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U.S. Citizenship
and Immigration
Services

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FILE:



Office: SANTA ANA, CALIFORNIA

Date: DEC 04 2008

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act (INA), 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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Santa Ana, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a sixty-year old native and citizen of Mexico who was found to be inadmissible to the United States pursuant to 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 enter the United States by fraud or willful misrepresentation. The applicant is married to a naturalized 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 with her husband and children in the United States.

The district director found that the applicant failed to establish extreme hardship to her U.S. citizen spouse and denied the application accordingly. *Decision of the Field Office Director*, dated June 26, 2007.

On appeal, counsel contends that the applicant's husband would suffer extreme hardship if she were refused admission to the United States, and that the Service erred in failing to consider all of the hardship factors in their totality. *Brief in Support of Appeal*, dated August 16, 2007.

The record contains a copy of the marriage certificate of the applicant and her husband, [REDACTED] indicating that they were married on February 19, 1972; statements from [REDACTED] copies of financial documents for the couple; letters from the applicant's and her husband's employers; a letter from the applicant's church; a copy of [REDACTED]'s naturalization certificate; and medical documentation regarding [REDACTED]'s heart condition and cleft palate surgery. The record shows that on November 2, 2004, the California Service Center denied the applicant's Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212). *Decision of the Director*, dated November 2, 2004. The applicant filed an appeal of this denial, which was dismissed by the AAO on April 10, 2006. *Decision of the AAO*, dated April 10, 2006. The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(6)(C)(i) of the Act provides:

In general.—Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) provides:

(1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien.

The record shows that the applicant attempted to enter the United States using a Form I-586 Border Crossing Card that did not belong to her in 1998, was summarily removed under the expedited removal process in June 1998, and re-entered the United States without inspection. The applicant does not contest that she is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 182(a)(6)(C)(i), for having attempted to enter the United States by fraud or willful misrepresentation. *See Brief in Support of Appeal* at 2.

A section 212(i) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the alien herself, or her children, is not a permissible consideration under the statute. 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).

The AAO notes that, although unclear from the record, the applicant may also be inadmissible pursuant to section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for unlawful presence. The requirements for a waiver of inadmissibility for unlawful presence are the same as for misrepresentation, and therefore, the following analysis is applicable under either ground of inadmissibility. *See* section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) (stating that the Attorney General may waive inadmissibility for unlawful presence if the applicant shows extreme hardship to the citizen or lawfully resident spouse or parent in the exercise of discretion).

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. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervante-Gonzalez*, the Board of Immigration Appeals 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: 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). In addition, the Court of Appeals for the Ninth Circuit has held that “the most important single hardship factor may be the separation of the

alien from family living in the United States,” and, “[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) (“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); *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981) (economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme) (citations omitted). Because the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals, separation of family will be given the appropriate weight under Ninth Circuit law.

The record reflects that the applicant married her husband, [REDACTED], in 1972 in Mexico. [REDACTED] is sixty-two years old, has lived in the United States since December 1985, and became a naturalized U.S. citizen on June 16, 2006. See *Declaration of [REDACTED]*, dated February 26, 2007. The couple has six children between the ages of eight and thirty-five, all of whom grew up in the United States, and eight grandchildren. *Letter to Immigration Officer from [REDACTED]* dated November 17, 2004. All of the couple’s children and grandchildren live in the United States in close proximity to their house. *Id.* Mr. [REDACTED] described his wife as his “soul mate,” stated that they have never lived apart for any reason in their more than thirty years of marriage, and asserted that they would not be able to live apart. *Declaration of [REDACTED]*, *supra*; *Letter to Immigration Officer from [REDACTED]*, *supra*.

[REDACTED] had heart bypass surgery in 1990, takes several medications daily with the help of his wife, and has been admitted to the emergency room several times for chest pains. *Letter to Immigration Officer from [REDACTED]*, *supra*. [REDACTED] claims that if his wife returned to Mexico and he stayed in the United States without her, he would likely forget to take his medications. *Id.* In addition, [REDACTED] stated that they purchased a house in 1995 and that he would be unable to pay all of the bills if his wife returned to Mexico. *Id.* He has worked full-time as a sheet metal cutter for the same company since February 1989 and contends that if he moved to Mexico with his wife, it would be difficult, if not impossible, for him to find employment based on his age, health condition, and the high rate of unemployment. *Id.*; *Letter from SPE Incorporated*, dated April 26, 2001. [REDACTED] expressed his concern about the unavailability of affordable medical care in Mexico, particularly considering his heart condition and the medications he takes on a daily basis. *Letter to Immigration Officer from [REDACTED]* dated November 17, 2004.

Also in the record is documentation describing [REDACTED]’s “long history of heart problems” over the past fourteen years, his aortic valve replacement surgery, and several recent hospitalizations including on November 11, 2004. See *Letter from Talbert Medical Group*, dated November 17, 2004; *Letter from [REDACTED] Coast Memorial Hospital*, dated November 12, 2004. A letter from [REDACTED]’s physician stated that Mr. [REDACTED] was in “poor health” and that he needs his wife for assistance. There is also documentation in the record indicating [REDACTED] had a cleft lip repaired in the 1950s. Counsel contends this cleft lip repair resulted in a speech impediment in which [REDACTED]’s speech is severely slurred and difficult to understand. *Brief in Support of Appeal* at 6-7.

Upon a complete review of the record evidence, the AAO finds that the applicant has established that her husband will experience extreme hardship if she is prohibited from remaining in the United States.

In this case, the economic impact, combined with the personal, emotional, and physical hardship that would result from the denial of a waiver of inadmissibility constitute extreme hardship. The record shows that the applicant and her spouse have been married for over thirty-six years and have never lived apart from one another. It is evident from the record that [REDACTED] has chronic heart problems and that he relies on his wife to assist him with taking numerous, daily prescription medications. In addition, [REDACTED] has difficulties communicating due to his speech impairment and relies on his wife to assist with communication in all aspects of his life, including doctor's visits and hospitalizations. If [REDACTED] remained in the United States without his wife, not only would he no longer be able to rely on her income, but he would risk health problems if he forgot to take his medications. The applicant has not indicated whether or to what extent the couple's children might be able to financially assist [REDACTED], or whether they could assist him with his medical needs. However, it is evident that given the course of the couple's marriage, and given Mr. [REDACTED] advanced age, he is very dependent on the applicant.

Returning to Mexico poses numerous other hardships for the applicant's husband, including the need to secure new employment, separation from his children and grandchildren, adjustment back to life in Mexico after over 20 years in the United States, and the financial burden of moving and relinquishing his current employment. In addition, although [REDACTED]s health conditions are likely treatable in Mexico, with the loss of health insurance, it is probable that the couple would be unable to adequately pay for his health care needs and numerous medications, thus incurring significant medical expenses and posing a substantial health risk. Furthermore, given his health and age, it is unlikely [REDACTED] could find employment in Mexico. [REDACTED] has no family remaining in Mexico except for two estranged brothers with whom he has not communicated for several years. *Brief in Support of Appeal* at 4. In sum, the hardship [REDACTED] would experience if his wife were refused admission is extreme, going well beyond those hardships ordinarily associated with deportation. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case are the misrepresentation and unlawful presence for which the applicant seeks a waiver, as well as the applicant's initial entry without authorization and re-entry after removal. The favorable and mitigating factors in the present case include: the applicant has significant family ties to the United States; the extreme hardship to the applicant's husband if she were refused admission, particularly in light of the length of the couple's marriage, [REDACTED]s advanced age, and his poor health; the applicant's record of working and paying taxes in the United States; the letter of support from the applicant's church; and the fact that the applicant has not been convicted of any crimes.

The AAO finds that, although the immigration violations committed by the applicant were serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained. Having been

granted a waiver of inadmissibility, the applicant will need to file a new Application for Permission to Reapply for Admission Into the United States After Departure or Removal (Form I-212).

ORDER: The appeal is sustained.