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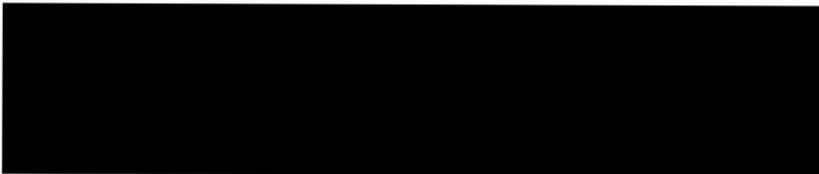
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FILE: [REDACTED] Office: PHOENIX, AZ Date: **JAN 22 2009**

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:



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 waiver application was denied by the District Director, Phoenix, Arizona. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, and the application will be approved.

The applicant, [REDACTED], is a native and citizen of Mexico. She 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 seeking to procure admission into the United States by fraud. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her U.S. Citizen husband, [REDACTED].

The District Director determined that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, her United States citizen spouse, and denied the Application for Waiver of Ground of Excludability (now referred to as Inadmissibility) accordingly.

On appeal, counsel for the applicant asserts that the District Director erred in the decision to deny the waiver application. Counsel contends that the District Director failed to examine the totality of the circumstances surrounding the qualifying relative's hardship. Counsel notes that the District Director failed to assess the factors in the aggregate, which amount to extreme hardship. Counsel maintains that the applicant furnished ample evidence of the qualifying relative's prospective and actual hardship.

Counsel filed the appeal notice on September 18, 2006 and requested 90 days to submit a brief to support the basis of his appeal. However, the AAO did not receive any additional documentation from counsel within this time period. On November 14, 2008, counsel filed a motion with the AAO to incorporate by reference the prior brief he submitted with the applicant's waiver application as legal support for the appeal. The entire record was reviewed and considered in rendering the decision on this 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.

Regarding the applicant's ground of inadmissibility, a Federal Bureau of Investigation report based upon the applicant's fingerprints reveals that on August 20, 1995 she was arrested and charged with *Documented False Claim to U.S. Citizenship*. The report shows that prosecution was declined and the applicant returned to Mexico. On January 11, 2006, the applicant was interviewed in connection with her adjustment of status application. During the applicant's interview she testified under oath that she attempted to enter the United States as a U.S. citizen at the Douglas, Arizona port-of-entry. The applicant further testified that she provided the border inspection officer her cousin's U.S. birth

certificate as proof of her U.S. citizenship. The applicant's attempt to procure admission into the United States by willfully misrepresenting a material fact renders her inadmissible to the United States under section 212(a)(6)(C)(i) of the Act.

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.

A waiver of inadmissibility under section 212(i) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the United States citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or to her children is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(i) of the Act; *see also Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

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 (BIA) set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to United States 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.

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).

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the

applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record reflects that the applicant wed _____ a U.S. citizen, on August 20, 2002. _____ is a qualifying family member for section 212(i) of the Act extreme hardship purposes. The applicant and _____ have a seven year old U.S. citizen child, _____. Hardship to _____ will be considered insofar as it results in hardship to _____.

Counsel for the applicant asserts that _____ has nearly nothing in common with familial, cultural or religious ties to Mexico. Counsel contends that 23 members of _____ immediate and extended family reside in the United States. As corroborating evidence of the applicant's ties to the United States, Counsel furnished a list of the applicant's family members and their places of residence in the United States. Counsel maintains that the lack of close family and the cultural differences between the United States and Mexico would make living there a terrible ordeal for Mr. _____. As stated in a letter from _____, dated May 30, 2006:

Professionally it would disastrous for me to go to Mexico. I have no family there. I have no friends there. I have spent the past 15 years building professional relationships with my clients and I would have to start all over again. All of my work will be lost. I don't speak [S]panish well enough to work in my field of expertise and my own style of music doesn't even fit into the Mexican culture.

Counsel asserts that _____ requires vision assistance and suffers from major depression for which he is currently taking medication. Counsel states that Mexico is considered to be a highly undesirable country in which to live due to its appalling social, economic and political conditions. Counsel cites to a U.S. Department States Consular Information Sheet on Mexico (dated February 3, 2006) that provides, "Adequate medical care can be found in all major cities. Excellent health facilities are available in Mexico City, but training and availability of emergency responders may be below U.S. standards. Care in more remote areas is limited."¹ Counsel states that _____'s physical condition and the extensive medical care he requires cannot be maintained in Mexico. As corroborating evidence of the applicant's medical conditions counsel furnished a letter from Marc R. _____, with the _____ Eye Center in Arizona and a letter from _____ Psy.D, located in Sedona, Arizona.

_____s letter, dated June 8, 2006, provides that the applicant suffers from impaired vision at nighttime as a result of his February 18, 1999 LASIK eye surgery. _____ letter provides in pertinent part:

_____ does have significant amounts of glare and halos. A measurement of the Wavefront analysis of his eyes does demonstrate a significant amount of coma, as

¹ The U.S. Department of State's *Country Specific Information* sheet on Mexico, dated August 13, 2008, provides identical information on the quality of medical facilities in Mexico.

well as trefoil, which are both aberrations that contribute to the degradation and quality of the image at nighttime.

It is my contention, based upon these findings, that [REDACTED] does have significant night problems and most likely cannot function outside of his comfort level.

[REDACTED] letter, dated May 26, 2006, provides that the applicant has been diagnosed with Major Depression. [REDACTED] indicates that he has provided the applicant treatment for the symptoms related to this illness since 1995. [REDACTED] letter provides in pertinent part:

I firmly believe it would be disastrous for [REDACTED] health and well-being if his wife's petition for residency was denied. To lose the two loves of his life would devastate him; to go to Mexico and lose his extended family support, musical clients (a career that has taken years to nurture), and to lose the on-going support and effectiveness of our work together would be equally devastating.

Given [REDACTED] ties to his extended family in the United States, his unfamiliarity with the culture and customs of Mexico, his diagnosis with Major Depression and ongoing psychological therapy with [REDACTED] and the issues related to his nighttime vision loss, it has been established that he would suffer extreme hardship if he were to relocate to Mexico due to the applicant's inadmissibility.

Although hardship to [REDACTED] in the event that he relocates with the applicant to Mexico is material for establishing eligibility for a waiver under section 212(h) of the Act, it is not the only factor to be considered. Extreme hardship to [REDACTED] must be established in the event that he accompanies the applicant or in the event that he remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

This matter arises in the Phoenix 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 record reflects that in 1995 [REDACTED] was diagnosed by his psychologist, [REDACTED] with Major Depression and he continues to receive therapy for this illness. According to the letter

from [REDACTED]'s separation from the applicant would result in a deterioration of his condition. [REDACTED]'s letter provides in pertinent part:

[REDACTED] came to me in 1995 after battling a debilitating depression on his own for many years. A talented musician, songwriter and producer, [REDACTED] career and life had come to a halt. As an artist, he was adamant about not medicating his emotions, but he knew he needed to do intensive work to get himself out of the deep hole in which he was lost.

One year after we began treatment, [REDACTED] met [REDACTED]. [REDACTED] was, and is, nothing short of an angel in [REDACTED] life, a great woman who loves him unconditionally and who has supported him through the trails and tribulations of his battle with a deep and chronic depression.

With the strong foundation of his love for [REDACTED] and the eventual birth of their daughter, [REDACTED] had finally created a structure in his life that brought him a sense of accomplishment and success as a man. It was the surfacing of [REDACTED] immigration issues along with upsetting struggles with degrading night vision resulting from Lasik surgery that led to a return and upsurge of [REDACTED] symptoms of depression – severe agitation, night terrors, sleep disturbance (which is being treated with Ambien), periods of immobilization and despair.

As stated by [REDACTED] in his May 30, 2006 letter:

If my wife was unable to live here with me, I would find life unbearable. Ever since we began her status process, I have been so preoccupied that I have been unable to sleep. I have a sleep disorder and currently have to take sleeping medication in order for me to get some much needed rest. The recent stress has also caused the return to my Rocesea, a horrible skin rash, to appear on my face. I am afraid that [REDACTED] departure would also cause such a deep sadness in my soul that I wouldn't be able to recover. She is the foundation of my life's structure and happiness.

As corroborating evidence of the applicant's medical treatment for insomnia, counsel furnished a letter from [REDACTED], with Skin Surgery and Family Practice in Sedona, Arizona. Dr. [REDACTED] letter dated May 12, 2006, provides, "[REDACTED] has been evaluated in my office for insomnia and treated with Ambien or Lunesta on the following dates: 2-14-03, 8-26-03, 7-19-04, 10-17-05 and 11-17-05."

The record further reflects that [REDACTED] is in need of assistance at night due to his nighttime vision impairment. The applicant's optometrist, [REDACTED], states in his letter that as a result of this surgery, [REDACTED] does have significant amounts of glare and halos." [REDACTED] recommends that based on [REDACTED] nighttime vision impairment, "[he] should use the assistance of his wife or someone else when navigating at nighttime." [REDACTED] states in his letter, "Without assistance while navigating at night, [sic] can put myself and my daughter in grave

danger.” indicates that the applicant drives him at night because his vision impairment is not improving.

The situation presented in this application rises to the level of extreme hardship because the record demonstrates that the applicant’s spouse would suffer extreme psychological and physical distress if the applicant were denied admission to the United States. The suffering experienced by the applicant’s spouse would surpass the hardship typically encountered in instances of separation because of the documented improvements to the medical conditions suffered by the applicant’s spouse as the result of the applicant’s support. The AAO therefore finds that the applicant has established that her spouse would suffer extreme hardship if her waiver of inadmissibility is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien’s undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The favorable factors in this matter are the extreme hardship to the applicant’s spouse and the passage of approximately thirteen years since the applicant’s immigration violation. The unfavorable factors in this matter are the applicant’s willful misrepresentation of a material fact before a U.S. government official to procure admission to the United States and periods of unauthorized presence. The AAO notes that the applicant does not appear to have a criminal record.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant’s breach of the immigration laws of the United States, the severity of the applicant’s fraud is at least partially diminished by the fact that thirteen years have elapsed since the applicant’s immigration violation. The AAO finds that the hardship imposed on the applicant’s spouse as a result of her inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary’s discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained, and the application will be approved.

ORDER: The appeal is sustained.