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U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



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FILE:



Office: SACRAMENTO, CA

Date:

AUG 07 2008

IN RE:



APPLICATION:

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

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.

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Sacramento, California. 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, a native and citizen of Mexico, was found inadmissible 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 attempting to procure admission into the United States by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i). In addition, the applicant was found inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The applicant, therefore, also 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 extreme hardship would be imposed on a qualifying relative, namely, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated August 23, 2007.

In support of the appeal, counsel submits a brief, dated December 19, 2007; a copy of a prescription issued to the applicant's spouse; evidence of the applicant's former immigration consultant's conviction; and copies of previously submitted documents. The entire record was reviewed and considered in rendering a decision on the applicant's appeal.

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:

- (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 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.

With respect to the finding that the applicant is inadmissible under section 212(a)(6)(C) of the Act because he previously attempted to procure lawful permanent resident status in the United States by filing a fraudulent Form I-130, Petition for Alien Relative, counsel contends that the applicant did not intend to defraud the government and that the applicant was unaware that the individual representing him in his previous application for permanent residence submitted fraudulent documentation on his behalf. Based on the lack of

willful intent, counsel asserts that the applicant is not inadmissible under section 212(a)(6)(C) of the Act. As stated by counsel,

. [redacted] [the applicant] put his whole trust in [redacted] [his former immigration representative].... His English was barely rudimentary at the time, and he was unable to read the form she asked him to sign, which turned out to be Form I-485, an application for adjustment of status via his purported wife, whom in fact he was not married to, had never met, and who was completely unknown to him then and now. He did not know [redacted] was filing for him on the basis of a supposed marriage. As the foundation for the I-130 visa petition and the adjustment application, [redacted] submitted a marriage certificate, which, according to the later conclusion of the general counsel to the City Clerk of New York who had supposedly issued it, was an obvious forgery....

Brief in Support of Appeal, dated December 19, 2007.

The Department of State Foreign Affairs Manual states, in pertinent part, that in order to find an alien ineligible under section 212(a)(6)(C)(i) of the Act, it must be determined that:

- (1) There has been a misrepresentation made by the applicant;
- (2) The misrepresentation was willfully made; and
- (3) The fact misrepresented is material; or
- (4) The alien uses fraud to procure a visa or other documentation to receive a benefit....

DOS Foreign Affairs Manual, § 40.63 N2.

The Department of State's Foreign Affairs Manual [FAM] further provides, in pertinent part:

Materiality does not rest on the simple moral premise that an alien has lied, but must be measured pragmatically in the context of the individual case as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa....

DOS Foreign Affairs Manual, § 40.63 N. 6.1. Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis to be persuasive.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). In this case, it has not been established, by a preponderance of the evidence, that the applicant did not attempt to obtain an immigration benefit by fraud and/or misrepresentation. As the record indicates, the applicant signed his name, under penalty of perjury, on immigration forms that contained his alleged wife's name, including the Form I-485 and the Form G-325A, Biographic Information, in September 1995. Even if

the applicant's understanding of the English language was rudimentary, as counsel contends, he presumably was able to read the name [REDACTED] on the forms and had the responsibility to ask his immigration consultant, or anyone with a basic understanding of the English language, what that name represented with respect to the form. Moreover, the applicant was almost twenty years old at the time the misrepresentations were made. He had family members residing in the United States, some even involved directly with the immigration process at that time who could have been asked about immigration processes. Based on the applicant's fraudulent misrepresentation, he was able to receive numerous benefits, including a driver's license, a social security card and employment authorization. It can not be concluded that the applicant did not willfully misrepresent a fact, as the fact which was misrepresented, namely, marriage to a U.S. citizen, was of direct and objective significance as it permitted the applicant to remain in the United States and obtain employment. As such, the AAO concurs with the field office director that the applicant is inadmissible under section 212(a)(6)(C) of the Act .

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

(B) 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.

In the present application, the record indicates that the applicant entered the United States pursuant to a valid visitor visa in March 1994. The applicant failed to depart from the United States upon the expiration of his authorized stay. On January 19, 1999, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On February 19, 1999, the applicant obtained advance parole authorization and subsequently departed and re-entered the country in parole status on March 30, 1999.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [now Secretary of Homeland Security (Secretary)] as a period of stay for purposes of determining

bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* The applicant accrued unlawful presence from April 1, 1997, the date of implementation of unlawful presence provisions under the Act, until January 19, 1999, the date of his proper filing of the Form I-485. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year. Pursuant to section 212(a)(9)(B)(i)(II), the applicant was barred from again seeking admission within ten years of the date of his departure.

Waivers of the bar to admission resulting from violations of sections 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Act are dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the alien himself experiences upon removal is irrelevant to section 212(a)(9)(B)(v) and 212(i) waiver proceedings; the only relevant hardship in the present case is that suffered by the applicant's U.S. citizen spouse. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez, 21 I&N Dec. 296 (BIA 1996).*

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (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 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.

This matter arises in the Sacramento 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.

The first step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse would encounter extreme hardship if she remained in the United States while the applicant resided abroad due to his inadmissibility. To support this assertion, the applicant's spouse states the following:

...I have been married to [REDACTED] (everyone calls him [REDACTED]) since August 19, 1998. Together we own [REDACTED] Mexican Restaurant...which we have been operating since we bought the business in July of 1999.

My husband and I have known each other since 1997. We are still very much in love, and we are each other's rock and support through all the ups and downs of life, and we have had a few. Currently we are submitting to a long and painful ordeal trying to have a child.... I am also under a doctor's treatment for depression, and taking prescribed medication (Lexapro) for this which has helped me a lot....

...If [redacted] were not permitted to remain in the U.S. with me, my whole life would be turned upside down. He is not only my husband; he is my business partner and my best friend. The hardship which I would suffer without him at my side is more extreme than I can imagine....

...we would have to try to sell the business because I can't run it on my own-- [redacted] is the cook.... If we sold the restaurant and I stayed behind here, I don't know what kind of job I could get with my education and training....

I graduated this month with my B.S. in Criminal Justice from CSU Sacramento. I am currently seeking employment....

Besides my total involvement with and dependence on my husband, I also rely a lot on my family.... We also spend as much time as we can with his family, who are LPRs and U.S. citizens....

...Our restaurant is very successful because of [redacted]'s knowledge, skills and hard work, and the energy and time we have both devoted to building it up. I sincerely do not know what would become of me if my husband is forced to go back to Mexico....

Declaration of [redacted] dated May 31, 2007.

In support of the applicant's spouse's statements, counsel offers an evaluation from [redacted] L.C.S.W., based on an interview he conducted with the applicant and his spouse. [redacted] states the following:

...the restaurant [owned by the applicant and his spouse] has won numerous awards and honors including Business of the Year in Woodland, the Best of Yolo County Award, and 28th of 101 restaurants in Solano and Yolo Counties. They [the applicant and his spouse] are considerable tax payers. In addition to federal income taxes, the business pays local business taxes, and state and local property taxes. The restaurant has 27 employees who are dependent on the continuation of operations. The restaurant is important to the local economy with a payroll of about \$224,000 per year. The restaurant has revenue in the millions, and is profitable and successful. The building, in which the restaurant is located, is a historical building, and part of the commitment is to maintain and improve that building consistent with the historical plan for the area....

██████████ [the applicant's spouse] states that it would be impossible for her to maintain the business without ██████████ [the applicant]. Many of the business relationships, the cooking, and the supervision of the staff are under ██████████ control. ██████████ states that if ██████████ were removed to Mexico it would place her in the position of forcing her to have to sell the business and the building. Due to the current state of the real estate market, a forced sale at this point would leave considerable money on the table. Both ██████████ and ██████████ point out that their 27 employees would be forced out of work, and ██████████ and ██████████ would no longer be in a position to help support their families and the local economy....

██████████ is going through fertility treatments, and has been working on becoming pregnant since 2003.... There are weekly meetings with the physician.

Recently, the couple has been considering adoption as an alternative. In order for this alternative to work out, naturally, the couple must be together....

██████████ has been suffering from major depressive disorder, and has been taking Paxil for several weeks. She states that she feels like all of her life she had to be the strong one and that she had to grow up really fast. She grew up in poverty and worries about losing the restaurant and her business and returning to poverty. She states that she feels like she has a monster on her neck. She feels as though she must constantly struggle from keeping it from consuming her....

...it is my opinion, that there are many extreme and irreparable hardships that would befall this family if ██████████ were to be removed....

Evaluation by ██████████ L.C.S.W., dated February 26, 2007. In addition to ██████████ evaluation, counsel has provided a copy of the applicant's spouse's current prescription for an anti-depressant to confirm the applicant's spouse's continued need for treatment.

Counsel has also provided extensive documentation about the applicant's and his spouse's flourishing business, a Mexican restaurant, which currently "...supports 24 employees, with an average monthly payroll of \$30,000, which forms the center of the couples' close relationship to their community...." *Supra* at 8. Additionally, copies of awards and letters of support from community members sent to the applicant and his spouse in regards to their business and their charitable contributions, have been included in the record.

The record establishes that the applicant plays an integral role in the thriving success of the business, which employs numerous individuals and is a fixed and respected entity in the community. Said business, operated by the applicant and his spouse, provides the sole basis for financial support to the applicant's spouse. Moreover, the record establishes that the applicant's spouse has a documented mental health condition that

requires medical follow-up and treatment, and is undergoing fertility treatment that requires the applicant's presence. Finally, it is evident that the applicant's spouse depends on the applicant for emotional and psychological support and encouragement. As such, the AAO concludes that were the applicant removed from the United States, the applicant's spouse would suffer extreme hardship. The applicant's spouse needs the emotional, psychological and financial support that the applicant provides; his absence would cause her extreme hardship.

Extreme hardship to a qualifying relative must also be established in the event that he or she relocates abroad to reside with the applicant based on the denial of the applicant's waiver request. As stated by counsel,

...Ms. [REDACTED] [the applicant's spouse] has no family, educational or economic ties to Mexico except as it is the home of her in-laws whom she has visited once since the marriage. She speaks passable Spanglish but is in no way situated to take up a productive life in a Spanish-speaking country. The Mexican economy is struggling, particularly in the area of Mr. [REDACTED] [the applicant's] hometown there, and an American woman with a U.S. criminal justice degree and only conversational Spanish would not find work in her field or likely any other....

...The couple owns a flourishing restaurant... The restaurant could conceivably be put up for sale but the couple's enormous investment, particularly in 'sweat equity,' probably could not be recovered, especially since any likely buyer would have difficulty obtaining financing in the current lending crisis. With the economic problems in Mexico and their lack of qualifications for whatever jobs might possibly be available, this couple faces almost certain destitution if this waiver is denied....

[REDACTED] in her declaration, and [REDACTED], M.S.W, in his professional evaluation, establishes beyond reasonable doubt that [REDACTED] chronic depression would be seriously complicated by a forced move to rural Mexico. **The fact that she and [REDACTED] would also have to give up their attempt to have a child through in vitro fertilization...would be an enormous blow....**

Supra at 8-9.

Based on the problematic country conditions in Mexico, the substandard health care, the lengthy disruption from being able to obtain employment in her area of expertise, namely, criminal justice, her long-term separation from her extended family, and the applicant's spouse's contention that the business created by the applicant and the applicant's spouse's will need to be sold at a loss due to the relocation abroad of its two owners, the AAO finds that the applicant's spouse would suffer extreme hardship were she to relocate to Mexico due to the applicant's inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Moreover, it has been established that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate to Mexico to reside with the applicant. 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 U.S. citizen 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 applicant's spouse's family, the medical and mental health conditions suffered by the applicant's spouse, the applicant's apparent lack of a criminal record, the applicant's siblings, one who is a U.S. citizen and one who is a lawful permanent resident, community ties, numerous letters of support provided by relatives, friends, colleagues and community members, payment of taxes, ownership of property, the employment of over twenty-six individuals and the extensive charitable contributions made by the applicant and his spouse, through their business, and the passage of over twelve years since the applicant's immigration violations that lead to his inadmissibility.

The unfavorable factors in this matter are the applicant's willful misrepresentation to an official of the United States Government in seeking to adjust status to permanent residency and his unauthorized presence and employment in the United States.

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 the applicant's 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) and section 212(a)(9)(B)(v), 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.