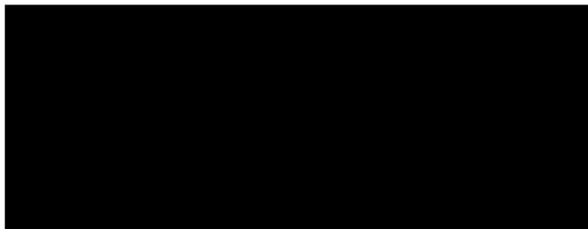


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Avenue, N.W. MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



H5

Date **OCT 03 2011**

Office: MEXICO CITY (CIUDAD JUAREZ)

FILE: 

IN RE: 

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City (Ciudad Juarez), Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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 having attempted to procure an immigration benefit through willful misrepresentation on March 6, 2007. The applicant was also found to be inadmissible under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), as an applicant who was in violation of a law related to a controlled substance. The applicant is married to a U.S. citizen and has a U.S. citizen son. He seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated February 11, 2008, the district director found that the applicant willfully misrepresented a February 19, 1998 arrest for passing a bad check during his immigrant visa interview on March 6, 2007. The district director also found that the applicant was detained at the San Ysidro port of entry and found to be in possession on 17 grams of marijuana. The district director then found that the applicant had failed to establish that he was not a threat to U.S. national security and also failed to establish extreme hardship to his U.S. citizen spouse as a result of his inadmissibility. The application was denied accordingly.

In a statement on appeal, the applicant's spouse states that the vehicle the applicant was driving on April 14, 1999 when marijuana was found in the trunk of the car was not his vehicle, that the applicant did disclose his arrest regarding the bad check, and that no charges were filed for this arrest. The applicant has also submitted evidence that he is not a threat to U.S. national security and that his spouse will suffer extreme hardship as a result of his inadmissibility.

The record indicates that on April 16, 1999 at the San Ysidro, California port of entry, 17 grams of marijuana was found in car the applicant was driving. The applicant was found (by the U.S. Customs Service) to be in violation of 19 U.S.C. § 1459, fined \$500, the car was seized, and the applicant was returned to Mexico.

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

- (1) Criminal and related grounds. —
 - (A) Conviction of certain crimes. —
 - (i) In general. — Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of —
 - (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a

foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

....

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

The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) *and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana* (emphasis added.)

It is not clear from the record that the administrative finding by the U.S. Customs Service constitutes a conviction under the Act, and the applicant has not admitted to having committed the crime, or the essential elements of the crime, of possession of marijuana. However, in that the applicant was found to be in possession of less than 30 grams of marijuana, and in that we find the applicant eligible for a waiver of inadmissibility under section 212(h) of the Act, we will assume for purposes of this appeal that the applicant was convicted of possession of marijuana.

The record also indicates that the applicant did not reveal his February 19, 1998 arrest for passing a bad check during his immigrant visa interview. Based on this failure to mention this arrest, the district director found the applicant inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for misrepresentation.

The AAO finds that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act because his failure to disclose his 1999 arrest is not material. According to the Department of State's Foreign Affairs Manual, 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 that is relevant to the alien's eligibility and that might well have resulted in a proper determination that he be excluded. *9 FAM 40.63 N61*. The applicant's 1999 arrest did not result in a conviction and the applicant never made any admissions as to the elements of the crime for which he was arrested. Had the applicant revealed this arrest, it would not have resulted in his inadmissibility or exclusion. Therefore, this arrest is not material and the applicant's omission is not a material misrepresentation. A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 US 759 (1988); see also *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964) and *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961).

Thus, the applicant is only inadmissible under section 212(a)(2)(A)(i)(II) of the Act and is eligible for a section 212(h) waiver.

A waiver of inadmissibility under section 212(h) 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, parent, son or daughter of the applicant. Hardship to the applicant can be

considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse and child are the qualifying relatives 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).

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 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.

The record of hardship includes two statements from the applicant's spouse, a document written in Spanish, and numerous medical records.

The AAO notes that because the applicant failed to submit a certified translation of the document, the AAO cannot determine whether the evidence supports the applicant's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

In her statements the applicant's spouse states that separation from the applicant has been emotionally draining and has caused emotional upheaval. She states that she has chosen to live in the United States because of her son's education and travel to Mexico to visit the applicant every weekend. She states that when her son asks her about his father she feels totally devastated and emotionally unstable. She states that this emotional hardship is affecting her ability to interact with others at home and at work. The applicant's spouse also states that her son has been suffering from seizures since he was 18 months old, he is under the care of a neurologist, is required to take medication on a daily basis, and requires constant supervision. She states that she needs her spouse in the United States to help her emotionally and physically deal with their son's medical condition. The applicant's spouse states that her income provides for a humble home and that although the applicant is working in Mexico he barely makes enough to support himself. She states that he has been offered a job with a tire market in San Ysidro, which if he were allowed to take would ease their financial situation.

The AAO notes that the medical documentation in the record establishes that the applicant's son suffers from a seizure disorder. Other documentation includes records of her pregnancy and records of numerous emergency room visits. These records indicate that in February, March, and April of 2004 the applicant's spouse visited the emergency room three times for abdominal and rectal pain. The record also indicates that on March 13, 2005 the applicant's spouse visited the emergency room complaining of headaches that she states have been occurring for the past eight years. The attending physician states in the emergency room report that he believes the headaches are stress related. The AAO also notes that the record indicates that on April 5, 2007 the applicant's spouse was given a handout concerning her being diagnosed with General Anxiety Disorder, but the record does not show how the applicant's spouse came to be evaluated for this mental health problem. The record also contains a physician's statement dated March 29, 2007, which states that the applicant's spouse

will be out of work from January 31, 2007 until March 29, 2007 due to a knee sprain, asthma, abdominal pain, and emergency room follow-up.

The AAO finds that the applicant's spouse has established that she will suffer extreme hardship as a result of the applicant's inadmissibility. The record establishes that the applicant's spouse is suffering extreme emotional hardship as a result of being separated from the applicant and having to care for their five-year-old son who has a serious medical condition. The applicant's spouse states that the separation has been emotionally devastating for her and medical records were submitted to show that the applicant's son does suffer from seizure disorder and that the applicant's spouse is suffering from severe stress and anxiety.

Furthermore, the AAO finds that the applicant's spouse and child would suffer extreme hardship as a result of relocating to Tijuana, Mexico, where the applicant was born because of the ongoing violence in this region of Mexico. The U.S. Department of State Travel Warning for Mexico, dated September 10, 2010 states that since 2006, the Mexican government has engaged in an extensive effort to combat drug-trafficking organizations (DTOs). The warning states that Mexican DTOs, meanwhile, have been engaged in a vicious struggle with each other for control of trafficking routes and according to published reports, 22,700 people have been killed in narcotics-related violence since 2006. The warning states that much of the country's narcotics-related violence has occurred in the northern border region and that more than half of all Americans killed in Mexico in 2009 whose deaths were reported to the U.S. Embassy were killed in the border cities of Ciudad Juarez and Tijuana.

The warning states further that large firefights have taken place mostly in northern Mexico and often in broad daylight on streets and other public venues. The warning states that the situation in northern Mexico remains fluid and that the location and timing of future armed engagements cannot be predicted. The warning also states that criminals have followed and harassed U.S. citizens traveling in their vehicles in border areas including Nuevo Laredo, Matamoros, and Tijuana. Therefore, in consideration of the violent country conditions in Tijuana, Mexico, as well as the hardships associated with severing ties to the United States, including any complications related to the medical condition of the applicant's spouse's son, the AAO finds that it would be extreme hardship for the applicant's spouse to relocate.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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 section 212(h)(1)(B) 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-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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 adverse factor in the present case is the applicant's possession of 17 grams of marijuana.

The favorable factors in the present case are the extreme hardship to his U.S. citizen wife and child if he were to be denied a waiver of inadmissibility; the applicant's lack of a criminal record or other offense; the age of the applicant (19-years-old) at the time of the offense; and, as indicated by his spouse, the applicant's employment and attributes as a good father.

The AAO finds that the offense committed by the applicant is serious in nature and cannot be condoned. Nevertheless, the AAO finds that 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.