, the applicant's eldest daughter explains that her mother helps her with homework, activities, and chores, and helps her father with his back aches. She states that her mother contributes financially to their household income. *Notorized Letter from Applicant's Daughter*.

The letter of the applicant's youngest daughter states that her mother takes care of her and her father (who gets sick all the time), sister, and brother. She states that if she attends a school in Mexico she would not know anything in the Spanish language. *Notorized Letter from Applicant's Daughter*.

The record contains a letter indicating that the applicant worked for Custom Plastics, Inc. from January 2003 to the present. *Letter from Ana Ayala, Human Resources Assistant*, dated February 26, 2003.

The letter in the record from the Guidance Counsel, M.A., at Proviso East High School, Maywood, Illinois, indicates that students "who came from a two parent home were more likely to be successful in a school setting." The guidance counsel states that "[b]reaking a family up at this point in a child's development would cripple and stagnate [the applicant's eldest daughter's] development." *Letter from the Guidance Counsel, M.A., at Proviso East High School, Maywood, Illinois*, dated May 10, 2005.

The record contains a letter from the principal of the Board of Education School District 89, which states that the applicant is a supportive parent who attends open house events, report card pick-ups and parent conferences for her youngest daughter. *Letter from principal*, dated June 8, 2005.

The record contains a neurosurgical follow-up report, dated December 31, 2002, regarding the applicant's husband. This report states that the applicant's husband:

[C]ontinues to have predominately midline low back pain. He has been laid-off of his job since January of this year. He is now tied up in issues related to the Workman's Compensation claim and trying to make decisions about future direction.

The doctor indicates that there is “significant degenerative disk disease at the L4-L5 level” and that his may be the cause of the back pain. The doctor states that he applicant’s husband resisted the idea of further evaluation and possible fusion and persists in medical management, which has not provided sustained relief and puts him at a disadvantage when trying to find new work. The medical doctor stated that applicant’s husband is not in “acute distress.” The doctor states that a fusion may provide excellent relief, and that the pain is a subjective situation. *Neurosurgical Follow-Up*, dated December 31, 2002.

The evidence in the record, the U.S. Department of State report on Mexico and the World Bank information, indicate the economic, political, and social conditions in Mexico.

The concept of extreme hardship to a qualifying relative “is not . . . fixed and inflexible,” and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez* at 565. In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

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).

The AAO acknowledges that it has been held that “the family and relationship between family members is of paramount importance” and that “separation of family members from one another is a serious matter requiring close and careful scrutiny. *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987) citing *Bastidas v. INS*, 609 F.2d 101 (3rd Cir. 1979).

An analysis of the factors in *Matter of Cervantes-Gonzalez*, which counsel asserts the director did not correctly apply, is appropriate here. It is noted the AAO will analyze extreme hardship in the event that the qualifying relative accompanies the applicant overseas or, in the alternative, that he or she remains in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

In rendering this decision, the AAO will carefully consider and give proper weight to the evidence in the record.

With regard to family separation, counsel states that the facts in *Matter of Nagi*, which differ from those presented here, are instructive here, as the case involves extreme hardship under section 212(i) of the Act. The AAO agrees with counsel in that the facts in *Nagi* differ from those presented here. However, the factual differences of the cases do not necessarily lead to the conclusion that the applicant has, based on these differences, established extreme hardship here. The applicant is required to produce sufficient evidence to support her claim of extreme hardship to a qualifying relative under section 212(i) of the Act.

Counsel states that the facts in *Perez*, *Matter of Chumpitazi*, and *Jong Ha Wang*, the cases dealing with extreme hardship that are cited by the director in his decision, differ from those in the instant case. Counsel states that in *Perez* the applicants were under deportation proceedings; the applicant and her husband (a naturalized citizen) in the instant case are not. Counsel states that the applicant and her husband have not alleged that they will leave their children in the United States; the applicants in *Perez* made this allegation.

The AAO finds that although the facts in *Perez*, *Matter of Chumpitazi*, and *Jong Ha Wang* differ from those in the instant case, the legal principles established in those cases are influential here. For instance, in *Perez*, the Court of Appeals defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. *Perez* at 392. It also states that “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” (citing *Hassan* at 927 F.2d at 468). Counsel points out that in *Perez* the Court of Appeals indicates that the hardship to a child upon separation from a deported alien parent needs to be considered in determination whether extreme hardship has been established. However, as stated earlier in this decision, the hardship imposed on a child is not a consideration under section 212(i) of the Act and will be considered here only to the extent that it causes hardship to the applicant’s husband. In *Matter of Chumpitazi*, the BIA indicated that extreme hardship “is not a definable term of fixed and inflexible content or meaning. It necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Chumpitazi* at 635 (citing *Matter of Hwang*, 10 I. & N. Dec. 468 (BIA 1964)). And, in *Jong Ha Wang* the U.S. Supreme Court stated that the “Attorney General and his delegates have the authority to construe “extreme hardship” narrowly should they deem it wise to do so.” *Jong Ha Wang* at 145. Thus, the AAO will consider in rendering its decision the legal principles in *Perez*, *Matter of Chumpitazi*, and *Jong Ha Wang*.

U.S. courts have held that the consequences of deportation imposed on citizen children of school age must be considered in determining extreme hardship. For example, *In Re. Kao-Lin*, 23 I. & N. Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent’s 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan; she had lived her entire life in the United States and was completely integrated into an American lifestyle; and uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the Circuit Court indicated that “imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language,” must be considered in determining whether “extreme hardship” has been shown. And, in *Prapavat vs. I.N.S.*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Circuit Court found the BIA abused its discretion in concluding that extreme hardship had not been shown in light of fact that aliens’ five-year-old citizen daughter, who was attending school, would be uprooted from the country where she lived her entire life and taken to land whose language and culture were foreign to her.

The applicant's husband asserts that if he joined the applicant in Mexico, he would suffer emotional hardship knowing that it would be difficult for his children to relocate to Mexico. He states that they do not know any life other than their life in the United States, their instruction at school is in the English language, and they would suffer terribly in Mexico. It is noted that the applicant's youngest daughter expressed that if she attends a school in Mexico she would not know anything in the Spanish language. The applicant's husband indicates that he studied eight years in Mexico, and does not have any job skills other than those of a laborer. He states that he does not think he could afford medical care for his back in Mexico, whereas he has health insurance in the United States. It is noted that the neurosurgical follow-up report, although outdated, indicates that the applicant has "significant degenerative disk disease at the L4-L5 level" and that the applicant's husband may need to undergo a fusion to provide sustained relief from pain. The report also indicates that his back problems have put him at a disadvantage when trying to find new work (he had to leave his job as it was the cause of his back problems) and that the applicant's husband might require surgery. The applicant's husband states that he is very close to his father and two brothers who live in Chicago and that he would endure hardship if he were to separate from them. (It is noted that the transcripts of the eldest daughter reflect that she has taken Spanish 2 in the 10th grade.) Although hardship to the applicant's children is not a consideration under section 212(i), the hardship endured by the applicant's husband, as a result of his concern about the well-being of his children, is a relevant consideration.

Given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the AAO finds that the hardship to the respondent, particularly in view of his 20 years of residence in the United States, his health problem and its impact on his employability, the adverse effect of moving from this country on his United States citizen daughters, and especially on the 13-year-old daughter, and the separation of the applicant and his father and siblings, rises to the level of "extreme" hardship if he joins the applicant in Mexico.

Furthermore, the AAO finds that the totality of the record is sufficient to establish that the applicant's husband would suffer extreme hardship if he were to remain in the United States without his wife. Although he has gainful employment, the employability of the applicant's husband has been limited due to significant back problems. In light of his neurosurgical follow-up report, he will most likely need to undergo another back surgery because of "significant degenerative disk disease at the L4-L5 level," which is the cause of back pain. He will need his wife to care for him following the surgery; his prior surgery left him unable to walk for three months and unable to work for six months. The applicant would suffer extreme emotional hardship if separated from his wife, in view of his 23-year marriage; and he would undoubtedly endure extreme emotional hardship if his children remained in the United States and as a result, separate from their mother. The AAO finds that the evidence, weighed collectively, establishes that the applicant's husband would endure extreme hardship in the event that he remains in the United States.

The grant or denial of the above waiver does depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's spouse, her U.S. citizen children, close ties to her community, and the passage of approximately 20 years since the applicant's

immigration violation. The unfavorable factors in this matter are the applicant's entry into the United States by claiming to be a citizen of the United States, and periods of unauthorized presence. The AAO notes that the applicant does not appear to have a criminal record.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's flagrant breach of the immigration laws of the United States, the severity of the applicant's false claim to U.S. citizenship is at least partially diminished by the fact that 20 years have elapsed since the applicant's immigration violation. The AAO finds that the hardship imposed on the applicant's spouse as a result of her inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

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. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

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