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U.S. Citizenship  
and Immigration  
Services

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PUBLIC COPY

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: SEP 11 2008

RELATES)

IN RE:

[Redacted]

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:

[Redacted]

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 Director, California Service Center, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) and it 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, on June 28, 1996, attempted to enter the United States at the San Ysidro, California Port of Entry. The applicant presented a counterfeit Form I-551 Lawful Permanent Resident Alien Card. The applicant was found to be inadmissible pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an immigrant in possession of an valid entry document or travel document. On June 29, 1996, the applicant was placed into immigration proceedings. On July 3, 1996, the applicant was removed from the United States and returned to Mexico. On October 2, 1998, the applicant married his lawful permanent resident spouse, [REDACTED], in San Diego, California. On February 19, 1999, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on November 21, 2001. On April 10, 2002, the Applicant filed an Application to Extend/Change Nonimmigrant Status (Form I-539). On February 13, 2003, the applicant's Form I-539 was approved and he was granted V nonimmigrant status until February 13, 2005. On December 8, 2004, the applicant filed a second Form I-539 requesting extension of his V nonimmigrant status. On September 9, 2005, the applicant's Form I-539 was denied. On March 1, 2006, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. On March 1, 2006, the applicant also filed a Form I-601. On August 8, 2006, the applicant appeared at Citizenship and Immigration Services' (CIS) San Diego, California District Office. The applicant testified that he had reentered the United States without parole or admission in 1998 after having been removed. On June 23, 2006, the applicant filed an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). On May 8, 2007, the applicant's Form I-485, Form I-212 and Form I-601 were denied. The applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act and he 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 lawful permanent resident spouse and U.S. citizen children.

The director determined that the applicant had failed to establish that his spouse would suffer extreme hardship. The director also determined that no purpose would be served by granting the applicant's waiver because the applicant's Form I-212 had been denied for other reasons. *See Director's Denial of Form I-601*, dated May 8, 2007. In denying the applicant's Form I-212, the director determined that the applicant did not warrant a favorable exercise of discretion. The director also determined that the applicant was statutorily ineligible to apply for permission to reapply for admission to the United States because he is inadmissible pursuant to section 212(a)(9)(C) of the Act. The director denied the Form I-212 accordingly. *See Director's Denial of Form I-212* dated May 8, 2007.

While counsel states that the applicant is appealing of the denials of his Form I-485, Form I-212 and Form I-601, the record reflects that only one Form I-290B has been filed. However, an applicant must file one Form I-290B for each decision he or she wishes to appeal.<sup>1</sup> Since Chapter 43.2 of the *Adjudicator's Field Manual*

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<sup>1</sup> The AAO notes that counsel states he is filing an appeal of the denial of the applicant's Form I-485. The AAO does not have jurisdiction over family-based adjustment applications. A Form I-485 may not be appealed, but the applicant can file a Motion to Reopen with the office that rendered the denial.

dictates that a Form I-601 should be adjudicated prior to adjudication of a concurrently filed Form I-212, the AAO will consider the appeal before it as relating to the applicant's Form I-601.

On appeal, counsel contends that the director was incorrect in retroactively applying the current version of section 212(i) of the Act to the applicant. Counsel contends that the director failed to apply controlling case law in determining extreme hardship. Counsel contends that the director failed to give proper weight to the applicant's circumstances and favorable factors. *See Counsel's Brief*, dated July 17, 2007. In support of his contentions, counsel submits the referenced brief, letters from the applicant's family members, school records, and financial and medical documentation. The entire record was reviewed in rendering a decision in this case.

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.
  
  
- (iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

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.

The district director based the finding of inadmissibility under section 212(a)(6)(C)(i) of the Act on the applicant's use of a counterfeit I-551 resident alien card to attempt to enter the United States in 1996. Counsel does not contest the district director's determination that the applicant is inadmissible to the United States as an alien who has attempted to enter the United States through fraud or willful misrepresentation.

The AAO notes, however, that counsel asserts that the director impermissibly applied the ten-year bar in section 212(a)(9)(C)(i) of the Act to the applicant's 1996 deportation. Counsel contends that since the applicant's removal took place prior to the April 1, 1997, effective date of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996). Citing to *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271 (2001), counsel contends that the director's reliance on section 212(a)(9)(C)(i)

of the Act is constitutionally impermissible. While counsel's assertions relate to the director's denial of the applicant's Form I-212, which is not before the AAO on appeal, the AAO, nevertheless, observes that although the applicant was removed prior to April 1, 1997, the record is unclear as to when he returned to the United States. An applicant who was ordered removed prior to April 1, 1997, but who unlawfully reentered the United States after April 1, 1997, is inadmissible under section 212(a)(9)(C)(i) of the Act. If both the removal and return were prior to April 1, 1997, section 212(a)(9)(C)(i) does not apply. *See Memorandum by Paul W. Virture, Acting Executive Associate Commissioner, Office of Programs, Dated June 17, 1997.*

Counsel contends that the applicant's application for a waiver should be considered under the pre-IIRIRA section 212(i) of the Act because the conduct that caused the applicant to be inadmissible occurred prior to the effective date of the IIRIRA. Counsel contends that, as provided in *INS v. St. Cyr, Id.*, the law that existed at the time of the applicant's conduct should apply and that require an applicant to apply for a waiver under the post-IIRIRA section 212(i) of the Act for pre-IIRIRA actions results in a violation of equal protection.

In *INS v. St. Cyr*, when considering the retroactive application of IIRIRA provisions that made a section 212(c) of the Act waiver unavailable to the applicant, the U.S. Supreme Court stated:

IIRIRA's elimination of § 212(c) relief for people who entered into plea agreements expecting that they would be eligible for such relief clearly attaches a new disability to past transactions or considerations. Plea agreements involve a *quid pro quo* between a criminal defendant and the government, and there is little doubt that alien defendants considering whether to enter into such agreements are acutely aware of their convictions' immigration consequences. The potential for unfairness to people like St. Cyr is significant and manifest. Now that prosecutors have received the benefit of plea agreements, facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would be contrary to considerations of fair notice, reasonable reliance, and settled expectations to hold that IIRIRA deprives them of any possibility of such relief. *INS v. St. Cyr, Id.* at 291.

The key to the reasoning in *St. Cyr* is the applicant's reliance upon the then existing statute when he made the plea agreement. The record in the instant case does not include conduct influenced by reliance upon prior law. There is no indication that the applicant had any awareness at all about the relationship between his conduct and inadmissibility or the availability of waiver relief.

Citing to *Matter of Soriano*, 21 I. & N. 516 (BIA, AG 1996) the precedent opinion in *Cervantes-Gonzalez*, stated that a statute is not retroactive if:

[I]t does not impair rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. More specifically, an intervening statute that either alters jurisdiction or affects prospective injunctive relief generally does not raise retroactivity concerns, and, thus, presumptively is to be applied in pending cases. [citation omitted]. Likewise, the Attorney General concluded [in *Soriano*] that the new provisions in section 212(c) applied to pending cases because the new legislation acted to withdraw her authority to grant prospective relief; it did not

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speak to the rights of the affected party. [citation omitted]. The effect was therefore to alter both jurisdiction and the availability of prospective relief to the alien. [citation omitted]. *Cervantes-Gonzalez*, 22 I&N Dec. 560 at 564 (BIA 1999).

The BIA held in *Cervantes-Gonzalez* that a request for a section 212(i) waiver of the Act is a request for prospective relief and as such its restrictions may be applied to conduct which predates passage of the current statute. As is required, the AAO will rely on *Cervantes-Gonzalez* here.

Hardship to the applicant himself is not a permissible consideration under the statute. 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. Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship in 212(i) cases. Thus, hardship to the applicant's U.S. citizen children will not be considered in this decision, except as it may affect the applicant's spouse, the only qualifying relative.

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*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-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. 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).

Since an applicant's qualifying relative is not required to reside outside of the United States as a result of denial of the applicant's waiver request, an applicant must establish that the qualifying relative would suffer extreme hardship whether he or she remained in the United States or accompanied the applicant to the foreign country of residence. 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 record reflects that ██████████ is a native and citizen of Mexico who became a lawful permanent resident in 1984. The applicant and ██████████ have a 17-year old son, a 14-year old son and an 11-year old daughter who are all U.S. citizens by birth. The applicant and ██████████ are in their 40's.

Counsel asserts that the director was operating on an improper and unduly restrictive standard in determining that the applicant's spouse would not suffer extreme hardship if his waiver application were denied. Counsel asserts that [REDACTED] is completely disabled as a result of a work injury and cannot drive, walk, or provide for herself. Counsel asserts that the applicant provides the necessary medical support for [REDACTED] through his employment and she is completely reliant upon his financial support. Counsel asserts that [REDACTED] will be left with the psychological ramifications of being unable to provide for her children. Counsel asserts that [REDACTED] will be unable to survive emotionally without her husband, given her demonstrated devotion to the applicant and her religion. Counsel asserts that the aggregate situation's effect on [REDACTED] emotional health and the likely degradation of her physical health is a major hardship that should weigh heavily in the applicant's favor.

[REDACTED], in her declaration, states that, in 2002, she fell and injured both of her knees at work. She states that, even though her knees were reconstructed, they do not function normally and have led to complications such as arthritis, fatigue, and weight-gain. She states that this has brought great distress into her life because she cannot be the mother she would like to be and she cannot work and improve her household. She states that her compassionate husband has been the light in her despair. [REDACTED] in her letter accompanying the appeal, states that the applicant is an exceptional person to raise their children and is a very kind, sensible, compassionate, hard working, honest and trustworthy person. She states that they have been together for 18 years and plan to be together for the rest of their lives. She states that they both keep an eye on their children's schoolwork and help when the children have to deal with changes in their lives. She states that they both serve as strong role models for their children, which keep them in school and out of trouble. She states that they bought their first home together in 2000 and sold it in 2006. She states that they reinvested the profit from their first home into three properties, renting two and residing in the third. She states that they are current on the mortgage and tax payments. She states that, in 2005, she stopped working due to an injury she sustained at work. She states that she is permanently disabled and cannot drive, walk very well and is limited in her activities. She states that she and her family have been unable to sleep thinking about what will happen to them if the applicant is denied admission to the United States. She states that she is torn between what is best for her children, raising them in the United States and separating them from their father, or taking them to Mexico, where their father can raise them, but where it is a completely different way of life. She states that the applicant is the only source of income. She states that the applicant also provides moral support and she will be unable to handle the situation by herself, especially with her disability. She states that the applicant has two jobs in order to make ends meet. She states that her children will be without a father figure. She states that it is important that her children have their father with them in the United States.

A Claim Receipt, dated October 17, 2006, indicates that [REDACTED] was issued a permanent disability check in the amount of \$247.66 for the period of October 4, 2006, until October 17, 2006, from Employer's Elite Insurance Services, a Worker's Compensation Administrator for Harbor Specialty Insurance Company. A Physicians Progress Report from [REDACTED], indicates that [REDACTED] sustained a work injury on April 1, 2002, while working for EZ8 Motel. The report indicates that [REDACTED] underwent arthroscopies in 2002, 2003 and 2006. It indicates that [REDACTED] continues to complain of knee pain, but that her medication of ibuprofen is helpful and that she takes zantac to help with gastro intestinal upset. It indicates that she is able to walk on a daily basis, and use a stationary bike, but that her weight loss is slowing down. It indicates that [REDACTED]'s knee shows slight swelling mostly on the left side. It indicates that Ms.

██████████ is to continue on a weight loss, walking and stationary bike program and to continue her medication. It states that she is in temporary and total disability (TTD) per her doctor and is to remain off work and is scheduled to return to the clinic (RTC) on December 14, 2006.

Counsel asserts that ██████████ worked for many years in the United States and that to continue to refuse to admit the applicant to the United States will force her to forfeit all that for which she has worked in the last 18 years. Counsel asserts that ██████████ will be forced to move to Mexico with her children and the applicant. Counsel asserts that Mexico does not and will not provide ██████████ with the same disability system with which the United States supports her and ██████████ will be stripped of the life-sustaining medical care the applicant provides. Counsel asserts the applicant's ability to support the family will be removed and will leave ██████████ with the psychological ramifications of being unable to provide for her children. Counsel asserts that ██████████ has spent the majority of her life in the United States and immersed herself in the culture. Counsel asserts that ██████████ would return to a Mexican culture that is much different than to what she is now accustomed. Counsel asserts that ██████████ has an extensive family structure in the United States and the emotional taxation of leaving them is far beyond what is considered to be the normal effects of removal.

██████████, in her declaration, states that if she and her children followed the applicant to Mexico they would be forced to leave their friends, family, home and way of life. ██████████, in her letter accompanying the appeal, states that she is torn between what is best for her children, in raising them in the United States, but separating them from their father, or taking them to Mexico, where they can be raised by their father, but where it is a completely different way of life. She states that if she takes her children to Mexico their career opportunities will be limited. She states that she will probably lose her benefits and she cannot be without her pain medication and therapy. She states that she cannot imagine living anywhere other than the United States. The economic hardship ██████████ faces is not uncommon to alien and families upon deportation. However, the hardship ██████████ faces is substantially greater than that which aliens and families upon deportation would normally face when combined with her injury and disability. A finding of extreme psychological and physical hardship is the inevitable conclusion of the combined force of the submitted affidavits and medical documentation. A discounting of the extreme hardship ██████████ would face in either the United States or El Salvador if her spouse were refused admission is, therefore, not appropriate. 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 ██████████ 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 fraud for which the applicant seeks a waiver, his removal from the United States, his illegal reentry after having been removed from the United States and his extended unlawful presence and employment in the United States. The favorable and mitigating factors in the present case are the extreme hardship to the applicant's spouse if she were refused admission, the applicant's spouse and children's significant ties to the United States and the applicant's otherwise clear background.

The AAO finds that, although the immigration violations committed by the applicant are 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.

The AAO notes that the applicant remains inadmissible pursuant to section 212(a)(9)(A)(i), and possibly section 212(a)(9)(C)(i) of the Act and must file a new Form I-212 to seek permission to reapply for admission.

**ORDER:** The appeal is sustained.