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U.S. Citizenship
and Immigration
Services

H₂

FILE:

Office: DENVER, CO

Date: FEB 05 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.


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Denver, Colorado, 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)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for procuring admission into the United States by fraud or willful misrepresentation. The applicant has a lawful permanent resident spouse and two U.S. citizen children. She 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 her family.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, at 3, dated June 8, 2006.

On appeal, counsel asserts that the district director abused his discretion and his decision was contrary to law. *Form I-290B*, received July 7, 2006.

The record includes, but is not limited to, counsel's brief, the applicant's and her spouse's statements, progress reports for the applicant's son and a doctor's letter for the applicant's son. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that on January 2, 1995, the applicant was admitted to the United States by presenting a U.S. birth certificate under another name. As a result of this misrepresentation, the applicant is inadmissible to the United States under section 212(a)(6)(C) of the Act.¹

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (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 that:

- (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

¹ The record reflects that the applicant was convicted in Texas of theft (class B misdemeanor) on August 12, 1997, and she was sentenced to six months of community supervision. *Applicant's Deferred Adjudication Judgment*, dated August 12, 1997. The maximum possible penalty for a class B misdemeanor in Texas is a \$2,000 fine and/or confinement in jail not to exceed 180 days. Tex. Pen. Code Ann. § 12.22 (2003). This is the applicant's only crime, her "term of imprisonment" was not in excess of six months and the maximum possible penalty for a class B misdemeanor in Texas does not exceed imprisonment for one year. Therefore, she is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for committing a crime involving moral turpitude as the section 212(a)(2)(A)(ii)(II) petty theft exception applies.

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.

A section 212(i) waiver of the bar to admission resulting from a violation of section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to a U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship experienced by the applicant or her children is relevant only to the extent it causes hardship to the applicant's 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 section 212(i) of the Act. These factors include the presence of 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.

Therefore, an analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. Extreme hardship to the applicant's spouse must be established whether he relocates to Mexico or remains in the United States, as he is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to her spouse in the event that he relocates to Mexico. The record reflects that the applicant's son was evaluated by a physician who states that the applicant's son fits the criteria for childhood autism. *Evaluation by* [REDACTED], at 3, dated April 21, 2003. The record includes special education progress reports for the applicant's son that establish he faces significant behavioral and educational challenges. *Applicant's Son's Special Education Progress Reports*, various dates. One of the applicant's sisters states that the applicant's son requires medical treatment all of the time, and he has been seeing a specialist for his medical condition. *Statement from* [REDACTED] dated January 17, 2006. The record does not reflect that the applicant's son is receiving medical treatment. However, the record indicates that the applicant's son has been monitored by a therapist. *Applicant's Son's Special Education Records*, undated.

A statement signed by two more of the applicant's sisters states that the applicant's children will not receive the same education in Mexico, they will not learn English in Mexico and emergency medical services are poor in Mexico. *Statement from* [REDACTED], dated January 26, 2006. Counsel states that the applicant's son will not receive the treatment that he requires in Mexico, and he requires individual classes and special medical attention which are not available in Mexico. *Brief in Support of Appeal*, at 6, undated. Counsel states that applicant's spouse would not

be able to meet the family's most basic needs and it is unlikely that he would be able to find comparable or adequate employment in Mexico to support the applicant and their children. *Id.* at 7. The AAO notes that not all of the claims of hardship are supported with substantiating evidence. Going on record without supporting documentation will not meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

However, based primarily on the emotional hardship that the applicant's spouse would experience by moving his autistic son out of his current environment (especially when one of the characteristics of the child's condition is the need for stability and routine), the AAO finds that the applicant's spouse would experience extreme hardship in the event that he relocates to Mexico.

The second part of the analysis requires the applicant to establish extreme hardship in the event that her spouse remains in the United States. As mentioned previously, the applicant's son was evaluated by a physician who states that the applicant's son fits the criteria for childhood autism. *Evaluation by [REDACTED]*. Counsel states that the applicant's spouse will become the sole emotional, financial and custodial provider for his two children. *Brief in Support of Appeal*, at 4-5. Counsel states that the applicant's son is autistic and it will be physically, emotionally and financially impossible for the applicant's spouse to support him on his own. *Id.* at 5. Counsel states that the applicant provides full-time child care for the children and that the applicant's spouse's employment does not generate enough income to cover full-time child care for his children. *Id.* at 5. The record is not clear as to whether the applicant's spouse could afford child care for his children. However, based on the documentation provided concerning the health problems of the applicant's son, the AAO finds that the applicant's spouse would experience extreme hardship if he were required to deal with these problems in the absence of the applicant.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, “[B]alance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The main adverse factors in the present case are the applicant’s misrepresentation, theft conviction, and her unauthorized period of stay. The AAO notes that the applicant filed for adjustment of status under section 245(i) of the Act, which permits adjustment of status despite an unauthorized period of stay in the United States.

The favorable factors include the applicant’s lawful permanent resident spouse and two U.S. citizen children; her lack of a criminal record in over 11 years; extreme hardship to her spouse; and her good moral character, as evidenced by letters of support in the record.

The AAO finds that the immigration violations of the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that 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.

ORDER: The appeal is sustained.