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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**

PUBLIC COPY

765



Date: NOV 09 2011

Office: TUCSON, ARIZONA

FILE: 

IN RE:

Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

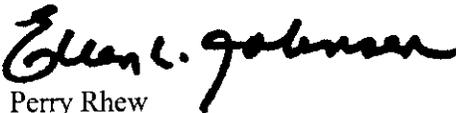


INSTRUCTIONS:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Tucson, Arizona. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 fraud or willful misrepresentation of a material fact in order to obtain 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 a qualifying relative and denied the waiver application accordingly. *Decision of the Acting Field Office Director*, dated April 7, 2009.

On appeal, counsel contends the applicant was unaware she had to submit evidence to show extreme hardship. Counsel submits evidence of hardship and contends the applicant has established extreme hardship to her U.S. citizen husband, particularly considering the couple's son has a speech disability and their daughter suffers from depression.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and her husband, [REDACTED] indicating they were married on February 4, 2005; copies of the birth certificates of the couple's three U.S. citizen children; a letter from [REDACTED] letters of support; a psychological evaluation for [REDACTED] letters from the children's school; a screening assessment for the couple's son; copies of pay stubs, tax records, and other financial documents; copies of photographs of the applicant and her family; 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:

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

result of aggregated individual hardships. See, e.g., *Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In this case, the applicant's husband, [REDACTED] states that he has been very worried about his wife's immigration situation and that their children are depressed. Specifically, [REDACTED] states that his older daughter, [REDACTED], who is twelve years old, cries in her bedroom every day. He contends his other daughter has become very distracted, does not want to eat, and that her character has changed. He also contends that their four-year old son cries when he does not see his mother and that he needs "special classes." In addition, [REDACTED] states that when he lost his job, his wife got another job and supports their house by always being strong. *Letter from [REDACTED]*, dated April 24, 2009.

A psychological evaluation in the record states that [REDACTED] exhibited symptoms of clinical depression and is already taking antidepressants. The social worker also states that the couple's son, [REDACTED] participates in speech therapy because he is unable to talk. The social worker states that [REDACTED] is unlikely to have access to special education and speech therapy if he were to move to Mexico. In addition, the social worker reports that the couple's daughter, [REDACTED], has been having crying spells, diarrhea, increased anxiety, hypervigilance, and increased fear and nightmares. The social worker states that [REDACTED] also had a speech impediment as a child, but has overcome it. According to the social worker, [REDACTED] does not speak Spanish even though her parents do, and moving to Mexico will force her to learn a new language after having struggled to overcome her speech impediment and having learned the phonetics of the English language. Moreover, the social worker states that the couple's daughter, [REDACTED] suffers from migraines, refuses to eat, has anxiety, and is afraid of the night. The social worker states that the Director of [REDACTED] school has become concerned about her and has assigned her a counselor. *Letter from [REDACTED]* dated April 24, 2009.

A letter from a special education teacher states that [REDACTED] qualifies for special education services. The letter states that [REDACTED] needs extra help learning his numbers and colors, needs help improving his attention span, and needs help with speech and language. The letter contends [REDACTED] also needs help improving his expressive language, increasing his vocabulary, and pronouncing sounds. *Letter from [REDACTED] and [REDACTED]*, dated April 20, 2009. A Comprehensive Developmental Assessment Evaluation of [REDACTED] states that he is toilet trained, but continues to need assistance with hygiene, that he is not yet using connected speech, and that he tested in the poor range of functioning in the Cognitive Domain. *Tucson Unified School District, Comprehensive Developmental Assessment Evaluation*, dated January 12, 2009; see also [REDACTED], dated August 22,

2008 (stating that [REDACTED] speech is hard to understand, that he has trouble focusing and completing tasks, and that he can follow one step directions only).

A letter from a school counselor states that she has seen a change in [REDACTED] behavior. According to the counselor, [REDACTED] used to be a very happy girl, but that she has been feeling sad and nervous since learning of her mother's possible deportation. *Letter from [REDACTED] undated.* A letter from [REDACTED] physician states that [REDACTED] suffers from headaches and poor sleep because she is afraid her mother is going to be deported. *Letter from [REDACTED] undated.*

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 the couple's son, [REDACTED] has limitations in cognitive functioning and is in special education classes and speech therapy. The record shows that [REDACTED] has difficulty expressing himself, has difficulties with attention span, and can follow simple directions only. According to [REDACTED] [REDACTED] cries when he does not see his mother. In addition, the record shows that the couple's daughter, [REDACTED] has had a noticeable change in behavior because she is sad and nervous about her mother's possible departure from the United States, and has been experiencing physical symptoms, such as anxiety, headaches, decreased appetite, and nightmares, as a result. 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 three minor children, one of whom has special needs and another who has documented emotional and physical problems as a result of the possibility of their mother departing the country.

Nonetheless, [REDACTED] has the option of returning to Mexico in order to avoid the hardship of separation and the record does not show that his move would amount to extreme hardship. Significantly, [REDACTED] does not discuss the possibility of returning to Mexico to avoid the hardship of separation and he does not address whether such a move would represent a hardship to him. *Letter from [REDACTED] supra.* The record shows that [REDACTED] is currently thirty-eight years old, was born in Mexico, and both of his parents continue to live in Mexico. *Biographic Information form (Form G-325A)*, dated April 1, 2008. In addition, the record shows that [REDACTED] has worked as a cook, laborer, as a carpenter, and in construction companies. *Affidavit of Support Under Section 213A of the Act (Form I-864)*, dated April 1, 2008 (indicating [REDACTED] is employed as a cook); *2007 U.S. Individual Income Tax Return (Form 1040A)*, dated February 7, 2008 (indicating [REDACTED] occupation as a carpenter); *Wage and Tax Statement (Form W-2)* (indicating wages of \$17,747 from [REDACTED]; *2005 Wage and Tax Statement (Form W-2)* (indicating wages of \$14,216 from [REDACTED]; *2005 U.S. Individual Income Tax Return (Form 1040A)*, dated March 17, 2006 (indicating [REDACTED] occupation as "labor"). There is no suggestion in the record that [REDACTED] could not find employment in Mexico. Moreover, although the social worker asserts that [REDACTED] came to the United States fourteen years ago, *Letter from [REDACTED] supra*, aside from his children [REDACTED] does not discuss any other ties he has to the United States.

Regarding the psychological evaluation, the AAO notes that the social worker makes numerous

statements that have no corroborating evidence in the record. For instance, according to the social worker, [REDACTED] is already struggling with symptoms of depression and is taking antidepressants prescribed by a [REDACTED]. However, the record does not contain a letter from [REDACTED] or a copy of the prescription and [REDACTED] himself makes no mention of taking antidepressants. In addition, the social worker contends [REDACTED] is trying to build up his own carpentry business and that the applicant has worked as the main breadwinner of the family for the past four months, earning \$1,200 per month. Although the record contains letters from the applicant's employer, there is no documentation addressing her wages or income. Moreover, the social worker states that the couple's daughter, [REDACTED], does not speak Spanish. However, the record shows that the family's first language is Spanish. *Tucson Unified School District, Comprehensive Developmental Assessment Evaluation, supra* ("Spanish is the dominant language of the home."); *see also Letter from [REDACTED]* dated April 23, 2009 (stating [REDACTED] "needs guidance in overcoming the challenge of English as a second language"); *Letter from [REDACTED]*, dated April 24, 2009 (stating [REDACTED] is in English Language Development classes and passed the English Language Learner test). Although the children may not be familiar with "academic Spanish," *Letter from [REDACTED], supra*, the record does not show that any difficulties the children may have with the Spanish language would cause extreme hardship to [REDACTED]. [REDACTED] Furthermore, the AAO notes that the evaluation in the record is based on one interview the social worker conducted with [REDACTED] and the couple's children on April 20, 2009. The fact that the evaluation was based on a single interview and makes assertions that are either unsupported or contradicted by other documentation in the record diminishes the evaluation's value to a determination of extreme hardship.

Although the applicant has demonstrated that the qualifying relative, her husband, would experience extreme hardship if separated from the applicant, we can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. The AAO has long interpreted the waiver provisions of the Act to require a showing of extreme hardship in both possible scenarios, as a claim that a qualifying relative will remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *see also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case.

Finally, the AAO notes that the acting field office director found that the applicant entered the United States without inspection, and is, therefore, ineligible to adjust status under section 245(a) of the Act. *Decision of the Field Office Director*, dated April 7, 2009. However, the record contains a copy of the visa the applicant used when she was admitted to the United States on May 2, 1998. Thus, the record clearly shows that the applicant was, indeed, admitted into the United States. Therefore, the acting field office director should re-evaluate whether she is eligible to adjust under section 245(a) of the Act. In addition, to the extent the acting field office director found the applicant ineligible for a waiver under section 212(a)(9)(C) of the Act, the Act states in pertinent part:

(C) Aliens unlawfully present after previous immigration violations. -

(i) In general. - Any alien who -

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States *without being admitted* is inadmissible.

Section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C) (emphasis added). In this case, the applicant indicates that she departed the United States in January 1998. The unlawful presence provisions of the Act went into effect on April 1, 1997 so in January 1998 the applicant could not have accrued one year of unlawful presence. However, even if she had accrued over one year of unlawful presence, the record shows that the applicant *was* admitted to the United States on May 2, 1998. As such, the record does not show that she is inadmissible under section 212(a)(9)(C) of the Act.

The applicant, however, remains inadmissible under Section 212(a)(6)(C)(i) of the Act. A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's husband caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. See Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.