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



U.S. Citizenship  
and Immigration  
Services

Date: **MAY 29 2014** Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

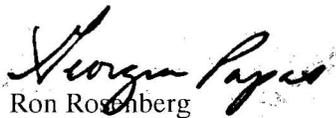
APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i)

ON BEHALF OF APPLICANT: [REDACTED]

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,

  
Ron Rosenberg

Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting Director, California Service Center, Laguna Niguel, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that 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. The record indicates that the applicant is married to a lawful permanent resident and is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen daughter. The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his spouse.

The Acting Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting Service Center Director*, dated May 8, 2013.

On appeal, counsel contends that the Acting Director erred by ignoring some of the hardship factors, trivializing others, and failing to consider the qualifying relative's hardships in the aggregate. Counsel also submits additional evidence of hardship to the applicant's qualifying relative. In addition, counsel contends that the Acting Director should not have made his decision without first issuing a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) and without affording the applicant and his wife the opportunity to have a personal interview related to his Form I-485, Application to Register Permanent Residence or Adjust Status. (Form I-485) at a U.S. Citizenship and Immigration Service (USCIS) office.

According to a June 3, 2013, policy memorandum, under 8 CFR §103.2(b)(8), USCIS has the discretion to issue RFEs and NOIDs in appropriate circumstances and also has the discretion to issue a denial without first issuing an RFE or NOID. Specifically, an RFE is to be used when the facts and the law warrant and is not to be issued when the evidence already submitted establishes eligibility or ineligibility in all respects. *See* USCIS Policy Memorandum, Requests for Evidence and Notices of Intent to Deny (Subject file PM-602-0085) (June 3, 2013) (available at <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/June%202013/Requests%20for%20Evidence%20%28Final%29.pdf>). In this particular case, the applicant submitted a Form I-601 conceding his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. Therefore his inadmissibility has been established, and there is no need for an RFE or a NOID. Concerning counsel's argument that the applicant should have been interviewed because he filed a Form I-485, the AAO has no jurisdiction over the applicant's I-485 application, and because it is not the subject of this appeal, the AAO will not discuss whether an interview was required.

The record includes, but is not limited to, the following documentation: a brief filed by counsel in support of Form I-290B, Notice of Appeal or Motion; statements by the applicant's spouse and other family members; medical documentation for the applicant's spouse; financial documentation;

country-conditions information about Mexico; and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.<sup>1</sup>

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

(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 Acting Field Office Director determined that the applicant entered the United States without inspection on November 26, 1998 and departed the United States in June 2002, and therefore, is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year. The applicant does not contest this inadmissibility.

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

(v) Waiver.-The Attorney General [now Secretary of the Department of Homeland Security (Secretary)]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 to the satisfaction of the [Secretary] 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.

In addition, the record reflects that the applicant is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for procuring admission to the United States through fraud or misrepresentation. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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<sup>1</sup> A few of the financial documents submitted, which appear to be credit-card bills, are in Spanish. These could not be considered without certified translations, pursuant to 8 C.F.R. § 103.2(b)(3).

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.

The record indicates that the applicant was interviewed at the U.S. consulate in Nuevo Laredo, Mexico, and was issued a Border Crossing Card (BCC) on June 10, 2002. To receive a BCC, the law requires the alien to have a residence abroad that he or she does not intend to abandon. Moreover, the applicant states on his Form I-601 that he is inadmissible for procuring an immigration benefit by material misrepresentation or fraud, because he applied for a visitor visa when he already resided in the United States. As such, the applicant is aware of this additional inadmissibility based on his material misrepresentation and does not contest the finding of inadmissibility.

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

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.

A waiver of inadmissibility under sections 212(a)(9)(B)(v) and 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 his children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's lawful permanent resident 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 U.S. Citizenship and Immigration Services (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 of Immigration Appeals (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. INS*, 138 F.3d 1292, 1293 (9<sup>th</sup> Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9<sup>th</sup> 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 contends that the applicant's spouse will suffer medical hardship if she is separated from the applicant. The record includes medical documentation showing that the applicant's spouse suffers from diabetes and takes medication for this condition. The applicant's spouse states that her blood sugar levels have been very high and the record includes evidence that her doctor recently increased the dosage of medicine to control her diabetes. Counsel also notes that the applicant's spouse has

recently begun to experience health problems in addition to diabetes. The applicant's spouse states that in 2012, doctors discovered a cyst during her mammogram. She further states that during a recent medical checkup, doctors found bacteria in her stomach and her liver was inflamed. In addition, the record includes two letters from March 2013, indicating that laboratory test and ultrasound results for the applicant's spouse were abnormal. Counsel states that the applicant's spouse was undergoing a series of tests and had an appointment with a lung specialist.

Counsel further contends that the applicant's spouse would suffer financial hardship if the applicant returns to Mexico. The applicant's spouse states that she cannot support herself without the applicant. The record includes evidence showing that the applicant's spouse earned approximately \$18,000 in 2012. The applicant's children state that the applicant and his spouse both work; they have several debts, including their house mortgage and payments for their credit cards, furniture, car, and insurance; and the applicant's spouse would not be able to pay these debts without the applicant's support. The record includes copies of bills reflecting large unpaid balances. In addition, each of their children describes their own financial situations and their inability to provide financial support to the applicant's spouse.

The applicant's daughter states that the applicant's spouse is emotionally dependent on the applicant. The applicant's spouse would be worried about where the applicant would live and his safety in Mexico if he returned. The applicant's daughter states that her mother suffered panic attacks and was hospitalized several years ago, and she worries that her mother will suffer them again if the applicant's waiver application is not approved.

The record establishes that if the waiver application were denied, the applicant's spouse would experience medical, financial, and emotional hardship as a result of loss of the applicant's support. These hardships, when considered in the aggregate, are beyond the common results of removal and would rise to the level of extreme hardship if she remained in the United States without the applicant.

Counsel also asserts that the applicant's spouse would experience extreme hardship if she relocates to Mexico to be with the applicant. The record reflects that the applicant's spouse was born in Mexico and became a lawful permanent resident of the United States on January 19, 2012. The record also shows that the applicant's spouse has strong family ties in the United States, including all three of her children and grandchildren.

Counsel asserts that it is not safe for the applicant's spouse to return to Mexico. The record indicates that the applicant's home is in Monterrey, Nuevo Leon. The applicant submits news articles about violence in Mexico, mostly drug-related, including a 2007 article from Reuters News Agency stating that Monterrey is ravaged by drug violence. According to the U.S. Department of State, visitors should "[d]efer non-essential travel to the state of Nuevo Leon, except the metropolitan area of Monterrey where [they] should exercise caution. Although the level of [transnational criminal organization] violence and general insecurity in Monterrey has decreased within the last 12 months, sporadic gun battles continue to occur [there]." *See Travel Warning-Mexico, U.S. Department of State*, dated January 9, 2014.

The applicant's spouse also asserts that it is unlikely she would be able to find employment in Mexico, given her age. The record reflects that the applicant's spouse is 54 years old. The record includes news articles about age discrimination and poverty in Mexico, submitted to corroborate this assertion.

Thus, due to her length of residence and extensive family ties in the United States and her concerns about poverty, prospective employment and her safety in Monterrey, it has been established that the applicant's spouse would suffer hardship beyond the common results of removal if she were to relocate to Mexico to reside with him.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 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.

We note that *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:

In evaluating whether . . . 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, "balance 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 favorable factors in this matter are the extreme hardships to his lawful permanent resident spouse if the applicant's waiver is not approved; the applicant's spouse's strong family ties in the United States; the fact that the applicant resided in the United States approximately 18 years, with an apparent lack of any criminal record; and letters of reference from family members written on behalf of the applicant. The unfavorable factors in this matter are the applicant's unlawful presence in the United States and his misrepresentation before the U.S. Consulate in 2002.

Although the applicant's immigration violations are serious, the record establishes that the positive factors in this case outweigh the negative factors and a favorable exercise of discretion is warranted. In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

**ORDER:** The appeal is sustained.