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U.S. Citizenship  
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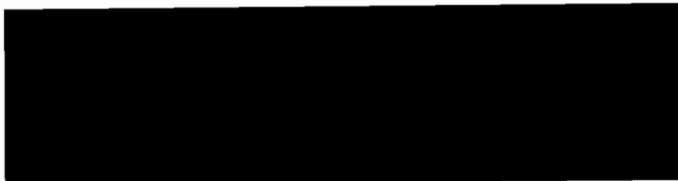
Date: **MAR 05 2009**

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(i) and 1182(a)(9)(B)(v)

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, San Francisco, California. The matter 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) and section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(9)(B)(i)(II), for having entered the United States by fraud or willful misrepresentation and having been unlawfully present in the United States for more than one year and seeking readmission within ten years of her last departure from the United States. The applicant is married to a naturalized U.S. citizen and has two U.S. citizen children. She seeks a waiver of inadmissibility 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 Ground of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated July 2, 2004.

On appeal, counsel contends that the district director misapplied relevant authority and facts in finding that the applicant's spouse would not suffer extreme hardship if the applicant were removed. *Notice of Appeal to the Administrative Appeals Unit (Form I-290B)*, dated August 2, 2004.

The record includes, but is not limited to, statements from the applicant and her spouse, dated March 1, 2002 and March 6, 2002 respectively; a copy of the family's medical insurance cards; medical records for the applicant's two children; printouts of background documentation on pollution and health conditions in Mexico; medical documentation for the applicant and statements from the applicant's two children. The entire record was reviewed and considered in rendering this decision.

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 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 record reflects that the applicant at the time of her interview for adjustment of status testified that she had used a fraudulent passport to enter the United States in 1994. Therefore, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, for having procured admission to the United States by fraud and must seek a waiver of inadmissibility under section 212(i).

As the applicant entered the United States with a fraudulent document and remained in the United States until she departed on advance parole on or about December 1, 1999, she is also subject to the unlawful presence provisions of the Act. The AAO notes, however, that the proper filing of an affirmative application for adjustment of status has been designated by the Attorney General (Secretary) as a period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by [REDACTED] Commissioner, Office of Field Operations*, dated June 12, 2002. The applicant filed her first Form I-485 adjustment of status application on August 4, 1997 which was denied on August 27, 1998. On June 11, 1999 the applicant filed her second Form I-485. The applicant departed the United States on December 1, 1999, triggering the unlawful presence provisions of the Act. Therefore, the applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act until she filed her first Form I-485 on August 4, 1997, and from the date her first Form I-485 was denied until she filed her second Form I-485 on June 11, 1999, a total of more than one year. In applying for an immigrant visa, the applicant is seeking admission within ten years of her December 1, 1999 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C) of the Act or a section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse and/or parent of the applicant. Hardship the applicant experiences or her children experience due to her inadmissibility is not considered in section 212(i) or 212(a)(9)(B)(v) waiver proceedings except to the extent that it results in hardship to a qualifying relative, in this case, the applicant's spouse. Therefore, the only relevant hardship in the present case is hardship suffered by the applicant's husband.

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 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 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.

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). 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 extreme hardship to the applicant's spouse must be established whether he resides in Mexico or 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 AAO will consider the relevant factors in adjudication of this case.

The applicant's spouse submits a statement and, in this statement, asserts that he cannot earn enough money in Mexico for the family because Mexico is a very poor country. He states that he does not have special skills that would get him a good job in Mexico. He also asserts that he does not have any family in Mexico except for his elderly father, and therefore, that there is no one who could help him. Economic hardship faced by the applicant's spouse is relevant in determining whether extreme hardship exists. However, the record contains no documentation, e.g., published country conditions

reports, showing that the applicant's spouse would be unable to find any employment in Mexico or that the applicant would be unable to find a job in Mexico and earn sufficient income to assist her spouse in supporting their family.

The applicant's spouse also states that both of his children have serious health problems that require constant attention. He asserts that his daughter, born January 4, 1997, has asthma, and that his son, born on May 23, 2001, suffers from seizures. He also asserts that his children would not receive proper health care in Mexico. In her statement dated March 1, 2002, the applicant states that her son's epilepsy results in three or four convulsions a day and will require him to take medicine for the rest of his life. She asserts that in Mexico there would be no medicine for her son to take every day. The record includes a letter from [REDACTED] at Kaiser, Permanente Medical Center, Pediatric Department, dated February 13, 2002. In this letter, [REDACTED] certifies that the applicant's son has been diagnosed with a seizure disorder of unknown etiology, that the treatment is still in progress and that he must take medicine daily. [REDACTED] concludes that it would be unwise for the applicant's son to leave the country at this time and he requires his mother's care. A copy of a prescription attached to the letter shows that the applicant's son takes medicine every day. The record contains copies of Pediatric Health Examination & Treatment Verifications from Kaiser Permanente, dated January 16, 2002, for both of the applicant's children. The verification for the applicant's son shows that he has a seizure disorder, that he should avoid travel outside the United States and that he needs consistent medical care. The verification for the applicant's daughter shows that she has asthma and needs regular and consistent medical care. The record also contains documentation regarding research on the connection between children's asthma and air pollution, and environmental and health conditions in Mexico.

While, as previously noted, the applicant's children are not qualifying relatives for the purposes of this proceeding, the AAO acknowledges the stress that moving a seizure-prone child outside the United States and away from his established care givers would place on the applicant's spouse should he relocate to Mexico. When considered in light of the Cervantes-Gonzalez factors previously cited, the AAO finds the evidence of record to establish that the applicant's spouse would suffer extreme hardship if he relocated to Mexico with the applicant and his children.

The applicant's spouse also asserts that he would suffer extreme hardship if he remained in the United States following the applicant's removal. He states that he cannot imagine life without the applicant and that they have had a solid relationship for ten years. He states that his biggest problem if the applicant were removed would be to raise his two children by himself; that he would face severe economic problems; that currently he works very long hours on two jobs to support his family and that without the applicant, he would have to drastically reduce his working hours since he has no one to help him with housework and childcare. The applicant's spouse also contends that his young children would suffer extreme hardship if they remained in the United States with him following the applicant's removal to Mexico. He asserts that it would be very hard for him to see his children grow up without their mother. He states that both his children have serious health problems that require constant attention and extra supervision, especially in an emergency. Without their mother, the applicant's spouse states that he would have a very hard time finding daycare to properly take care of his son when he has a seizure. Although the applicant's children are not qualifying relatives for the purposes of a 212(i) or 212(a)(9)(B)(v) waiver proceeding, the AAO notes the medical

conditions of both children and acknowledges the additional hardship that caring for his children alone, particularly his son, would place on the applicant's spouse if he remained in the United States following the applicant's removal.

Considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, cited above, the AAO finds that the applicant's spouse would experience extreme hardship if separated from his wife and required to care for his two children by himself.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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 adverse factors in the present case are the applicant's entry with misrepresentation, and her unlawful presence and unauthorized employment in the United States. The favorable factors are the applicant's ties to the United States; the extreme hardship to her U.S. citizen spouse if she were to be denied a waiver of inadmissibility; and the absence of any criminal record for the applicant.

The AAO finds that the immigration violations committed by 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.