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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



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DATE: **APR 22 2011**

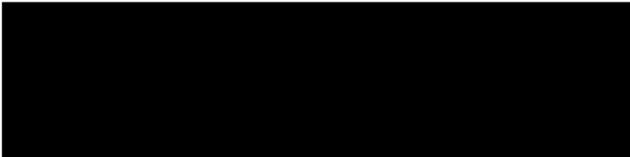
Office: CLEVELAND

FILE:

IN RE: Applicant:

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Cleveland, Ohio, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The waiver application will be approved. The matter will be returned to the field office director for continued processing.

The record establishes that the applicant, a native and citizen of Mexico, was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The applicant was also found to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured nonimmigrant visas and subsequent entry to the United States by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to be able to reside in the United States with his U.S. citizen spouse and child, born in 2008.

The field office director concluded that 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 December 23, 2008.

In support of the appeal, counsel for the applicant submits a brief, dated February 19, 2009, and referenced exhibits. The entire record was reviewed and considered in rendering this decision.

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

Aliens Unlawfully Present.-

- (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
 - (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year...and again seeks admission within 3 years of the date of such alien's departure or removal, or
 - (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...

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.

....

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

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.

Regarding the field office director's finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, the record indicates that the applicant entered the United States without inspection in July 2000. The applicant departed the United States in December 2003. The applicant subsequently re-entered the United States with an H-2B nonimmigrant visa on March 17, 2004, with permission to remain until November 30, 2004. The record indicates that the applicant did not depart the United States until May 2005. The applicant again re-entered the United States with an H-2B nonimmigrant visa on July 12, 2005, with permission to remain until November 30, 2005. The applicant remained beyond his period of authorized stay. The record indicates that he has not departed the United States since that date. The field district director found that the applicant accrued unlawful presence from July 2000 until his departure from the United States in December 2003, and again from December 2004 until his departure from the United States in May 2005. The field office director concluded that the applicant was inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year.

Based on a thorough review of the record, the AAO concurs with counsel that the field office director erred in finding that the applicant was inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having accrued unlawful presence for a period of more than one year. Unlawful presence under section 212(a)(9)(B)(i) of the Act only applies to an alien who has accrued the required amount of unlawful presence during any single stay in the United States; the length of the alien's accrued unlawful presence is not calculated by combining periods of unlawful presence accrued during multiple unlawful stays in the United States. *See Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009.

In the instant case, the applicant's periods of unauthorized stay in the United States were from September 29, 2003¹ until December 2003 and again from December 2004 until May 2005. The applicant did not accrue more than one year of unlawful presence pursuant to section 212(a)(9)(B)(i)(II) of the Act. Nor did he accrue more than 180 days of unlawful presence during a single stay in the United States pursuant to section 212(a)(9)(B)(i)(I) of the Act. As such, the AAO concludes that the applicant is not inadmissible under section 212(a)(9)(B) of the Act.

In her decision, the field office director further noted that the applicant had provided false information on his Form I-9, Employment Eligibility Verification, in 2006. The record does not conclusively establish which specific documents the applicant presented when he completed the Form I-9. The AAO notes that an alien who falsifies a Form I-9 does not make the false statements before a United States government official, and an employer's decision to hire any particular individual involves a private employment contract. Thus, false statements on Form I-9 are not for the purpose of obtaining a benefit under the Act. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 571 (BIA 1999); *See also Genco Op., Paul W. Virtue, Act. Gen. Co., Penalties for misrepresentations by an unauthorized alien on an Employment Eligibility Verification Form (Form I-9)*, No. 91-39, 2 (April 30, 1991). As such, the AAO finds that the applicant is not inadmissible for fraud or willful misrepresentation based on the Form I-9 completed in November 2006.

¹ The applicant turned 18 years old on September 29, 2003. Section 212(a)(9)(B) of the Acts states, in pertinent part:

(iii) Exceptions—

(1) Minors

No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

As such, the applicant's period of unauthorized stay in the United States from July 2000 until September 28, 2003 can not be taken into account when calculating unlawful presence pursuant to section 212(a)(9)(B) of the Act.

Regarding the field office director's finding that the applicant is also inadmissible under 212(a)(6)(C)(i) of the Act, for fraud or willful misrepresentation, the record establishes that the applicant failed to disclose his entry without inspection in July 2000 and his unauthorized presence in the United States until his departure in December 2003 when he applied for his first H-2B Visa in March 2004. Moreover, the applicant failed to disclose his H-2B overstay when he applied for his second H-2B Visa in July 2005. On appeal, counsel contends that although the applicant did willfully misrepresent to the consular officer that he had made no previous trips to the United States and/or that he had overstayed his H-2B period of authorized stay, such misrepresentations were not material. *Brief in Support of Appeal*, dated February 19, 2009.

The principal elements of a misrepresentation that renders an alien inadmissible under section 212(a)(6)(C)(i) of the Act are willfulness and materiality. In *Matter of S- and B-C-*, 9 I&N Dec 436 (BIA 1960 AG 1961), the Attorney General established the following test to determine whether a misrepresentation is material:

A misrepresentation . . . is material if either (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded. *Id.* at 447.

The Supreme Court has addressed the issue of material misrepresentations in its decision in *Kungys v. United States*, 485 U.S. 759 (1988). In that case, which involved misrepresentations made in the context of naturalization proceedings, the Supreme Court held that the applicant's misrepresentations were material if either the applicant was ineligible on the true facts, or if the misrepresentations had a natural tendency to influence the decision of the Immigration and Naturalization Service. *Id.* at 771.

The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). In this case, it has not been established, by a preponderance of the evidence that the applicant did not materially misrepresent himself to obtain H-2B visas and subsequent admission to the United States. Had the applicant disclosed that he had previously entered the United States without inspection, irrespective of his age, had resided in the United States without authorization, and had overstayed his first H-2B visa, the consular officer would likely have denied any visa requests and/or the immigration officer would likely have denied the applicant entry to the United States. As such, based on the evidence in the record, the AAO concurs with the field office director that the applicant 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 their child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen

spouse 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 a qualifying relative, 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-I-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.

The applicant’s U.S. citizen spouse asserts that she will suffer emotional and financial hardship were she to reside in the United States while the applicant relocated abroad due to his inadmissibility. In a declaration she states that the applicant is her soul mate and she cannot bear to live without him. She notes that every time they have been separated in the past she has experienced extreme pain. In addition, the applicant’s spouse contends that she works part-time in order to care for their young child while her husband works full-time and were he to relocate abroad, she would not be able to make ends meet and keep up with their extensive household bills. *Affidavit of* [REDACTED] [REDACTED] Finally, counsel references the hardships the applicant’s child will suffer due to long-term separation from his father, thereby causing the applicant’s spouse extreme hardship. *Supra* at 10.

In support, a psychological report has been provided, establishing that the applicant’s spouse and child will suffer emotional hardship were the applicant to relocate abroad. *See Psychological Report from* [REDACTED] dated October 22, 2008. Moreover, evidence has been submitted establishing the applicant’s critical financial contributions to the household through his long-term full-time employment with T & D Fabricating. *See Form W-2 and Earnings Summary for 2008*. The AAO notes that in 2008, the applicant earned over \$22,000 while his spouse made approximately \$5000, and pursuant to the applicant’s spouse’s declaration and the submitted credit report, they have outstanding loans totaling over \$32,000. *Supra* at 2 and *Credit Report*

The record reflects that the cumulative effect of the emotional and financial hardship the applicant’s spouse would experience due to her husband’s inadmissibility rises to the level of extreme. The AAO thus concludes that were the applicant unable to reside in the United States due to his inadmissibility, the applicant’s spouse would suffer extreme hardship.

Extreme hardship to a qualifying relative must also be established in the event that he or she accompanies the applicant abroad based on the denial of the applicant's waiver request. The applicant's U.S. citizen spouse explains that she has lived in the United States since she was seven years old and her extended family, including her mother, father, two sisters and brother, reside in Painesville, Ohio. She states that she is very close to her family, and were she to relocate abroad, she would not be able to afford to visit them often. She further states that they do not have the financial means to travel to Mexico regularly to visit her and such a predicament would cause her emotional hardship. Moreover, the applicant's spouse asserts that she and the applicant will be unable to obtain gainful employment in Mexico to maintain her standard of living. *Supra* at 3. Finally, counsel references the problematic country conditions in Mexico, including violence and insecurity. *Supra* at 5-7.

The record reflects that the applicant's spouse was raised in the United States. Were she to relocate abroad to reside with the applicant, she would have to adjust to a country with which she is no longer familiar. She would have to leave her community, her gainful employment, and her family, including her mother, father and siblings, and she would be concerned about her and her child's safety and well-being in Mexico. Moreover, the applicant's spouse would not be able to maintain her quality of living due to the substandard economy in Mexico.² Finally, the U.S. Department of State has issued a travel warning, advising U.S. citizens and lawful permanent residents of the high rates of crime and violence in Mexico. *Travel Warning-Mexico, U.S. Department of State*, dated September 10, 2010. It has thus been established that the applicant's spouse would suffer extreme hardship were she to relocate abroad to reside with the applicant due to his inadmissibility.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Moreover, it has been established that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate abroad to reside with the applicant. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. In discretionary

² As noted by the U.S. Department of State,

Poverty is widespread (around 44% of the population lives below the poverty line) and high rates of economic growth are needed to create legitimate economic opportunities for new entrants to the work force. The Mexican economy in 2009 experienced its deepest recession since the 1930s. Gross domestic product (GDP) contracted by 6.5%, driven by weaker exports to the United States; lower remittances and investment from abroad; a decline in oil revenues; and the impact of H1N1 influenza on tourism.

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 . . . 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-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance 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 favorable factors in this matter are the extreme hardship the applicant's U.S. citizen spouse and child would face if the applicant were to reside in Mexico, regardless of whether they accompanied the applicant or stayed in the United States, his community ties, the applicant's apparent lack of a criminal record, his gainful employment and the payment of taxes. The unfavorable factors in this matter are the applicant's unauthorized entry to the United States, unlawful presence and unlawful employment while in the United States, and misrepresentation, as outlined in detail above.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the I-601 waiver application approved.

ORDER: The appeal is sustained. The waiver application is approved. The field office director shall reopen the denial of the Form I-485 application on motion and continue to process the adjustment application.