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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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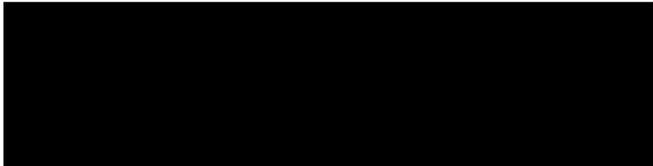


FILE: [REDACTED] Office: NEWARK, NEW JERSEY Date: **AUG 20 2010**

IN RE: Applicant: [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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Tariq Syed
for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Colombia 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 attempted to procure admission to the United States by fraud or the willful misrepresentation of a material fact. The record indicates that the applicant is married to a United States citizen, the mother of a Colombian citizen child, and the grandmother of a United States citizen. She is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 husband, daughter, and grandson.

The Field Office Director found 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 Field Office Director*, dated February 26, 2008.

On appeal, the applicant, through counsel, asserts that United States Citizenship and Immigration Services (USCIS) failed to “explain the specific reasons for its determination that [the applicant’s] actions or statements constituted a fraud on or a material misrepresentation to a U.S. government official in accordance with INA 212(a)(6)(c)(i).” *Form I-290B*, filed March 28, 2008. Counsel claims “[a]n analysis of the circumstances surrounding [the applicant’s] arrival in the United States and USCIS’s [sic] grant of parole to her will demonstrate that at no time did she commit a fraud on or make a material misrepresentation to a U.S. government official.” *Id.* Alternatively, counsel claims that “[e]ven if [the applicant] had committed a fraud on or made a material misrepresentation to a U.S. government official, USCIS has failed to properly consider the arguments set forth in [the applicant’s] I-601 waiver application.” *Id.*

The record includes, but is not limited to, counsel’s appeal brief; statements from the applicant and her husband; medical documents for the applicant’s husband; banking, lease, wage and tax documents; household bills; articles and reports on violence in Colombia and on Colombian guerrilla groups; country conditions reports on Colombia; and a travel warning for Colombia. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

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

Section 212 of the Act provides, in pertinent part, that:

- (i) (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 [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 the present case, the record indicates that on February 19, 2001, the applicant traveled to the United States under the Transit Without Visa (TWOV) program, in order to apply for political asylum. On March 1, 2001, the applicant was paroled into the United States to pursue her asylum claim. On January 16, 2002, the applicant filed an Application for Asylum and for Withholding of Removal (Form I-589). On or about August 16, 2002, the applicant's lawful permanent resident husband filed a Form I-130 on behalf of the applicant. On September 30, 2004, the applicant's husband became a United States citizen. On April 22, 2005, the applicant's Form I-130 was approved. On March 30, 2006, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On December 3, 2007, the applicant's Form I-485 was denied. On January 2, 2008, the applicant's Form I-485 was reopened. On February 15, 2008, the applicant filed a Form I-601. On February 26, 2008, the Field Office Director denied the applicant's Form I-601, finding the applicant had procured, and attempted to procure, immigration benefits by misrepresenting material facts, and she had failed to demonstrate extreme hardship to a qualifying relative. On April 4, 2008, the Field Office Director denied the applicant's Form I-485.

In counsel's appeal brief dated April 25, 2008, counsel asserts that USCIS "failed to properly recognize the fact that [the applicant] did not enter the U.S. pursuant to TWOV, but she was paroled into the U.S. pursuant to an application for political asylum." The AAO notes that the applicant was paroled into the United States on March 1, 2001; however, she first entered the United States under the TWOV program on February 19, 2001. TWOV documentation provided by American Airlines, and contained in the record, reflects that the applicant presented her Colombian passport to the airline, and that she represented to the airline that she was traveling to Colombia. The evidence in the record reflects that the applicant completed a Form I-94T, TWOV arrival and departure record on February 19, 2001, when she traveled from Madrid, Spain to the United States. In addition to the above TWOV-related documentation, the record contains a February 20, 2001, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, signed by the applicant, and a February 19, 2001, Withdrawal of Application for Admission/Consular Notification (Form I-275). The Form I-275 reflects that the applicant and her daughter traveled to the United States from Madrid, and upon entry into the American Airlines lounge, the applicant and her daughter approached an inspector and requested asylum. The documents also reflect that the applicant presented herself to American Airlines agents in Madrid as a Colombian national traveling to Colombia. The documents reflect further that the applicant did not intend to travel Colombia, and that her plan was to live with her husband in New Jersey once she arrived in the United States. Upon

presentation for United States immigration inspection, the applicant stated her true intention for coming to the United States.

Counsel claims that “USCIS has failed to explain when or how [the applicant] committed a fraud on or made a material misrepresentation to a U.S. government official.” Counsel states that “[w]e concede that, by her actions, [the applicant] may have misrepresented the nature of her trip to the airline, but once before an official of the U.S. government, she made it perfectly clear why she was coming to the United States.”

It is noted that the TWOV program was designed to facilitate international travel, and permitted:

[A]liens traveling from one foreign country to another, which route entails a stopover in the United States, to proceed “in immediate and continuous transit” through this country without a passport or visa. 8 U.S.C. § 1182(d)(4)(C) (1970). An individual desiring to use the transit without visa privilege must establish, inter alia, that 1) he is admissible under the immigration laws, 2) he has confirmed means of transportation to at least the next country, and 3) he will accomplish his departure within eight hours after his arrival or on the next available transport. 8 C.F.R. § 214.2(c) (1980)¹

Counsel cites to *Matter of Shirdel*, 19 I&N Dec. 33 (BIA 1984), to support his claim that since the applicant presented her own passport, her “circumstances are distinguishable from controlling case law on the specific issue of transit without visa (TWOV) in the context of discretionary asylum applications.” The AAO finds counsel argument to be unpersuasive. In *Matter of Shirdel*, the Board of Immigration Appeals (Board) held that two Afghani citizens who posed as Turkish nationals were excludable under the second clause of section 212(a)(19) of the former Act, for seeking to enter the United States by fraud or a material misrepresentation. The decision specifically states that, “[t]he fraud was their flying to the United States posing as TRWOV aliens in order to submit applications for asylum.” *Matter of Shirdel*, *supra* at 36.

The AAO notes that the U.S. First Circuit Court of Appeals held in *Ymeri v. Ashcroft*, 387 F.3d 12, FN4 (1st Cir. 2004), that:

The transit without visa privilege is a benefit provided under the Immigration laws. An alien who transits through this country as a transit without visa participant has attained one of the benefits listed in section 1182 [212] (a)(6)(C)(i) [of the Act], regardless of whether the alien effects an “entry.”

U.S. v. Kavazanjian, 623 F.2d 730, 732 (1st Cir. 1980) held that:

¹ The TWOV program was suspended on August 2, 2003.

[T]he actions of an alien who adopts TWOV status solely for the purpose of reaching this country's border, without any intention of pursuing his journey, constitute a circumvention of the TWOV program and a fraud on the United States.

....
[W]e think an alien's assumption of TWOV status by itself constitutes an implicit representation that he intends merely to transit through the United States before again departing. See *Reyes v. Neely*, 228 F.2d 609, 611 (5th Cir. 1956), ("A misrepresentation may be made as effectively by conduct as by words").... *Id.* at FN15.

In the present matter, the record clearly reflects that the applicant traveled to the United States posing as a TWOV alien under the TWOV program. The record reflects further that the applicant intended to remain in the United States to reside with her husband. Based on the above rulings, the AAO finds that the applicant thereby committed a fraud on the United States, and that she is inadmissible under section 212(a)(6)(C)(i) of the Act.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or her daughter can be considered only insofar as it results in hardship to a qualifying relative. The applicant's husband is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. See *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. Cf. *Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is “not a definable term of fixed and inflexible content or meaning,” but “necessarily depends upon the facts and circumstances peculiar to each case.” *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one’s present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm’r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “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.” *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. See *Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be

considered in analyzing hardship. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; see also *U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. ██████ was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. See, e.g., *Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

Extreme hardship to the applicant’s spouse must be established whether he resides in Colombia or the United States, as he is not required to reside outside the United States based on the denial of the applicant’s waiver request. The AAO will consider all relevant factors in the adjudication of this case.

Counsel claims that the applicant’s husband will suffer extreme hardship if the applicant is “removed from the U.S. for life.” Counsel states the hardships suffered by the applicant’s husband would be “political, economic and medical in nature.” In a statement dated February 1, 2008, the applicant’s husband states he has “developed chronic pain in [his] knees and [his] right arm” and he has “chronic back pain.” On April 22, 2008, Immediate Medical Care Center indicated that the applicant’s husband “has recurrent pain in his back” and “arthritis of thoracic spine,” and they recommended that he does not left over 10 pounds. Additionally, the record establishes that the applicant’s husband was diagnosed with a pituitary tumor and a renal mass. See letter from ██████ dated May 13, 2009; see also report from ██████

Hospital, dated February 8, 2010. The AAO notes that the applicant's husband cannot work because of his medical conditions. See *prescription note from [REDACTED]*, dated December 8, 2009. Additionally, the record establishes that the renal mass may be renal cell carcinoma and he may require surgery. See *consultation order and response, The University Hospital*, dated March 9, 2010. The AAO acknowledges the additional burdens that the applicant's husband's illness and need for medical treatment would create for the applicant and her husband upon relocation.

In a statement dated February 1, 2008, the applicant claims that her daughter needs her "help with her new baby." She also states that she and her husband "are becoming very attached to [her grandson]." The AAO notes that hardship to the applicant's daughter is not directly relevant to a determination of extreme hardship in section 212(i) proceedings.

Counsel states if the applicant's husband "were to relocate to Colombia with [the applicant], he would find himself even worse off economically since his back condition would remain a problem but [the applicant's] job prospects would offer no viable cushion." The applicant states "[n]either [her husband] or [her] have any educational qualifications which would open up job prospects for [them] in Colombia other than starting [their] own businesses." Counsel claims that if the applicant and her husband start their own businesses, they would be "subjected to life-threatening calls and threats of kidnapping." The applicant's husband states they would become targets of the guerrilla groups because "the guerrillas tend to target civilians who have had contact with the United States" and "civilians who appear to have money such as business owners or professionals." The applicant states she does "not want to return to a country where [she] and [her] family could be victimized once again and possibly killed." The AAO notes that counsel provided numerous articles and reports regarding the violence in Colombia and on the widespread kidnapping occurring in Colombia. Counsel also states that "[t]he U.S. government has issued a travel alert to all U.S. citizens considering travel to Colombia." The AAO notes that on March 5, 2010, the U.S. Department of State issued a travel warning, warning United States citizens of the dangers of traveling to Colombia. The U.S. Department of State reports that American citizens have been the victims of violent crimes, including kidnapping and murder. *U.S. Department of State, Travel Warning – Colombia*, dated March 5, 2010. Additionally, the U.S. Department of State notes that violence by narco-terrorist groups and other criminal elements exists in all parts of the country, and kidnapping remains a serious threat; however, the "the U.S. government's ability to assist kidnapping victims is limited." *Id.* The AAO notes that based on the travel warning issued for Americans traveling to Colombia and the applicant's husband's severe medical issues, relocation of the applicant's husband to Colombia would result in extreme hardship.

The AAO finds that the applicant's husband would also experience extreme hardship were he to remain in the United States without the applicant. This finding is based on the extreme emotional harm the applicant's husband will experience due to concern about the applicant's well-being and safety in Colombia, a concern that is beyond the common results of removal or inadmissibility. The applicant states she and her husband "have considered the idea of [her husband] remaining in the United States," but "[t]his separation would cause [the applicant's husband] and [her] great distress." The applicant states she "would not feel safe in Colombia without [her husband]" and her husband "would not feel comfortable letting [her] live in Colombia alone."

The record establishes that when the applicant was employed she provided the majority of the income for her family. The applicant states that “[f]rom 2004 through 2007, [her] earnings...more than doubled [her husband’s] earnings” and the record supports this claim. Counsel states “[w]ithout the substantial economic support provided by [the applicant], [the applicant’s husband] would be left in the United States to support himself with very little physical means to do so.” The applicant’s husband states if the applicant were removed to Colombia, he “could not continue to rent the land [his] mobile home is situated upon, pay [his] living expenses, pay the court-ordered child support [he] [is] obligated to pay,...pay [his] and [the applicant’s daughter’s] medical expenses, contribute to [the applicant’s grandson’s] living expenses and send money to [the applicant] and both of [their] family’s in Colombia.” The AAO notes that the applicant’s husband’s children are all adults and the record has not established that he has been ordered to pay child support for them past their age of majority. However, the AAO notes that based on the applicant’s husband’s severe medical conditions, it is unlikely that he will be able to financially support himself in the applicant’s absence. Additionally, the AAO acknowledges that the applicant’s husband will require the applicant’s assistance when undergoing medical testing and treatments for his medical conditions. Considering the applicant’s husband’s severe medical issues which will affect his ability to financially support himself, and the emotional harm he will experience due to concern about the applicant in Colombia, the AAO finds that the applicant’s husband would experience extreme hardship if he remains in the United States.

The AAO finds that the applicant meets the requirements for a waiver of her grounds of inadmissibility under section 212(i) of the Act. Furthermore, the applicant is entitled to a waiver as a matter of discretion.

The adverse factor in the present case is the applicant’s prior misrepresentation for which she now seeks a waiver. The favorable and mitigating factors are the extreme hardship to the applicant’s United States citizen husband, who depends on her for emotional and financial support, history of paying taxes, and the absence of a criminal record apart from her immigration violation.

While the AAO does not condone her actions, the applicant has established that the favorable factors in her application outweigh the adverse factor. In discretionary matters, the applicant bears the full burden of proving her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The application is approved.