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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

H5

[REDACTED]

FILE: [REDACTED]

Office: CHICAGO, ILLINOIS

Date: DEC 09 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:

[REDACTED]

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Chicago, Illinois. The decision 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 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 using a fraudulent identity document in order to obtain immigration benefit under the Act. The record reflects that the applicant is married to a United States citizen (USC) and 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 his U.S. citizen spouse and children.

The district director found that the applicant 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*, dated May 31, 2008.

On appeal, the applicant through counsel asserts that the applicant's wife will suffer extreme emotional and financial hardship due to family separation. Counsel asserts that the applicant's children have significant medical problems and that his wife relies on the applicant to help care for the children and that the impact of the applicant's departure from the United States would be devastating to his family. *Form I-290B and accompanying brief in Support of Appeal*.

The record includes, but is not limited to, counsel's brief in support of appeal, an affidavit from the applicant's wife, copies of Individualized Education Plan Reports for the applicant's children, [REDACTED] a copy of an ADDES evaluation report for [REDACTED] from [REDACTED] MSW, School Social Worker, Peru Public Schools, Peru, Illinois, dated January 30, 2007, a copy of an Interpretive Report for [REDACTED] from [REDACTED] MSW, School Social Worker, Peru Public Schools, Peru, Illinois, dated January 29, 2008, copies of medical records and emergency room reports for [REDACTED] from Illinois Valley Community Hospital, Peru, Illinois, copies of W-2 Wage and Tax Statements and U.S. Individual Income Tax Returns (Form 1040A) for the applicant and his wife, and supportive letters from friends attesting to the applicant's relationship with his family. The entire record was reviewed and considered in rendering a decision on the appeal.

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 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 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 the present case, the record reflects that the applicant procured a fraudulent Mexican identity document (birth certificate) in the name of [REDACTED] and used said document to obtain an immigration benefit under the Act. The applicant is married to a United States citizen and is the beneficiary of an approved Form I-130. On July 24, 2007, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. During his adjustment interview on January 23, 2003, the district director found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act. On April 18, 2008, the applicant filed a Form I-601 waiver. On May 31, 2008, the district director denied the applicant's Form I-485 and Form I-601, finding that the applicant had failed to demonstrate extreme hardship to his qualifying relative.

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 his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's wife 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-Morales*, 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 of Immigration Appeals 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. Arrieta 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.

In this case, the record reflects that the applicant’s spouse, [REDACTED] is a 32-year-old citizen of the United States. The applicant and his wife were married in Princeton, Illinois, on February 19, 1999 and have two children together. The record also reflects that the applicant and his

wife are raising his wife's 13-year-old son from a prior relationship. The applicant's wife asserts that she will suffer extreme emotional and financial hardship if the applicant's waiver application is denied.

Regarding the emotional hardship of separation, the applicant's wife states that she and the applicant have known each other since April 1998 and have been married since 1999. The applicant's wife states that the applicant is heavily involved in their children's life and that "we cherish our time together as a family and it would break our hearts to be torn apart." *Affidavit of* [REDACTED] [REDACTED] dated April 14, 2008. The applicant's wife states that their three children have significant medical problems, that she needs the applicant to help care for the children and that removal of the applicant from their lives would result in extreme hardship to her and her children. *Id.* The applicant's wife states that her oldest son, [REDACTED] has been diagnosed with ADHD and has been placed in special education with an Individualized Education Plan (IEP); that her second child [REDACTED] has also been placed in special education because she is significantly weaker than her peers and that she has significant problems with inattentiveness in the classroom which indicates that she may be "at-risk" for ADHD, and her youngest child, [REDACTED] has been hospitalized and has been taken to emergency rooms on numerous occasions because of seizures and convulsions. *Id.* The record includes documentation from the Peru Public School District, documenting the significant problems the applicant's children, [REDACTED] have and the assistance they are receiving from the school district. The record also contains copies of [REDACTED] medical records from Illinois Valley Community Hospital documenting his medical problems.

Regarding the financial hardship of separation, the applicant's wife states that although she is employed at [REDACTED] she needs the applicant's income to meet their family's financial obligations. *Affidavit of* [REDACTED] [REDACTED] dated April 14, 2008. The applicant's wife provided detailed information of the family's monthly expenses totaling over \$2,000.00. *Id.* The record includes a copy of the applicant's wife's Form W-2 for 2006 showing that her wages, tips and other compensation for 2006 totaled \$4,827.60, and that the applicant's income for 2006 was \$36,916.50. Based on the family's income and expenses, the AAO finds that the applicant's wife will be unable to meet the family's financial obligations without the applicant's income.

Were the applicant to relocate abroad due to his inadmissibility, the record indicates that the applicant's wife would be required to assume the role of primary caregiver and breadwinner to their three children without the complete support of the applicant. The applicant's wife would be left alone to care for three children, all of who have documented problems. The emotional hardship of caring for three children with significant problems coupled with her financial problems, cumulatively rise to the level of extreme hardship.

Regarding relocation to Mexico, the applicant's wife states that she cannot relocate to Mexico with the applicant for the following reasons: she was born and raised in the United States, she has never lived in Mexico, her entire family (parents and siblings) all reside in the United States not too far from her, that they are a very close family and that they visit each other on a regular basis, and her children have significant medical problems, and in Mexico, they will not receive the same level of

medical and special education assistance they are currently receiving in the United States. *Affidavit of* [REDACTED] dated April 14, 2008. The record reflects that if the applicant's wife is forced to relocate to Mexico, she would be relocating to a country where she does not have any family ties. She would have to leave her family and support network and she would be concerned about her and her children's safety, health, education, and financial well-being at all times in Mexico.

In addition, the AAO notes that the United States Department of State has issued a travel alert for Mexico. As noted by the U.S. Department of State:

Although the greatest increase in violence has occurred on the Mexican side of the U.S. border, U.S. citizens traveling throughout Mexico should exercise caution in unfamiliar areas and be aware of their surroundings at all times. Bystanders have been injured or killed in violent attacks in cities across the country, demonstrating the heightened risk of violence in public places. In recent years, dozens of U.S. citizens living in Mexico have been kidnapped and most of their cases remain unsolved.

The state of Michoacán is home to another of Mexico's drug-trafficking organizations (DTOs), "La Familia". In June 2010, 14 federal police were killed in an ambush near Zitacuaro in the southeastern corner of the state. In April 2010, the Secretary for Public Safety for Michoacán was shot in a DTO ambush. U.S. citizens should defer unnecessary travel to the area. If travel in Michoacán is unavoidable, U.S. citizen should exercise extreme caution, especially outside major tourist areas.

Travel Warning – Mexico, U.S. Department of State, Bureau of Consular Affairs, dated September 10, 2010.

The record reflects that the applicant's husband is from Michoacán, and the applicant's wife will have to reside in this area if forced to relocate to Mexico to live with the applicant. Based on the totality of the evidence, it has been established that the applicant's wife would suffer extreme hardship if she relocates to Mexico to reside with the applicant due to his inadmissibility.

Considered in the aggregate, the applicant has established that his spouse would suffer extreme hardship if his waiver request 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-Morales*, 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 AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he

merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the extreme hardship the applicant's wife faces if the waiver request is denied, the applicant's history of employment and payment of taxes in the United States and the lack of criminal record. The unfavorable factors include the misrepresentation made by the applicant in an attempt to obtain immigration benefit under the Act and periods of unauthorized presence.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

The AAO notes that the district director denied the Form I-485, application to adjust status, solely on the basis of the applicant's inadmissibility under section 212(a)(6)(C) of the Act and the director's denial of the Form I-601 waiver application. *Decision of the District Director*, dated May 31, 2008. The district director's denial of the Form I-485 was premature, as the applicant timely filed the instant appeal. Because the appeal will be sustained, there remains no basis, in the present record, for the denial of the adjustment application. Accordingly, the district director should reopen the adjustment application pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(i) and issue a new decision.

ORDER: The appeal is sustained.