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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

[REDACTED]

H5

Date: MAR 12 2012

Office: MEXICO CITY, MEXICO

FILE: [REDACTED]

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B) and section 212(i) of the Immigration and Nationality 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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Mexico City, 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)(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 and seeking readmission within ten years of her last departure from the United States and under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission into the United States by fraud or willful misrepresentation in May 2004. The applicant is married to a U.S. citizen and has three U.S. citizen children. She seeks a waiver of inadmissibility in order to reside in the United States with her family.

In a decision, dated September 18, 2009, the field office director found that although the applicant's inadmissibility would have an adverse effect on her family, the hardship presented did not rise to the level of extreme hardship. The waiver application was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated October 13, 2009, counsel states that the field office director failed to apply the hardship standards under *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). She states that applicant's family would suffer as a result of her inadmissibility because the applicant cares for the children while her spouse works two jobs to support the family. Counsel also states that the applicant's stepdaughter has a medical condition for which they have sought medical, educational, and psychological treatment and that the applicant's spouse has no ties to Mexico.

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

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(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.

The record indicates that the applicant entered the United States without inspection in May 2004 and resided in the United States until July 2008. Thus, the applicant accrued unlawful presence from May 2004 until July 2008. In applying for an immigrant visa, the applicant is seeking admission within ten years of her July 2008 departure from the United States. The applicant is, therefore,

inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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

(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.

The record indicates that on August 5, 2008 the applicant testified to a consular officer that she entered the United State in May 2004 by using someone else's entry documents. Thus, the applicant is also inadmissible under section 212(a)(6)(C) of the Act.

Section 212(a)(9)(B)(v) and section 212(i) of the Act provide waivers of section 212(a)(9)(B)(i) and section 212(a)(6)(C) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) or 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 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-Moralez*, 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 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.

The record of hardship includes: counsel's brief, two letters from the applicant's spouse, letters from friends and family, and medical and educational documentation pertaining to the applicant's daughter.

The applicant's spouse is claiming extreme emotional and financial hardship as a result of separation from the applicant and as a result of relocation. The applicant's spouse claims that he is suffering emotionally from being separated from the applicant because he is despondent and he no longer has the applicant to help him care for his two children, one of which has various medical problems and a learning disability and the other who experienced a traumatized childhood. Medical and court documentation in the record supports the applicant's spouse's claims that his daughter from a previous relationship sees her mother regularly and suffers from hearing loss, behavioral problems, a possible learning disability, and frequent urinary tract infections. The record also indicates that the applicant's spouse's son from a previous relationship was abandoned by his mother at a young age, separated from his four siblings, placed into foster care until the applicant's spouse could gain custody of him, and now has behavioral problems. The applicant's spouse's statement and statements from family indicate that the applicant was the caretaker for these children while her spouse worked as a United Parcel Service driver from 8:40am to 9:30pm; that other family members are trying to help where they can, but it is very difficult for them; and that the applicant's spouse has changed his work schedule to care for the children which has caused the family to face financial hardship.

The AAO notes that counsel claims the applicant also helps her spouse to care for an elderly and disabled family member. This claim is not supported by the record, except that a school report states that the applicant's spouse's daughter lives with her father, brother, and grandfather. No other details concerning the grandfather are part of the record.

The applicant's spouse also claims emotional and financial hardship as a result of relocation because he will not be able to find employment in Mexico, he cannot speak Spanish, Mexico has a high crime rate, and he cannot take his children outside the United States. The record does not include documentation to support the assertions regarding employment or safety in Mexico. However, the record does indicate, through an educational assessment, that the applicant's spouse's daughter sees her mother on a regular basis. In addition, the record indicates that the applicant is from Guerrero, Mexico and that her son's father is presumed dead from drug cartels in Mexico. The AAO notes that the current U.S. State Department Travel Warning supports statements regarding narcotics related violence in Guerrero, where there is reported to be a strong presence of transnational criminal organizations. Finally, the AAO recognizes the hardship that would be involved in relocating school age children, who are suffering from various medical and behavioral problems, and who do not know the language or the culture of the country where they are relocating. *See Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001). In his statement, the applicant's spouse has shown that any hardship to his children would also cause him hardship.

Therefore, the AAO finds that the applicant has shown that her spouse will suffer extreme hardship as a result of her inadmissibility. He is suffering extreme emotional hardship as a result of separation because he is now the primary caretaker for two special needs children and works fulltime. In addition, he would suffer extreme hardship as result of relocation because of the potential safety issues he would face in relocating his two special needs children to an area of Mexico where there is reported narcotics related violence.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary 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 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-Moralez, 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 factors in the present case are the applicant's fraudulent entry into the United States, her subsequent illegal entry into the United States and her unlawful residence in the United States.

The favorable factors in the present case are the extreme hardship to the applicant's spouse; the applicant's family ties to the United States; the applicant's lack of a criminal record, and as evidenced by the numerous letters from friends and family, the applicant's attributes as a mother and wife.

The AAO finds that the immigration violations committed by the applicant are 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.