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



U.S. Citizenship
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FILE:

CDJ 2004 744 854

Office: CIUDAD JUAREZ, MEXICO

Date: **MAR 02 2010**

IN RE:



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), 1182(i)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Ciudad Juarez, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a 30-year-old native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year, and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), as an alien who has procured admission to the United States through fraud or misrepresentation. The applicant is married to a U.S. citizen, and she seeks a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(i), in order to reside with her husband in the United States.

The Officer in Charge found that the applicant failed to establish extreme hardship to her citizen spouse, and denied the application accordingly. *Decision of the Officer in Charge*, dated Apr. 17, 2007. On appeal, the applicant contends through counsel that the denial of the waiver imposes extreme hardship on her husband. *See Form I-290B, Notice of Appeal*, dated May 10, 2007; *Letter Brief in Support of Appeal*.

The record contains, *inter alia*, a copy of the couple's marriage certificate, indicating that they were married in California on February 14, 2003; a letter from the applicant's husband discussing the hardships caused by the denial of a waiver; a psychological report regarding the applicant's husband; medical records for the applicant; tax records; family photographs; and a letter brief in support of the appeal.

The AAO reviews these proceedings de novo. *See* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). The entire record was considered in rendering a decision on the appeal.

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

(B) Aliens Unlawfully Present -

(i) In general

Any alien (other than an alien lawfully admitted for permanent residence) who-

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

. . . .

(v) Waiver

The Attorney General [now the Secretary 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.

Section 212(a)(6)(C)(i) of the Act provides:

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 applicant states that she entered the United States in December, 2002, by presenting a border crossing card that belonged to another individual. *See Form I-601, Application for Waiver of Ground of Excludability*. The applicant departed the United States in March, 2004. *Id.* The applicant's spouse filed a Petition for Alien Relative (Form I-130), which U.S. Citizenship and Immigration Services approved on August 3, 2004. *See Form I-130, Petition for Alien Relative*.

The applicant's unlawful presence for one year or more, and departure from the United States triggered the ten-year bar in section 212(a)(9)(B)(i)(II) of the Act. *See Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006). The applicant's use of another person's border crossing card to gain admission into the United States renders her inadmissible under section 212(a)(6)(C)(i) of the Act. *See Matter of S- and B-C-*, 9 I&N Dec. 436, 447-49 (BIA 1960; A.G. 1961) (stating that a misrepresentation is material if the alien is ineligible on the true facts or if the misrepresentation shut off a line of inquiry which may have resulted in ineligibility).

In order to obtain a hardship waiver under sections 212(a)(9)(B)(v) and 212(i) of the Act, an applicant must show that the bar imposes an extreme hardship on the applicant's U.S. citizen or lawful permanent resident spouse or parent. *See* 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(i). Under the plain language of the statute, hardship to the applicant, or to his or her children or other family members, may not be considered, except to the extent that this hardship affects the applicant's qualifying relative. *See id.* (specifically identifying the relatives whose hardship is to be considered); *see also INS v. Hector*, 479 U.S. 85, 88 (1986). Additionally, extreme hardship to the qualifying relative must be established in the event that he or she remains in the United States and in the event that he or she accompanies the applicant to the home country. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-68 (BIA 1999) (en banc) (considering the hardships of family separation and relocation). Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996) (en banc).

The concept of extreme hardship to a qualifying relative “is not . . . fixed and inflexible,” and the determination is based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565. In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a non-exhaustive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include: the presence of family ties to U.S. citizens or lawful permanent residents in the United States; family ties outside the United States; country conditions where the qualifying relative would relocate and family ties in that country; the financial impact of departure; and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 565-66. In addition, the U.S. Court of Appeals for the Ninth Circuit has held that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *see also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted); *Matter of Lopez-Monzon*, 17 I&N Dec. 280 (Commr. 1979) (noting in the context of a waiver under section 212(i) of the INA that the intent of the waiver is to provide for the unification of families and to avoid the hardship of separation). Because the present case arises within the jurisdiction of the Ninth Circuit, separation of family will be given the appropriate weight under Ninth Circuit precedent.

Additionally,

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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, e.g., economic detriment due to loss of a job or efforts ordinarily required in relocating or adjusting to life in the native country. Such ordinary hardships, while not alone sufficient to constitute extreme hardship, are considered in the assessment of aggregate hardship.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (internal quotation marks and citation omitted). However, “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that mere economic detriment and emotional hardship caused by severing family and community ties are common results of deportation and do not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit held that economic hardship and adjustment difficulties did not constitute hardship that was unusual or beyond that which would normally be expected upon deportation. In *INS v. Jong Ha Wang*, 450

U.S. 139 (1981), the U.S. Supreme Court affirmed that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.¹

The AAO finds that the applicant has established that the denial of a waiver imposes an extreme hardship on her spouse if he remains in the United States without the applicant, or if he relocates to Mexico to be with her.

The record reflects that the applicant's spouse, [REDACTED] is a 30-year-old native and citizen of the United States. *See Birth Certificate for [REDACTED]*. The couple has been married for almost seven years. *See Marriage Certificate*. The applicant was pregnant at the time of the appeal. *See Letter from [REDACTED]*, dated Apr. 20, 2007. The applicant's spouse asserts that he is suffering extreme emotional and financial hardships as a result of the denial of the waiver.

The applicant's husband contends that he has suffered extreme psychological hardship as a result of the separation from the applicant. *See Letter Brief on Appeal*, dated June 1, 2007. [REDACTED] reported to a psychotherapist that he is "sad all the time," has "no pleasure left in [his] life," and complains of fatigue and difficulty sleeping and concentrating at work. *Psychological Report by [REDACTED]*, dated May 18, 2007. [REDACTED] stated that he "feel[s] like [he's] in a room of sadness, and [he] can't find the door to get out." *Id.* Counsel contends that the psychological distress caused by separation is compounded by [REDACTED] unexpected loss of his father when he was 18 years old, giving rise to feelings of abandonment. *See Letter Brief in Support of Appeal, supra; Psychological Report, supra.*

Additionally, the applicant suffered from a miscarriage in May, 2006, shortly after the waiver application was denied. *See Letter from [REDACTED] supra.* [REDACTED] believes that the applicant lost the pregnancy due to the stress of the visa denial in April, 2006. *See Psychological Report, supra; see also Letter from [REDACTED] supra* (noting that the applicant "presented important data of stress" during both pregnancies). The record indicates that the applicant's miscarriage and second pregnancy have intensified [REDACTED] depression and anxiety. [REDACTED] reported to the psychotherapist that "he has thoughts of death and fantasizes how it would be to stop feeling the pain." *Psychological Report, supra.* The psychologist opined that [REDACTED] suffers from Major Depressive Disorder, and urged him to seek a medical evaluation for antidepressants and professional psychotherapy services. *Id.* Additionally, the psychologist expressed serious concerns regarding [REDACTED] physical well-being given his "chronic emotional symptoms" and his "suicidal ideation." *Id.*

also claims that the separation from the applicant has caused financial hardship. *See*

¹ The Officer in Charge erred in citing to *Matter of Tin*, 14 I&N Dec. 371 (Reg. Commr. 1973) and *Matter of Lee*, 17 I&N Dec. 275 (Commr. 1978), because these decisions discuss the factors relevant to consent to reapply for admission after deportation from the United States, which are not applicable to this case. Because the AAO is sustaining this appeal after a de novo review, this error is harmless.

Letter Brief in Support of Appeal, supra; Psychological Report, supra. [REDACTED] is employed as a truck driver. *See Psychological Report, supra.* His income in 2006 was \$20,400. *See Form W-2 Wage and Tax Statements.* The record further indicates that [REDACTED] was forced to sell his house because he did not have enough money to pay the mortgage, support the applicant in Mexico, and pay for his trips to Mexico to keep his marriage alive.

Here, the applicant has shown that the hardships caused by family separation, when considered in the aggregate, constitute extreme hardship. *See Matter of O-J-O-*, 21 I&N Dec. at 383. Although the separation of family members and financial difficulties alone do not establish extreme hardship, the impact of [REDACTED] prolonged separation from his wife, given his psychological state and history of loss, takes this case beyond the ordinary hardships to be expected when one family member is inadmissible. Accordingly, the applicant has shown that the cumulative impact of the emotional and financial hardships is extreme. *See Salcido-Salcido*, 138 F.3d at 1993 (emphasizing weight to be given to the hardship that results from family separation); *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565 (recognizing importance of family ties and the financial impact of departure); *Matter of Lopez-Monzon*, 17 I&N Dec. at 281 (noting that waiver was designed to promote the unification of families and to avoid the hardship of separation).

The applicant also has provided evidence that her husband would suffer extreme hardship if he were to relocate to Mexico. First, [REDACTED] was born in the United States. *See Birth Certificate.* Most of [REDACTED]'s family lives in Modesto, California, and apart from the applicant and her family, he has no family ties in Mexico. The record indicates that although [REDACTED] has been gainfully employed in the United States since at least 2003, his income has declined significantly each year, and he does not have funds sufficient to relocate to, and reestablish himself in, Mexico. *See Tax Records.*

Based on the evidence of psychological and financial hardships to [REDACTED] as a result of family separation, and his long residence, family ties, and work history in the United States, coupled with concerns regarding conditions in Mexico, the AAO finds that the applicant has established extreme hardship to her spouse if the applicant is prohibited from entering in the United States, or if her husband relocates to Mexico. Although not all of the relevant factors in this case are extreme in themselves, the entire range of factors considered in the aggregate takes the case beyond those hardships ordinarily associated with deportation or inadmissibility, and supports a finding of extreme hardship. *See Matter of O-J-O-*, 21 I&N Dec. at 383; *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of Coelho*, 20 I&N Dec. 464, 467 (BIA 1992). The adverse factors in this case are the applicant's misrepresentation and the unlawful presence for which she seeks a waiver. The favorable and mitigating factors in this case include: the applicant's ties to her U.S. citizen spouse in the United States; the applicant's lack of a criminal record; and the extreme hardship to the applicant and her spouse caused by the denial of a waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. at 301 (setting forth relevant factors).

The AAO finds that the favorable factors in this case outweigh the adverse factors, and that a grant of relief in the exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.