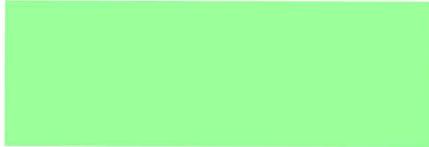


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
20 Massachusetts Avenue NW  
Washington, DC 20529-2090

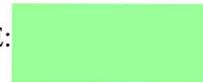


U.S. Citizenship  
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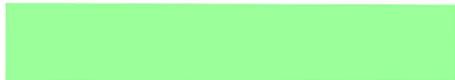


DATE: **MAY 23 2014** Office: TUSCON, ARIZONA

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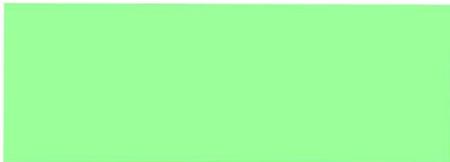


IN RE:



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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
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 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 under 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 procured admission to the United States through fraud or misrepresentation. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her U.S. citizen spouse and child.

In a decision, dated November 15, 2013, the field office director found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for entering the United States with a Border Crossing Card when she was attending school in the United States. He also found that the applicant had failed to show hardship to her spouse that would rise to the level of extreme hardship. The application was denied accordingly.

On appeal, counsel states that the field office director made several errors in denying the applicant's adjustment and waiver applications. Counsel asserts that the applicant did not make a material misrepresentation upon entering the United States and the interviewing officer mischaracterized the applicant's testimony in order to come to the conclusion that she made a misrepresentation. Counsel states that the record contains no documentation to support the field office director's view of the applicant's testimony. Counsel states that the applicant did not begin residing in the United States until after her last entry into the United States. He states that the applicant's due process rights were also violated. Finally, counsel asserts that the field office director erred in not finding that the applicant's spouse would suffer extreme hardship as a result of her inadmissibility.<sup>1</sup>

Constitutional issues, such as counsel's assertion regarding a violation of the applicant's due process rights, are not within the appellate jurisdiction of the AAO, therefore this assertion will not be addressed in the present decision.

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

- (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.

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<sup>1</sup> The Form I-290B, Notice of Appeal or Motion, indicates that it is an appeal of both the Form I-485 Application for Adjustment of Status and Form I-601 Application for a Waiver of Inadmissibility. The AAO does not have jurisdiction over the Form I-485, for which there is no appeal, and therefore this decision will only apply to the applicant's appeal of the Form I-601.

Section 212(i) of the Act provides:

- (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.

The record reflects that on August 22, 2001, at the age of eleven years old, the applicant was issued a Border Crossing Card. The applicant claims that she resided in Mexico, crossing into the United States with her Border Crossing Card, to visit her uncle and to attend high school. During her adjustment interview, the applicant stated that she attended [REDACTED] in Nogales, Arizona starting in 2004 and graduating in March 2008. The record includes documentation indicating that the applicant was employed evenings and summer in Mexico from January 2007 to August 2012 and gave birth to a son in Mexico on September 6, 2008.

The Department of State Foreign Affairs Manual § 40.63 N4.7, states, in pertinent part:

a. In determining whether a misrepresentation has been made, some of the most difficult questions arise from cases involving aliens in the United States who conduct themselves in a manner inconsistent with representations they made ...to immigration officers when applying for admission. Such cases occur most frequently with respect to aliens who, after having obtained visas as nonimmigrants, either:

...

(2) Fail to maintain their nonimmigrant status....

b. To address this problem, the Department developed the 30/60-day rule. This rule is intended to facilitate adjudication of these types of cases consistent with the statutory mandates.

§ 40.63 N4.7-1 of the manual states that the 30/60-day rule should apply if an applicant informs an immigration officer at the port of entry (POE), that the purpose of his or her visit is tourism, or to visit relatives, etc., and then violates such status by enrolling in a program of academic study without the benefit of the appropriate change of status. § 40.63 N4.7-2 states that if an applicant violates his or her nonimmigrant status in a manner described above within 30 days of entry, it should be presumed that the applicant misrepresented his or her intention in seeking entry.

As stated above, the applicant was using her border crossing card to enter the United States to attend high school, a benefit that would have required a change of status to an F1 student visa. The record indicates that the applicant misused her border crossing card, which is the equivalent of a

B2 visitor's visa, and misrepresented her intentions upon entry into the United States. If the immigration officer had known that the applicant was crossing in to the United States to attend high school, it would have affected the applicant's ability to enter the United States. While the applicant may argue that she was not residing in the United States, the act of presenting her border crossing card for entry was a material misrepresentation of her intentions upon entering the United States as she knew she was not entering as a visitor, but was entering to attend school. The applicant is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for having procured admission to the United States through fraud or misrepresentation and requires a waiver of that inadmissibility. The applicant's qualifying relative is her U.S. citizen spouse.

Section 212(i) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (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 v. I.N.S.*, 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.

The record contains references to hardship the applicant’s child would experience if the waiver application were denied. Congress did not include hardship to an applicant’s children as a factor to be considered in assessing extreme hardship. In the present case, the applicant’s spouse is the only qualifying relative for the waiver under section 212(i) of the Act, and hardship to the applicant’s child will not be separately considered, except as it may affect the applicant’s spouse.

The record of hardship includes: an affidavit from the applicant, an affidavit from the applicant’s spouse, medical documentation concerning the applicant’s spouse, medical documentation concerning the applicant’s son, a letter from the applicant’s spouse, financial documentation, country conditions information for Nogales, Sonora, Mexico, and several letters from family, friends, and community members.

The record indicates that the applicant’s spouse earned \$18,000 to \$25,000 per year working with [REDACTED] and that the applicant currently does not earn an income, staying home to care for their small child.

The record shows that the applicant’s one year old child has had numerous health issues since birth, including a heart murmur. Other medical records indicate that within the first weeks of the applicant’s son’s life he suffered from congestion, cough, and digestive irregularity. A medical letter, dated July 2, 2013, states that the applicant’s son has problems with his “pulmonary status” which requires constant vigilance and that the applicant has been instrumental in maintaining her

son's health. The applicant's spouse states that relocating to Mexico with his son is not possible given his child's health condition and the care he requires. He also states that separating from the applicant would cause hardship because he cannot stop working to care for their child. He has to provide for the family and the applicant cares for the child.

The applicant's spouse states that he is suffering anxiety and sleeplessness as a result of the possibility of the applicant not living with him anymore. The medical documentation in the record indicates that the applicant's spouse was provided with a psycho-social evaluation, was diagnosed with depression, and will be seeing a psychiatrist for his anxiety and sleeping problems. The documentation, dated December 12, 2013, indicates that the applicant's spouse is receiving individual counseling and case management; that the counselor is willing to work with the applicant's spouse on his impulse control two to three times per week; and the psychiatrist will be seeing the applicant's spouse one time every 90 days.

The applicant's spouse states that he cannot relocate to Mexico because of the conditions in the part of Mexico where the applicant is from, Nogales, Sonora, Mexico, and that he, who was born in the United States, has never lived in Mexico, can barely read or write in Spanish, and would not be able to find employment in Mexico. He also states that if he relocated to Mexico he would be separated from his daughter from a previous marriage and would not be able to meet his child support obligation to her. He states that Nogales, Sonora is a very dangerous city. The applicant submits various news articles to support his assertions regarding the dangers of living in Sonora. The Department of State Travel Warning, dated January 9, 2014, states that Sonora is a key region in the international drug and human trafficking trades, and can be extremely dangerous for travelers.

The record indicates that the applicant's spouse will suffer extreme hardship as a result of the applicant's inadmissibility. The applicant's spouse will suffer extreme emotional and physical hardship as a result of relocating to Mexico given the applicant's spouse's ties to the United States, including two U.S. citizen children; the dangerous conditions in the area of Mexico where he would relocate; and the possible medical care issues he would face with his son in Mexico. The record also establishes that the applicant's spouse will suffer extreme emotional and financial hardship as a result of separation. The record establishes that the potential separation from the applicant is causing him anxiety and he is being treated for anxiety and depression. The record also indicates that the applicant's spouse is the sole financial provider for the family and without the applicant he would have to pay someone to watch their small child who has medical needs. Considered in the aggregate, the applicant has established that her spouse would face extreme hardship if the waiver request is denied.

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.

*Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. See, e.g., *Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

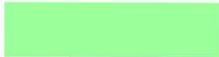
*Matter of Mendez-Moralez* at 300.

In *Matter of Mendez-Moralez*, 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 for section 212(h)(1)(B) relief must bring forward to establish that he



merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion 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 unfavorable factors in the applicant's case include her misrepresentation to immigration officials regarding her intent upon entering the United States and her illegal residence in the United States. The favorable factors include the hardship to the applicant's spouse and son if she were denied a waiver of inadmissibility; the applicant's lack of a criminal record; and, as attested to in numerous letters, the applicant's attributes as a good friend, loving mother and wife, and valued member of the community.

In balancing all equities and adverse matters, the record establishes that the positive factors in this case outweigh the negative factors and a favorable exercise of discretion is warranted. The burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

**ORDER:** The appeal is sustained.