



**U.S. Citizenship
and Immigration
Services**

(b)(6)

[Redacted]

DATE: NOV 05 2014

Office: ALBUQUERQUE, NM

FILE: [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) and Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

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,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by Field Office Director, Albuquerque, New Mexico 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 the mother of a lawful permanent resident child and two U.S. citizen children. The applicant seeks a waiver of inadmissibility in order to remain in the United States with her family.

In a decision, dated December 20, 2013, the field office director found that although the record indicated that the applicant's spouse would suffer hardship as a result of the applicant's inadmissibility, the record did not show that this hardship rose to the level of extreme hardship. The waiver application was denied accordingly.

On appeal, counsel states that the field office director applied the wrong legal standard when she adjudicated the applicant's waiver. She also states that the field office director improperly assessed and weighed the evidence, and applied an erroneous legal standard on discretion. Counsel states further that the field office director's restrictive analysis of the relevancy and materiality of the evidence is inappropriate given that the applicant was not represented. Counsel states that the applicant's waiver application deserves to be reconsidered and she submits new evidence on appeal.

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.

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.

Section 212(a)(9)of the Act provides:

- (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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

...

(v) Waiver.-The Attorney General 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 Attorney General 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The record reflects that the applicant first entered the United States in September 2001 on a tourist visa. She did not depart the United States until August 2004. On January 25, 2005, she then reentered the United States on her tourist visa, with the intent to continue residing in the United States. 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 a material misrepresentation. The record also reflects that the applicant accrued unlawful presence in the United States during her illegal residence in the United States from 2001 to her departure in 2004. The applicant is therefore also inadmissible under section 212(a)(9)(B)(i) of the Act for having been unlawfully present in the United States for more than one year. The applicant's qualifying relative is her U.S. citizen spouse.

Sections 212(i) and 212(a)(9)(B)(v) of the Act provide 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 children will experience if the waiver application were denied. It is noted that 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 waivers under section 212(i) and 212(a)(9)(B)(v) of the Act, and hardship to the applicant's children will not be separately considered, except as it may affect the applicant's spouse.

The record of hardship includes: statements from the applicant, statements from the applicant's spouse, statements from the applicant's son, numerous statements from friends of the applicant and her family, photographs of the applicant's family, financial documentation, educational documentation concerning the applicant's 10 year old son, documentation regarding family ties to the United States, and country conditions information for Mexico.

The record now establishes that the applicant's spouse will suffer extreme hardship as a result of the applicant's inadmissibility. The record shows that the applicant's spouse will suffer extreme emotional and financial hardship as a result of separation and as a result of relocation. The applicant's spouse states that he is very stressed and depressed as a result of thinking about being separated from his spouse. He states that his wife plays such an integral part in his children's lives that he is concerned about their suffering if she were returned to Mexico. He states that he is also concerned with his wife's safety in Mexico because the area where they would live, Namiquipa, in the state of Chihuahua is dangerous. The record shows that the applicant and her spouse have been married for 24 years and they have three children, ages 6, 10, and 21 years old. The record states that all of the children live at home with their parents. The record also indicates, through statements from the applicant, her spouse, her son, and 15 detailed letters from friends and other members of the community, that the applicant plays a crucial role in the family household as the caretaker for the couple's children and the manager of the household finances. The record shows that although the applicant's spouse is the sole income earner for the family, he works very long hours and has a long commute. Without the applicant to care for their children, the applicant's spouse would not be able to afford before and afterschool care nor would he be able to emotionally support his children with their education. Of particular concern, as evidenced by letters from teachers and an individualized education plan, is the applicant's 10 year old son who is deficient in his language and speech development in both Spanish and English. The record shows that in his current school he is provided with 13 hours per week of special education services and 1.25 hours per week of special language development. The letters from the applicant's son's teachers indicate that the applicant is the parent who consistently attends all of the meetings regarding her son's development.

In addition, the record indicates that the applicant's spouse has had very little education and earns \$13 per hour or approximately \$28,000 per year. A quote from a childcare facility in the area where the applicant lives indicates that it would be an additional \$9,460 per year to pay for his two youngest children to attend before and afterschool care. Financial documentation in the record shows that this added expense would cause extreme financial hardship for the applicant's spouse. The applicant's spouse also asserts that he would not be able to financially support the applicant in Mexico nor would he be able to pay for travel to visit his spouse in Mexico. Thus, the record establishes that the evidence of emotional and financial hardship as a result of separation, taken into consideration in its totality, indicates that the applicant's spouse will suffer extreme hardship as a result of separation.

The record also establishes that the applicant's spouse will suffer extreme hardship as a result of relocation. The applicant's spouse states that he has resided in the United States for 28 years, entering the country at the age of 18 years old. He owns a home with a mortgage in the United States and has three U.S. citizen children in school in the United States. The applicant's spouse also has significant family ties to the United States and no current family ties to Mexico. The applicant's

spouse asserts that he is 47 years old and does not have much education. He states that he would only be able to find seasonal agricultural work in Mexico and would not be paid much for his work. Finally, the record contains a U.S. State Department Travel Warning for Mexico and numerous news articles reporting on violence in and around the town of Namiquipa, where the applicant's family would live if they relocated.

The current U.S. State Department Travel Warning, dated October 10, 2014, warns U.S. citizens about the risk of traveling to certain places in Mexico due to threats to safety and security posed by organized criminal groups in the country. In Chihuahua, the state where Namiquipa is located, the warning states that U.S. citizens should defer non-essential travel anywhere in the state of Chihuahua and travel during daylight hours between cities. The warning states that crime and violence remain serious problems throughout the state of Chihuahua. News articles submitted with the record indicate that Namiquipa has been experiencing violence, stating that it is one of 6 municipalities that had been taken over by drug lords and that the president of the municipality had been executed by 15 men with assault rifles on his way to work. Although these articles are dated from 2011, they together with the current Travel Warning establish that violence in the area where the family would relocate is a reasonable concern. Thus, given the applicant's spouse's significant family ties to the United States, his financial ties to the United States, his long residence in the United States, his age and educational level making it difficult for him to find employment in Mexico, and the concerns over violence in the area of Mexico where his family would relocate, establishes that he would suffer extreme hardship as a result of relocation.

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.

The AAO notes 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:

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 favorable factors in the applicant's case include: the extreme hardship her spouse and children would face as a result of her inadmissibility, her extended family ties to the United States, her lack of any criminal record, and, as evidenced by numerous letters in the record, the emotional support she provides to her family. The unfavorable factors in the applicant's case include the applicant's unlawful residence in the United States and her misrepresentation upon entering the United States on a visitor's visa.

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. 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.