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



U.S. Citizenship
and Immigration
Services

[REDACTED]

DATE: **MAY 24 2013** Office: BALTIMORE, MD [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with a long, sweeping underline.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Tucson, Arizona and is now before the Administrative Appeals Office (AAO) on Motion. The motion will be granted and the underlying application will be approved.

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 seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by willful misrepresentation of a material fact, and section 212(a)(6)(E)(i), 8 U.S.C. § 1182(a)(6)(E)(i), for having knowingly encouraged, induced, assisted, abetted or aided another alien to enter or to try to enter the United States in violation of the Act. The applicant is the beneficiary of an approved Petition for Alien Relative and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act in order to reside in the United States with her U.S. citizen spouse and children.

The Field Office Director concluded that no waiver was available to the applicant for violating section 212(a)(6)(E)(i) of the Act and further determined that an extreme hardship claim on behalf of the applicant's daughter could not be considered as she was not a qualifying relative under section 212(i) of the Act. *See Decision of Field Office Director* dated May 15, 2009.

The applicant filed an appeal through counsel on July 8, 2009, which was then dismissed by the AAO.¹ The applicant's counsel has now filed a Motion to Reconsider asserting that the AAO erred in determining that the applicant is inadmissible under section 212(a)(6)(E)(i), and therefore a decision should be made based on the extreme hardship to the applicant's spouse pursuant to section 212(i) of the Act.

The record contains, but is not limited to: counsel's briefs; statements from the applicant, the applicant's spouse, and the applicant's friends; medical reports; financial records; as well as various immigration applications and decisions. The entire record was reviewed and considered in rendering a decision on the appeal.

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

- (I) (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.²

¹ In an appeal decision dated November 15, 2011, the AAO did not make a determination on the section 212(i) waiver after concluding no waiver was available based on the applicant's inadmissibility under section 212(a)(6)(E)(i).

² The applicant's false claim to citizenship charge on August 3, 1994, occurred prior to the enactment of IIRAIRA on September 30, 1996. Therefore, the permanent bar under section 212(a)(6)(C)(ii) of the Act, is not applicable. The applicant's inadmissibility will instead be

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

- (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien 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 resident spouse or parent of such an alien.

In the present case, the record indicates that on August 3, 1994 the applicant applied for admission at the Nogales, Arizona land border claiming U.S. citizenship. Based upon the foregoing, the applicant was found to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. §1182(a)(6)(C)(i), as one who seeks to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by willful misrepresentation of a material fact. The record supports this finding, and the AAO concurs in the applicant's inadmissibility under 212(a)(6)(C)(i) of the Act. The applicant does not contest her inadmissibility under this section of the Act.

Section 212(a)(6)(E) of the Act provides:

- (i) In general-Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of the law is inadmissible.
- (ii) Special rule in the case of family reunification-clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of the title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced assisted, abetted, or aided only the alien's spouse, parent, son or daughter (and no other individual) to enter the United States in violation of the law.
- (iii) Waiver authorized-For provision authorizing waiver of clause(i), see subsection (d)(11).

determined pursuant to section 212(a)(6)(C)(i) of the Act, for which a waiver under section 212(i) of the Act is available.

In the present case the record further indicates that the applicant and her brother were questioned regarding their immigration status during a secondary inspection at the Nogales, Arizona land border after attempting to enter the United States on August 3, 1994. According to evidence in the record, upon initial inspection by a legacy Immigration and Nationality Service (INS) officer, the applicant offered documents in support of her 16-year-old brother's U.S. citizenship. The record also contains Form I-213, Record of Deportable Alien, which indicates that the applicant was very adamant her brother was a U.S. citizen during the primary inspection, and that they were then questioned separately during a secondary examination. The AAO, in its previous decision dated November 15, 2011, determined that the evidence in the record was insufficient to support a finding that the applicant presented documents on August 3, 1994 to demonstrate her brother's U.S. citizenship. Therefore, that issue will not be revisited in this decision.

The issues now left for reconsideration are whether the INS officer's indication on Form I-213 that the applicant was very adamant in trying to convey her brother's U.S. citizenship is sufficient to demonstrate that the applicant knowingly, encouraged, induced, aided, abetted or assisted another alien to enter or try to enter the United States in violation of the law pursuant to section 212(a)(6)(E)(i) of the Act. And, if the applicant is not inadmissible pursuant to section 212(a)(6)(E)(i) of the Act, does the applicant merit a waiver based on extreme hardship to her qualifying relative under section 212(i) of the Act.

Counsel, in his brief dated December 14, 2011, asserts that the AAO erred in its November 15, 2011 decision, finding that the applicant actively sought to convince the inspector of her brother's U.S. citizenship. Counsel also asserts that the statement on the Form I-213 indicating the applicant was very adamant to convince the primary inspector her brother was a U.S. citizen is insufficient to demonstrate that the applicant made any affirmative act as an alien smuggler, to knowingly encourage, induce, assist, abet or aid another within the meaning of section 212(a)(6)(E)(i) of the Act. Counsel further indicates that the record does not show the applicant took any specific action to convince the inspector of her brother's U.S. citizenship, and that the word adamant recorded on the Form I-213, forming the basis for an inadmissibility finding under section 212(a)(6)(E)(i) of the Act, although descriptive of the manner in which an action is taken, fails to offer a sufficiently clear explanation of the particular act or action taken by the applicant within the defined meaning of alien smuggling under the Act. Counsel offers a Ninth Circuit case, *Altamirano v. Gonzales*, as a guiding decision where the court determined that in order to find an individual inadmissible for alien smuggling pursuant to section 212(a)(6)(E)(i) of the Act, there must be an affirmative action on the part of that individual. *Altamirano v. Gonzales*, 427F.3d 586 (9th Cir.2005). See also, *Tapucu v. Gonzales*, 399 F.3d 736 (6th Cir.2005).

After reconsideration of the record and a review of the controlling case law it is determined that there is insufficient evidence to determine that the applicant performed an affirmative act within the meaning of section 212(a)(6)(E)(i) of the Act during the August 3, 1994 attempted entry. The only information contained in the record concerning the applicant's actions regarding her brother's U.S. citizenship at that time was that she offered documents, (which might have been an affirmative act had it not been previously found to be insufficiently demonstrated in the record), a Form I-213 indicating the applicant was very adamant about her brother's U.S.

citizenship, and the applicant's own statements that she did not at any time directly respond to questions regarding her brother's citizenship, only her own, for which she has admitted wrongdoing. No sworn statements were included in the record offering further details about the actual questions posed to the applicant and her simultaneous responses on August 3, 1994. The inadmissibility consequences of a finding under section 212(a)(6)(E)(i) of the Act are permanent in nature with no waiver available under circumstances such as these, and although the burden of proof is always on the applicant to demonstrate eligibility for the benefit sought, the evidence used to determine an affirmative act in accordance with *Altamirano*, must sufficiently demonstrate that the applicant knowingly encouraged, induced, assisted, abetted or aided another to enter or attempt to enter the United States in violation of the law. The recording that the applicant was very adamant as indicated on the Form I-213, is not found to sufficiently convey the specific affirmative act the applicant took to knowingly encourage, induce, assist, abet, or aid another alien in attempting to enter the United States in violation of the law. Therefore, the AAO finds the applicant is not inadmissible pursuant to section 212(a)(6)(E)(i) of the Act, and the waiver for extreme hardship must be determined under section 212(i) of the Act.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a demonstration that barring admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully permanent resident spouse or parent of the applicant. Hardship to the applicant and any children can be considered only insofar as it results in hardship to a qualifying relative. In the present case, the applicant's spouse is the only qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver and the 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 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 1292 (9th Cir. 1998) (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.

Counsel for the applicant indicates that the applicant’s spouse is undergoing severe mental stress due to his worries about the applicant’s inadmissibility. The applicant’s counsel also asserts that the qualifying spouse would face hardships if he were to relocate with the applicant to Mexico such as financial difficulties, child care and safety issues.

The applicant indicates that her spouse would face extreme difficulty if they were separated because she has been the primary caretaker for their two young children and she maintains a stepmother role with his two older children from a prior relationship. The applicant indicates that her spouse would suffer stress and be unable to manage the care of all the children while working his full-time job. The applicant states that their daughter [REDACTED] was diagnosed with a rare form of cancer called rhabdomyosarcom (muscular cancer), at the age of 1-year-old and required extensive treatment. The applicant indicates that she was able to work out of the hospital for her

employer, while her daughter underwent treatment, and her spouse continued to work full-time at his job in order to maintain their medical insurance. The applicant also indicates that her daughter [REDACTED] continues to be monitored through regular follow-up procedures every three months which require full anesthesia due to her age, for which she remains on each occasion the main caretaker present. The applicant indicates that she is able to work from home as well as care for their children, so that her spouse can maintain his full-time outside employment. The applicant indicates that relocation would be difficult for her spouse because the health insurance he currently receives though his employer covers the costs for their daughter's continued treatment.

The applicant's spouse indicates that he and the applicant share a long-term loving relationship and he is under extreme stress due to his wife's inadmissibility, and the possibility of their separation. The applicant's spouse fears that their family structure and daily life will suffer irreparable damage if they are separated. The applicant's spouse also indicates that he is in constant fear about his children living without their mother's daily presence and whether it would have lasting effects on them. The applicant's spouse indicates he fears it will be extremely difficult for him to provide care for all of his children alone, especially when one of them needs regular intensive medical treatment, while also working a full-time job. The applicant's spouse indicates he must maintain his full-time employment so that they can continue health insurance for their daughter's treatments. The applicant's spouse states that he cannot relocate to Mexico in order to live with the applicant, because he has no professional or business ties to that country, and fears he would be unable to find sufficient employment or needed health care for his family. The applicant's spouse also indicates that if he relocated to Mexico he would find it difficult to care for his two oldest children's needs, because they would remain in the United States. This would limit his time spent with them, as well as the financial maintenance he could provide with employment in Mexico.

In the present case, the evidence in the aggregate reflects that the applicant's spouse would suffer extreme hardship due to separation from the applicant. The AAO has carefully considered all of the evidence indicating that the qualifying spouse is experiencing a tremendous amount of stress due to the applicant's immigration issues, and would have significant difficulty in raising their children as a single parent, while continuing in full-time employment, especially when one of those children requires continuous medical monitoring. The applicant has been the primary caretaker during the intensive procedures required for their daughter's healthcare, so that the qualifying spouse could maintain his full-time employment, and ensure continuation of the required medical insurance. The applicant has demonstrated that she and her spouse have managed to work together as a couple to ensure needed medical treatment for their seriously ill child, while also providing the necessary care for their entire family. The applicant has sufficiently shown that her separation from the qualifying spouse at this time would cause him to suffer harm which would be unusual and uncommon under the circumstances.

It has also been shown that the documented financial burdens the applicant and her spouse have incurred together such as a home mortgage, and various consumer loans, as well as the significant emotional impact on the couple's children due to a separation, would place an

unusually high burden on the applicant's spouse. Considering all elements of hardship in the aggregate, the record supports a finding that the applicant's spouse would suffer extreme hardship should he be separated from the applicant.

The applicant has likewise demonstrated that the qualifying spouse would face extreme hardship should he relocate with her to Mexico. The lengthy period of residence in the United States of the applicant's spouse as well as his extended employment history have created significant and fundamental ties to the United States which would make relocation to another country a recognized challenge. In addition, within the decision to relocate it is recognized that the qualifying spouse might be compelled to forgo seeing his older children on a regular basis. The qualifying spouse's two older children with whom he now maintains extensive contact would likely remain in the United States, limiting his availability to them as well as the resources he could provide.

Moreover, it has also been shown that country condition reports for Mexico show that the applicant's spouse will face challenges there. The U.S. Department of State Travel Warning for Mexico, dated November 20, 2012, specifically mentions safety issues in Sinaloa. It indicates in pertinent part:

You should defer non-essential travel to the state of Sinaloa except the city of Mazatlan where you should exercise caution particularly late at night and in the early morning. One of Mexico's most powerful TCOs is based in the state of Sinaloa. With the exception of Ciudad Juarez, since 2006 more homicides have occurred in the state's capital city of Culiacan than in any other city in Mexico. Travel off the toll roads in remote areas of Sinaloa is especially dangerous and should be avoided. We recommend that any other travel in Mazatlan be limited to Zona Dorada and the historic town center, as well as direct routes to/from these locations and the airport.

The AAO therefore finds that, when considering all elements of hardship in the aggregate, relocation in order to live with the applicant would cause extreme hardship to the applicant's spouse.

Accordingly, after a review of the documentation in the record, and considered in its totality, the the applicant has established that her U.S. citizen spouse would suffer extreme hardship should the applicant reside outside the United States.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the

social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In *Matter of Mendez-Morales*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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)...

Id. at 301. The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant must bring forward to establish a favorable exercise of administrative discretion is merited will depend in each case on the nature and circumstances of the ground of inadmissibility sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in this matter are the extreme hardship the applicant's U.S. citizen spouse would face if the applicant were to reside in Mexico, regardless of whether he accompanied the applicant or remained in the United States, the applicant's community and family ties in the United States, the letters from community members that illustrate the important role that the applicant plays in the life of her family in the United States, and the applicant's apparent lack of a criminal record. The unfavorable factors in this matter are the applicant's attempted entry into the United States through willful misrepresentation of material facts.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in her case outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(i) of the INA, the burden of proving eligibility remains entirely with the applicant. Section 291 of the

Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the prior decision of the AAO will be reversed and the underlying application will be approved.

ORDER: The motion is granted, the prior decision of the AAO is reversed, and the underlying application is approved.