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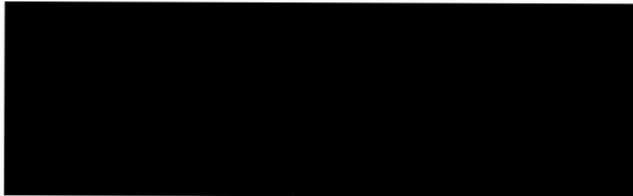
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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#12



FILE:



Office: PHOENIX, ARIZONA

Date: APR 24 2009

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)

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 "John F. Grissom".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, Phoenix, Arizona denied the waiver application. The matter is now before the Administrative Appeals Office, Washington DC (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)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having used fraud or misrepresentation of a material fact (his identity) when he used documents of an individual other than himself to attempt to gain admission into the United States. The applicant currently lives with his spouse in Yuma, Arizona. Pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), he seeks a waiver of the section 212(a)(6)(C)(i) inadmissibility finding in order to adjust to legal permanent resident status in the United States and to continue to reside with his spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on his spouse, the qualifying relative, and therefore denied the Form I-601, Application for Waiver of Grounds of Inadmissibility. *Decision of the District Director*, dated March 14, 2006.

On appeal, the applicant submits a brief from himself and a brief from counsel. Counsel asserts that the applicant's United States citizen spouse, who is currently 57 years old, immigrated to the United States in 1976 and has, therefore, resided in the United States for a significant portion of her life. Counsel further states that the applicant and his spouse currently care for his spouse's elderly United States citizen mother, who suffers from multiple medical conditions. Counsel also states that the applicant's spouse is her mother's primary caretaker. Counsel goes on to say that the applicant is currently the sole bread winner of the family and that the applicant's spouse would not be able to both work and care for her elderly mother in the United States. Counsel also asserts that if the applicant's spouse were to accompany him to Mexico, he would not earn a sufficient income to support the family.

In the applicant's brief, he first asserts that the director incorrectly applied the waiver provisions of the Act as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (IIRIRA). He asserts that the director should have applied the pre-IIRIRA waiver provisions of the Act, as the applicant's fraud or willful misrepresentation occurred in 1991, which was prior to IIRIRA's passage. The applicant also contends that he nonetheless still qualifies for a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i) as his United States citizen spouse would suffer extreme hardship if he were required to return to the Mexico. The applicant states that the director failed to accord due weight to the evidence he submitted in support of his assertion that his spouse would suffer extreme hardship in accordance with the section 212(i) extreme hardship standard. He states that the director failed to consider all relevant factors cumulatively in making that determination. The applicant states that he merits a favorable exercise of discretion and submits additional evidence for consideration with his appeal. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C) of the Act states, in pertinent part, the following:

- (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 states, in pertinent part, the following:

- (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.

In this case, the applicant attempted to enter the United States on May 27, 1991 with a border crossing card that was issued to another individual. As such, he sought to procure admission to the United States by willfully misrepresenting a material fact, his identity, and is therefore inadmissible under section 121(a)(6)(C)(i) of the Act.

The AAO will first address the applicant's contention that the director should have applied the pre-IIRIRA waiver provisions of the Act.

The record establishes that the applicant attempted to enter the United States on May 27, 1991, which was prior to the 1996 passage of IIRIRA, with a border crossing card issued to another person. As noted by the applicant in his appeal, the United States Supreme Court ruled in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed. 2d. 229 (1994) that there is a presumption against the retroactive application of statutes. The applicant contends that consideration of the conduct that led to his being found inadmissible should be based upon the law that existed at the time of that conduct; in this case, the date he sought admission into the United States via fraud or willful misrepresentation.

The AAO disagrees. *Landgraf* held that a statute has a retroactive effect when:

[I]t would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. *Landgraf* at 280.

In a case considering the retroactive application of IIRIRA provisions that made an INA § 212(c) waiver unavailable to the applicant, *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271 (2001), the United States Supreme Court stated the following:

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. *St. Cyr* 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 attempt to enter into the United States with fraudulent documents and his inadmissibility or the availability of waiver relief.

Citing to *Matter of Soriano*, 21 I. & N. 516 (BIA, AG 1996) and *Landgraf*, the Board of Immigration Appeals in *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) 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 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* at 564.

The BIA held in *Cervantes-Gonzalez* that a request for an INA § 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. Here, the instant I-601 was filed on or around February 13, 2006. Accordingly, the AAO will rely on *Cervantes-Gonzalez* here.

Having established the governing law, the first issue to be addressed is whether the applicant's return

to Mexico would impose extreme hardship on a qualifying family member. If extreme hardship is established, the AAO will then make an assessment as to whether it should exercise discretion.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The 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.

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).

Counsel claims that a waiver should be granted in this case because the applicant's spouse would suffer extreme hardship if a waiver is not granted either if she were to remain in the United States without the applicant or if she were to relocate to Mexico to be with him. Documents in the record that are relevant to the applicant's claim that his spouse would experience extreme hardship include: a psychological evaluation of the applicant's spouse; an affidavit from the applicant's spouse; and country conditions information which provides details regarding the economic situation in Mexico. The record also contains financial and tax documents from the applicant and medical documents pertaining to the applicant's mother-in-law and an attestation from his step-daughter. Though neither the applicant's mother-in-law nor his step-daughter are qualifying family members, these documents do contain testimony regarding hardships that would be experienced by the applicant's spouse if the applicant were to reside in Mexico. The applicant also submitted two previously noted briefs. Though the applicant and his spouse both stated that they would provide additional medical documentation relating to his spouse's health after a scheduled appointment with a cardiologist, no such evidence was found in the record.

The entire record, including prior counsel's brief on appeal, the applicant's brief on appeal and all documents created for and submitted pursuant to the application for admission and application for waiver have been reviewed in making this decision.

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 relatives of the applicant's spouse are not permissible considerations under the statute except to the extent that they impact his spouse. In this case the applicant's sole qualifying relative is his spouse. However, if she no longer received financial assistance from the applicant, because her mother is in ill health and she has been her mother's caretaker for 20 years, the record indicates that this would

exacerbate hardships experienced by the applicant's spouse if a waiver is not granted. Therefore, evidence in the record regarding the applicant's mother-in-law's medical condition is discussed here.

In support of his assertion that the applicant's spouse is needed in the United States to care for her mother, counsel submits medical documents. These documents indicate that the applicant's 82 year old mother-in-law has the following medical conditions: she is diabetic and requires insulin; she suffers from coronary artery disease; she suffers from anxiety and depression with psychotic features; has high cholesterol; she has suffered from acute bronchitis; she has had cataract and heart surgery and she currently has elevated blood pressure. The record reflects that the applicant's spouse's mother has been prescribed more than 10 daily medications and has appeared confused regarding these medications during medical appointments. The applicant's mother-in-law has had two surgeries and at least 17 medical appointments between January 2003 and February 2006. *Medical Records from [REDACTED]; History and Physical Examination, Yuma Regional Medical Center.* A letter from a clinician at the Excel Group further states that the applicant's mother-in-law receives ongoing mental health services and has been diagnosed with Depressive Disorder and that she sees a psychiatrist on a weekly basis and receives medication for this condition. *Letter from [REDACTED] of the Excel Group, dated April 11, 2006.*

The record reflects that the applicant's mother-in-law will continue to require regular, ongoing medical attention. A notation in each of the medical documents from the [REDACTED] states that the applicant's mother-in-law resides with her daughter. *Medical Records from [REDACTED]; History and Physical Examination, Yuma Regional Medical Center.* The address on the applicant's mother-in-law's driver's license confirms that she resides with the applicant and his spouse.

The applicant's spouse has cared for and lived with her mother for twenty years. Therefore, she is the person most familiar with her mother's medical history. As her mother is now experiencing significant medical difficulties and has a diminished ability to communicate regarding her medical history, the applicant's spouse is uniquely situated to continue to care for her mother. The applicant's mother is a United States citizen and all of her doctors as well as her mental health care provider reside in the United States. The record contains no evidence that the applicant's spouse's mother has expressed a willingness to relocate to Mexico if a waiver is not granted in this case, nor does the record indicate that it would be medically advisable for her to do so. If the applicant's spouse were to relocate to Mexico and could no longer assist with the care of her mother, evidence in the record makes clear that she would need to find an alternate assisted living situation for her mother and she would need to continue to assist with relaying her mother's medical history to individuals who would assist with her mother's care in her absence. Because the applicant is the only breadwinner in the family, and because he has submitted evidence regarding financial difficulties he would experience if he were to relocate to Mexico, the record indicates that the applicant and his spouse would not have the economic resources available to finance an assisted living situation for the applicant's spouse's mother.¹ Therefore, the AAO finds that, when considered in the aggregate, evidence regarding the emotional hardship that the applicant's spouse

¹ See next page for references to country conditions evidence submitted regarding economic conditions in Mexico.

would endure as a result of separation from her infirm mother with whom she has resided for 20 years and the financial hardships that the applicant's spouse would also experience as a result of being forced to pay for her mother's care rises to the level of extreme hardship.

In addition to hardships she would experience if she were not able to care for her mother if she were to relocate to Mexico to reside with the applicant, the applicant's spouse has stated that she is currently not working and that the applicant is the sole bread winner for the family. *Extreme hardship affidavit from [REDACTED] dated February 9, 2006. She asserts that because she has deteriorated shoulder joints from working in the fields, she is unable to work with her arms and asserts that the applicant assists her because of this condition. Id.*

Former counsel states that it would not be possible for the applicant to find employment in Mexico that would enable him to continue to support his spouse. In support of this statement, the applicant has submitted country conditions articles and reports detailing the economic situation in Mexico.² These documents highlight the growth of poverty in Mexico. The AAO notes that the documents submitted by counsel were published in 2003 and 2004 and are now outdated. However, a report from the Bureau of Human Rights and Labor of the United States Department of State published more recently states that in Mexico:

The law provides for a daily minimum wage, which is set each December for the coming year. For the year the minimum daily wages, determined by zone, were: 52.3 pesos (approximately \$5.15) in Zone A (Baja California, Federal District, State of Mexico, and large cities); 50.96 pesos (approximately \$5) in Zone B (Sonora, Nuevo Leon, Tamaulipas, Veracruz, and Jalisco); and 49.50 pesos (approximately \$4.80) in Zone C (all other states). The minimum wage did not provide a decent standard of living for a worker and family, and only a small fraction of the workers in the formal workforce received the minimum wage.³

Counsel asserts that country conditions indicate that if the applicant were to relocate to Mexico, he would not earn a salary commensurate with his current wages. The record reflects that at the time the applicant submitted his Form I-601 application, he was employed by three employers in the United States. *Letter from [REDACTED]; Letter from [REDACTED]; Letter from [REDACTED].* Because the applicant is the sole breadwinner for the family, without his salary, the applicant's spouse would be forced to obtain employment in order to maintain her household

² Bacon, David. "Nafta's Legacy – Profits and Poverty." San Francisco Chronicle. January 14, 2004.; Estrada-Lopez, Jose Luis. Poverty and Economic Reforms: Public Policies in Mexico from a Comparative Perspective with Chile and South Korea. Date unknown; Jordan, Mary and Kevin Sullivan. "Trade Brings Riches, but Not to Mexico's Poor." The Washington Post. March 22, 2003; Bureau of Democracy, Human Rights and Labor, United States Department of State. "Mexico: Country Reports on Human Rights Practices – 2003." Released February 25, 2004; Library of Congress. Library of Congress Country Studies: Mexico. Date not provided.

³ Bureau of Democracy, Human Rights and Labor, United States Department of State. "2008 Human Rights Report: Mexico." Released February 25, 2009.

expenses. However, if she did so, the record indicates that she would have to hire a caretaker to care for her mother while she was at work. *Brief from counsel*, dated April 11, 2006.

The record also contains an evaluation from Licensed Social Worker, [REDACTED], who states that the applicant's spouse is undergoing emotional stress and depression as a result of thinking about the possibility of separation from the applicant. He states that the applicant's spouse reported experiencing panic-like attacks and states that she lost 15 pounds over the 20 days prior to her December 16, 2005 evaluation date with him. [REDACTED] diagnoses the applicant's spouse with major depression, acute stress disorder, and states that she has degenerative shoulder joints. He states that, "a severe depression episode [would] most likely occur" if the applicant's waiver is not granted. He further refers to the applicant's spouse's cardiac condition and recommends that she should seek medical attention regarding this condition. However, it is not clear on what basis he concluded that the applicant's spouse suffers from a cardiac condition. The record reflects that this social worker met with the applicant and his spouse only one time and there is no evidence that she is undergoing a regular course of treatment for depression or for any other medical condition.

The applicant's spouse's daughter states that the applicant's spouse has lost weight and has trouble sleeping because of the thought that a waiver may not be granted. *Extreme hardship affidavit of* [REDACTED] dated December 30, 2005. She further states that she is worried about the applicant's spouse's health and notes the hardship that being separated from her grandchildren will create. *Id.*

The applicant's spouse also submits an affidavit. In it, the applicant's spouse states that she has resided in the United States since she was 14 years old. She details her relationship with her husband and asserts that the applicant is the sole breadwinner in their marriage. She states, and the record supports, that the applicant works at multiple places of employment to provide for her. She further asserts that she has deteriorated shoulder joints that prevent her from performing everyday duties and states that the applicant helps her as a result. She states that she intends to see a cardiologist to determine if she has a heart condition and that this appointment was made for February 20, 2006. *Extreme Hardship affidavit from* [REDACTED] dated February 9, 2006; and *Letter from* [REDACTED] dated February 9, 2006. She also states that if the applicant were removed to Mexico, and she were to remain behind in the United States this would be difficult both economically and emotionally. *Extreme Hardship affidavit from* [REDACTED], dated February 9, 2006.

Though the applicant and his spouse as well as a licensed social worker noted that the applicant's spouse has both a cardiac condition and deteriorated shoulder joints, the record does not contain evidence of these conditions. However, the record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that the applicant's spouse would face extreme hardship if the applicant was forced to return to Mexico. The applicant's spouse is her mother's care taker and she states that she has taken care of her mother for the past 20 years. It is clear that her mother has been disoriented at her medical appointments and relies on the applicant's spouse to assist with her medical care and to inform doctors of her mother's medical history. Because of the nature of her mother's conditions, the record establishes that the applicant's spouse

would not be able to care for her mother if she did not have the applicant's salary to rely on. The applicant has submitted evidence that he would not be able to earn a commensurate salary if he were to relocate to Mexico. Further, the applicant has submitted evidence that his spouse has been diagnosed with depression and she has stated that she has had a significant weight loss in a short period of time because of stress associated with that depression.

When considered in aggregate, the factors of hardship to the applicant's wife, should she remain in the United States without the applicant, constitutes extreme hardship. As was previously noted, the record also establishes that the applicant's spouse would experience extreme hardship if she were to relocate to Mexico to reside with the applicant.

Based on the forgoing, the AAO finds that the applicant's wife will face extreme hardship if the applicant's waiver application is denied. Thus, the applicant has shown that a qualifying relative would suffer extreme hardship if he is required to depart the United States.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factors in this case consist of the following:

The applicant knowingly attempted to enter the United States with the border crossing card of another individual on or about May 27, 1991. On or about June 6, 2002 the applicant submitted a Form I-485 application in which he failed to reveal that he previously entered the United States by fraud or misrepresentation.

The positive factors in this case include:

The applicant has significant family ties to the United States, including his wife, mother-in-law, step-daughter and step-grand-children as well as sisters-in-law, and brother-in-law; the applicant's wife would suffer extreme hardship if he is compelled to depart the United States; the applicant submitted an affidavit in which he fully explained the terms of his entry to the United States, and he expressed remorse regarding his violation of U.S. immigration laws; the applicant assists in caring for his mother-in-law, a U.S. citizen; the applicant has a record of working and paying his taxes in the United States; the applicant is involved in his community via a religious organization, and; the applicant has not been convicted of any crimes.

Although the applicant's immigration violations cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of establishing that the *application merits approval remains entirely with the applicant*. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.