U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship and Immigration Services

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[redacted]

Date: APR 03 2012 Office: ALBUQUERQUE, NM FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act (the 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,

Ellen C. Johnson

Perry Rhew
Chief, Administrative Appeals Office

> 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 record shows, and counsel concedes, that the applicant entered the United States several times with a nonimmigrant visa and represented to immigration officials that he was visiting the United States when, in fact, the applicant intended on remaining in the United States to resume his work and residence. Rather than concede inadmissibility, however, counsel relies on *Matter of Battista*, 19 I&N Dec. 484 (BIA 1987), *Matter of Ibrahim*, 18 I&N Dec. 55 (BIA 1981), and *Matter of Cavazos*, 17 I. & N. Dec. 215 (BIA 1980), for the proposition that even though the applicant misrepresented his intention, because the applicant is an immediate relative and there are no other negative factors in the case, the applicant deserves to adjust his status to that of a lawful permanent resident.

The AAO finds counsel's contention unpersuasive. Section 245 of the Act provides that the Secretary may, in her discretion, adjust the status of an alien inspected and admitted or paroled into the United States to that of an alien lawfully admitted for permanent residence if the alien applies for adjustment, the alien is eligible to receive an immigrant visa, the alien is admissible to the United States for permanent residence, and an immigrant visa is immediately available. In this case, the alien has been found to be inadmissible to the United States and, therefore, ineligible to receive an immigrant visa. To be found inadmissible for fraud or willful misrepresentation under section 212(a)(6)(C)(i) of the Act, the applicant must, among other things, have made a false representation. The Department of State Foreign Affairs Manual defines a misrepresentation as "an assertion or manifestation not in accordance with the facts." *DOS Foreign Affairs Manual,* § 40.63 N4.1. In this case, counsel does not contest that the applicant made an assertion that was not in accordance with the facts. Specifically, the applicant misrepresented to immigration officials his intent regarding his stay in the United States. Therefore, he is inadmissible under section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit.

Significantly, the BIA cases upon which counsel relies do not address inadmissibility. Rather, all three cases address the applicant's intent upon entering the United States as a discretionary factor. Only *after* an applicant has established eligibility to adjust status does the Secretary consider whether the applicant merits a waiver of inadmissibility as a matter of discretion. Extreme hardship

is a requirement for eligibility, and once established, it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). If an applicant is found to be statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion. Therefore, because it is uncontested that the applicant misrepresented his intentions upon entering the United States, the applicant is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit.

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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., 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 wife, [redacted] states that she and her husband have two sons. She states that her younger son was diagnosed with Down Syndrome and was born with two holes in his heart, the right side of his heart was larger than his left, and his liver was larger than average. In addition, she contends that her son was hospitalized for six weeks because he developed blisters under his eyes, his arm and leg became swollen, he developed a blood disorder called transient myeloproliferative that could develop into leukemia, and was diagnosed with aspiration because when he is fed liquids, they go down his lungs. She states her son was released from the hospital on oxygen and with a feeding tube. [redacted]ontends her son requires check-ups every two weeks because he has trouble eating and gaining weight. She states that she could not have gotten through everything without her husband, that she is so lucky to have him in her life, and that even though her son will have Down Syndrome his entire life, he will get all the help he needs in the United States for his disability. Furthermore, [redacted] states that if it weren't for her husband's income, the bills would not get paid. Moreover, [redacted] states that Mexico is dangerous and there is a lot of crime. She states her entire family, including her parents, brother, and sister all live in the United States and she cannot imagine being without them.

After a careful review of the record, the AAO finds that the applicant's wife, [redacted] will suffer extreme hardship if the applicant's waiver application were denied. According to the applicant and his wife, the applicant is the sole income earner for the family and [redacted]s taking care of their two sons who are currently two and three years old. The record shows that the couple's two year old son, [redacted], has been diagnosed with numerous medical problems, including [redacted] (Down Syndrome), Myeloproliferative Disorder, Ventricular Septal Defect, Atrial Septal Defect, and Dermatosis. Copies of his medical records indicate he has had persistent difficulty gaining weight, and that during feedings, he becomes congested, sweats, and has increased belly breathing. The records also show that he has been prescribed eight separate medications. Although the medical records indicate that some of his health conditions have been resolved, and that he no longer needs to be seen regularly by the cardiology clinic, he continues to see a dietician and his primary care physician regularly. In addition, the record contains an article addressing myeloproliferative disorder, which states that this disorder can become leukemia, corroborating [redacted]s claim that her son needs close follow

up medical care. In addition, according to tax documents in the record, in 2008, worked three separate jobs, earning a total of well below the Poverty Line. According to her Biographic Information form (Form G-325A), since July of 2007, she has worked as a cashier and as an interpreter, and she has been a homemaker since December 2008. Considering all of the evidence in the aggregate, the AAO finds that if decided to stay in the United States, the effect of separation from the applicant goes above and beyond the experience that is typical to individuals separated as a result of inadmissibility or exclusion and rises to the level of extreme hardship.

Moreover, moving to Mexico to avoid separation would be an extreme hardship for As described above, the couple's son has been diagnosed with numerous medical problems and requires regular follow-up care. Relocating to Mexico would disrupt the continuity of the couple's son's medical care. The AAO also acknowledges that was born in the United States and that her entire family lives in the United States. Furthermore, regarding her contention that she fears relocating to Mexico due to crime, the record contains ample documentation addressing the serious safety concerns in Mexico. The AAO also takes administrative notice of the most recent Travel Warning from the U.S. Department of State urging U.S. citizens to defer non-essential travel to the state of Chihuahua, where the applicant was born and where his parents continue to live. *U.S. Department of State, Travel Warning, Mexico*, dated February 08, 2012. Considering all of these factors cumulatively, the AAO finds that the hardship would experience if she moved to Mexico to be with her husband is extreme, going well beyond those hardships ordinarily associated with inadmissibility or exclusion. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that 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 are the applicant's numerous entries into the United States misrepresenting his intentions and periods of unauthorized employment. The favorable and mitigating factors in the present case include: family ties in the United States including his U.S. citizen wife and their two U.S. citizen children; the extreme hardship to the applicant's wife and children if he were refused admission; letters of support describing the applicant as a hard worker, wonderful husband, and loving father; and the fact that the applicant has not had any arrests or convictions in the United States.

The AAO finds that, although the applicant's immigration violations 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.