

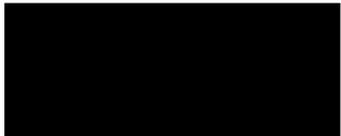
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: **MAY 31 2011** Office: WASHINGTON DC FIELD OFFICE FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(i) of the 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, Washington DC Field Office. The matter 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 Peru who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willful misrepresentation of a material fact in order to procure an immigration benefit. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside with her husband and children in the United States.

The field office director found that the applicant failed to establish extreme hardship to her spouse and denied the waiver application accordingly. *Decision of the Field Office Director*, dated February 6, 2008.

On appeal, counsel states that the applicant claimed she was married, when she was not in fact married, in order to procure a visa to visit the United States. In addition, counsel contends that the applicant has established extreme hardship to her spouse, particularly considering his entire family lives in the United States, he does not speak any Spanish, the applicant suffers from depression, and the applicant's children from a previous relationship have medical and psychological problems.¹

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and her husband, [REDACTED], indicating they were married on March 21, 2006; a letter and a declaration from [REDACTED] a psychological evaluation; copies of the birth certificates of the applicant's two U.S. citizen children from a previous relationship; a copy of the applicant's daughter's medical records; a copy of the applicant's son's Individualized Education Plan (IEP); letters from the applicant's and [REDACTED] employers; copies of pay stubs, tax records, and other financial documents; a copy of a protective order; letters of support; a copy of the U.S. Department of State's Country Specific Information for Peru, articles, and other background materials; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

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

¹ In response to the field office director comment that "the Service has no proof of [the applicant's] entry into the United States," *Decision of the Field Office Director, supra*, counsel contends that the applicant provided proof of her entry into the United States by producing an airline ticket issued to [REDACTED]. The AAO notes that this issue appears to have been resolved given that the field office director denied the applicant's Form I-485 accepting the fact that the applicant entered the United States using a false visa, rather than finding that the applicant was ineligible to adjust her status under either section 245(a) or (i) of the Act. *Decision of the Field Office Director, supra; Notice of Decision*, dated February 6, 2008 (denying the applicant's Form I-485). Therefore, this issue need not be discussed here.

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.

Section 212(i) provides, in pertinent part:

(1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], 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 permanent resident spouse or parent of such an alien

In this case, the applicant concedes that she informed the Embassy in Peru that she was married, when she was not in fact married, in order to obtain a visa to visit the United States. *Response to Notice of Action*, dated April 17, 2007. According to the applicant, she entered the United States in July 1993 using her purported married name of “Velasquez.” *Id.* Therefore, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willful misrepresentation of a material fact in order to procure an immigration benefit.

The AAO notes that the applicant may also be inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. According to a letter from a social worker in the record, as well as other documentation in the record, the applicant was arrested and convicted of shoplifting in November 2004. *Letter from* [REDACTED] dated April 6, 2008. Regardless, because the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act and demonstrating eligibility for a waiver under section 212(i) also satisfies the requirements for a waiver of criminal grounds of inadmissibility under section 212(h), the AAO need not determine whether the applicant is also inadmissible under section 212(a)(2)(A)(i)(I).

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 children 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-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-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 applicant's husband, [REDACTED] states that his wife has two children who live with them and that because their biological father is not involved in their lives, he is the only male role model the children have. According to [REDACTED], the children finally have stability in their lives and they are a very close family. [REDACTED] states he was born in the United States, has lived in the United States his entire life, and does not speak Spanish. He contends he could not live in Peru with his wife because he has nothing there, his entire family lives in the United States, and he could not find a job in Peru. *Letter from* [REDACTED], undated; *Declaration of* [REDACTED], dated December 12, 2006.

A letter from a social worker states that the applicant became depressed before the birth of her first child and that after having the baby, she was paralyzed with anxiety and lost weight. The applicant reported having visual disturbances, insomnia, and thoughts of hurting herself. The social worker contends that the applicant suffers from Depressive Disorder that has never been treated and recommends the applicant have a psychiatric consultation. According to the social worker, if the applicant moves to Peru, it is likely that her depression will not be properly treated and she will not be emotionally available to her children. In addition, the social worker states that one of the applicant's children has a learning disorder/dyslexia and that both children have pre-existing psychological difficulties. According to the social worker, the applicant's daughter's grades have dropped, she has lost weight, she has been wetting her bed at night, and she is having undiagnosed stomach pains because of the applicant's immigration problem. The applicant's son reportedly has a learning disability, is possibly dyslexic, wets his bed while sleeping, and has become combative. Furthermore, the social worker states that the children's biological father was an alcoholic who was physically and emotionally abusive toward the applicant and the children. The social worker states that the abuse escalated until the police and judicial systems intervened and a "stay-away order" was issued. The children's biological father has purportedly not had any contact with them since 2002. *Letter from* [REDACTED], *supra*.

The record contains a copy of the applicant's son's Individualized Education Plan (IEP) which states that he has a learning disability and is in special education classes. *Department of Special Services, Individualized Education Program*, dated April 20, 2007. The record also contains a copy of a Protective Order, mandating that the children's father refrain from committing further acts of family

abuse, not drink alcohol when visiting with the children, and have no further physical contact with the family except during visitation. *Protective Order – Family Abuse*, dated May 20, 1999.

Upon a complete review of the record evidence, the AAO finds that if [REDACTED] remained in the United States without his wife, he would suffer extreme hardship. Although hardship to the applicant's children can be considered only insofar as it results in hardship to a qualifying relative, considering the unique circumstances of this case, the applicant's children's hardship would result in extreme hardship to [REDACTED]. The record shows that [REDACTED] is the stepfather of the applicant's two children who are currently thirteen and fifteen years old. According to [REDACTED], he is very close with his stepchildren and he is the only male role model in their lives. *Letter and Declaration from [REDACTED]*. Letters of support in the record indicate that [REDACTED] "has taken her children in as his own," and state that he is "lovingly devoted" and a "wonderful father to the children." *Letter from [REDACTED]* dated March 12, 2008; *Letter from [REDACTED]* dated March 6, 2008. According to the social worker and the Protective Order, the children's biological father abused them and has not seen them since 2002. *Letter from [REDACTED] supra; Protective Order – Family Abuse, supra*. In addition, the record shows that the applicant's son has a learning disability and is in special education classes. *Department of Special Services, Individualized Education Program, supra*. Therefore, if the applicant's waiver application were denied and the children stayed in the United States, [REDACTED] would experience extreme hardship as a single parent to his stepchildren, both of whom have been abused and one of whom has a learning disability, while potentially having to deal with the children's biological father. For the same reasons, if the children moved to Peru with the applicant, [REDACTED] would also experience extreme hardship. This finding is based on the extreme emotional harm [REDACTED] would experience due to concern about his stepchildren's well-being in Peru, a concern that is beyond the common results of removal or inadmissibility.

The AAO also finds that if [REDACTED] had to move to Peru to be with his wife, he would experience extreme hardship. The record shows that [REDACTED] was born in the United States, has lived in the United States his entire life, and, according to [REDACTED], does not speak Spanish. [REDACTED] would need to adjust to a life in Peru after having lived in the United States his entire life, a difficult situation made even more complicated given the history of abuse and special educational needs of his stepchildren. Based on these considerations, the AAO finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case include the applicant's misrepresentation of a material fact to procure an immigration benefit, periods of unauthorized presence and employment, and the applicant's arrest and conviction for shoplifting in 2004. The favorable and mitigating factors in the present case include: the applicant's family ties to the United States, including her U.S. citizen husband and two

U.S. citizen children; the extreme hardship to the applicant's husband if she were refused admission; a letter of support describing the applicant as responsible, "a strong mother[,] and an irreplaceable fixture in th[e] community," and the fact that the applicant has not had any other arrests for more than five years. *Letter from* [REDACTED], dated March 20, 2008.

The AAO finds that, although the applicant's immigration violation and conviction are serious and cannot be condoned, when 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.