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



U.S. Citizenship
and Immigration
Services

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EL PASO, TX 79936

FILE:

[REDACTED]

Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date: **SEP 03 2010**

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and 212(j) 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 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,

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, 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 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 a period of one year or more and seeking readmission within ten years of his last departure and 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 by fraud or willful misrepresentation. The applicant is married to a U.S. citizen and is the father of a U.S. citizen. He seeks a waiver of inadmissibility to reside in the United States with his family.

The district director found that the applicant had failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *Decision of the District Director*, at 4, dated May 21, 2007.

On appeal, counsel states that the supporting documentation clearly sets out that the applicant's spouse is suffering extreme hardship. *Brief in Support of Appeal*, at 1, undated.

The record includes, but is not limited to, counsel's brief, criminal records for the applicant, statements from the applicant and his spouse, medical documents for the applicant's son, financial documents for the applicant and his spouse, employer letters for the applicant and his spouse, education-related documents for the applicant's spouse, a letter of support for the applicant, research on the effects of father involvement, and country conditions information on Mexico. The AAO notes that some of the documents in the record are in Spanish and do not include English-language translations. As such, they will not be considered. *See* 8 C.F.R. § 103.2(b)(3). The entire record was reviewed, and considered except for the non-translated documents, in rendering a decision on the appeal.

The district director found that the applicant had failed to disclose to the consular officer that he was arrested or received by the Lenexa Police Department on or about June 7, 2002 and charged with obstructing and resisting an officer, disorderly conduct, and operating a vehicle without a valid driver's license, and that he was arrested or received by the Olathe Sheriff's Office on or about January 12, 2004 and charged with obstructing legal process in a misdemeanor case.¹ As such, the applicant was found to be inadmissible under section 212(a)(6)(C)(i) of the Act.

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

- (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.

¹ Counsel states that the applicant inadvertently neglected to disclose the incidents on his May 25, 2006 Form DS-156 and during his consular interview. *Brief in Support of Appeal*, at 2.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [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 Attorney General [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 AAO notes that the Supreme Court in *Kungys v. United States*, 485 U.S. 759 (1988) found that the test of whether concealments or misrepresentations were “material” was whether they could be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, i.e., to have had a natural tendency to affect, the legacy Immigration and Naturalization Service’s (now United States Citizenship and Immigration Services) decisions. In addition, *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements of a material misrepresentation are as follows:

A misrepresentation made in connection with an application for a visa or other documents, or with entry into the United States, is material if either:

- a. the alien is excludable on the true facts, or
- b. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien’s eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (AG 1961).

The record is not clear as to whether the applicant was convicted for all of the crimes mentioned by the district director.² However, the AAO notes that the crimes for which the applicant was arrested are not crimes involving moral turpitude. The AAO further notes that these offenses may not be convictions for immigration purposes as the applicant was prosecuted as a juvenile offender. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000). Regardless of whether they may be considered convictions under the Act, under the true facts, the applicant would not have been inadmissible under section 212(a)(2)(A)(i)(I) of the Act. In addition, the misrepresentation did not tend to shut off a line of inquiry that was relevant to the alien’s eligibility and which might well have resulted in proper determination that he be found inadmissible. Based on the record, the AAO finds that the applicant

² The record includes a complaint charging the applicant with committing disorderly conduct in violation of K.S.A 21-4101(c) and of obstruction of official duty in violation of K.S.A 21-3808(b)(2) on or about June 7, 2002. The record includes a dated March 31, 2004 Journal Entry from the District Court of Johnson County, Kansas reflecting that the applicant pled guilty to this complaint, was found to be a juvenile offender as to the obstruction of official duty charge, and the disorderly conduct case was dismissed per plea agreement.

did not willfully misrepresent a material fact and is not inadmissible under section 212(a)(6)(C)(i) of the Act for failing to mention the aforementioned arrests.³

The record reflects that the applicant entered the United States without inspection in July 2000, turned 18 years old on June 22, 2003, was granted an order of voluntary departure on December 20, 2004 until February 20, 2005 and departed the United States on February 18, 2005. The applicant accrued unlawful presence from June 22, 2003, the date he turned 18 years of age, until December 20, 2004, the date he was granted an order of voluntary departure. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for a period of more than one year and seeking readmission within ten years of his February 18, 2005 departure from the United States.

Section 212(a)(9)(B) 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 Attorney General [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.

³ The AAO also notes that the record reflects that on March 6, 2003 the applicant was found to be a juvenile offender in violation of the former Kansas Statutes Annotated 21-3701(a)(1) and (b)(4) for Misdemeanor Theft. The record is not clear as to whether the applicant failed to disclose this crime on his visa application. The AAO also notes that this offense may not be a conviction for immigration purposes as the applicant was prosecuted as a juvenile offender. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000). Even if it is considered a conviction, the applicant would be eligible for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act as the maximum penalty for the crime is one year and he did not receive a sentence of imprisonment. Based on the true facts, the applicant would not be inadmissible for committing this crime. In addition, the misrepresentation did not tend to shut off a line of inquiry that was relevant to the alien's eligibility and which might well have resulted in proper determination that he be found inadmissible. Based on the record, the AAO finds that the applicant did not willfully misrepresent a material fact and is not inadmissible under section 212(a)(6)(C)(i) of the Act.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's 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 USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals (BIA) stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (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 BIA 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 BIA has also held that the common or typical results of deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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 BIA 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.*

We observe that 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., *In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. See *Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the BIA considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; see also *U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. See, e.g., *Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly

where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The first part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event of relocation to Mexico. The record reflects that the applicant's spouse was born in the United States. *Applicant's Spouse's Birth Certificate*. Counsel states that the applicant's spouse's father and one her brothers are lawful permanent residents and that her other brother is a U.S. citizen. *Brief in Support of Appeal*, at 7. The record includes a copy of the applicant's spouse's father's permanent resident card and a copy of her brother's U.S. passport card. The applicant's spouse states that her son was born with acute asthma and has needed special medical attention. *Applicant's Spouse's Statement*, at 1, dated June 29, 2010. The record reflects that the applicant's son has been diagnosed with acute asthma. *Discharge Summary*, dated October 26, 2007. The applicant's spouse states that she would not be able to pursue her college education in Ciudad Juarez. *Applicant's Spouse's Statement*, at 3. Although the record does not include information on colleges in Ciudad Juarez, the AAO notes that the applicant's spouse was offered a scholarship to attend Kansas City Kansas Community College and that she took classes there in 2004. *Applicant's Spouse's Scholarship Letter*, dated February 12, 2003; *Applicant's Spouse's College Transcript*. The record reflects that the applicant's spouse resides in Ciudad Juarez, Mexico. *Form I-601*, dated May 30, 2006. The applicant's spouse details the violence in Ciudad Juarez, Mexico and that there have been a number of killings in the applicant's neighborhood. *Applicant's Spouse's Statement*, at 3. The AAO notes the applicant's claim that he was beaten and robbed while making a deposit at a bank, a shoot out took place in front of his house, and his spouse and son have recurring nightmares. *Applicant's Statement*, at 2-3. The record includes a letter from the applicant's current employer verifying that the applicant was robbed while making a bank deposit. *Letter from Applicant's Employer*, dated May 19, 2010.

The AAO notes that on August 27, 2010, the Department of State updated a travel warning to United States citizens traveling to Mexico. This warning is focused on northern Mexico, i.e., along the United States-Mexico border. The travel warning states that violence along the U.S.-Mexico border has increased. "Large firefights have taken place in towns and cities in many parts of Mexico...such firefights have occurred mostly in northern Mexico, including Ciudad Juarez, Tijuana, Chihuahua City, Nogales, Matamoros, Reynosa and Monterrey. During some of these incidents, U.S. citizens have been trapped and temporarily prevented from leaving the area." The travel warning states "[t]he situation in northern Mexico remains fluid; the location and timing of future armed engagements cannot be predicted...." When the safety issues that would affect the applicant's spouse in Ciudad Juarez, her family ties to the United States, the applicant's son's asthma and the

normal hardships created by relocation are considered in the aggregate, the AAO finds that the applicant's spouse would suffer extreme hardship if she relocated to Mexico.

The second part of the analysis requires the applicant to establish extreme hardship in the event that a qualifying relative remains in the United States. The applicant's spouse states that she and her son have experienced extreme hardship financially, spiritually and emotionally due to the applicant's visa denial. *Applicant's Spouse's Statement*, at 1. The applicant's spouse states that her son was born with acute asthma and has needed special medical attention. *Applicant's Spouse's Statement*, at 1. The applicant's spouse states that the applicant could assist with the care of their son if he was in the United States. *Id.* The record reflects that the applicant's son was diagnosed with acute asthma. *Discharge Summary*. The applicant's spouse states she is currently earning \$8.00 per hour, the applicant only makes \$230 a month in Ciudad Juarez, she has to send him money to assist with his bills, and she has accumulated many outstanding debts since his departure. *Applicant's Spouse's Statement*, at 2. The record includes evidence of some of the applicant's spouse's expenses, including day care, rent, water, telephone and gas expenses. The record includes delinquent payment notices and employer letters for the applicant and his spouse. The record also includes a Notice of Plan to Sell Property for a car that the applicant's spouse has an interest in or owes money on. *Notice from Fireside*, dated January 18, 2006.

Counsel states that the applicant's spouse worries incessantly about the safety of the applicant. *Brief in Support of Appeal*, at 4. The record reflects that the applicant's spouse resides in Ciudad Juarez, Mexico. *Form I-601*, dated May 30, 2006. The applicant's spouse details the violence in Ciudad Juarez, Mexico. *Applicant's Spouse's Statement*, at 3. The AAO finds the applicant's spouse's concerns plausible based on the Mexico travel warning previously discussed. The AAO also notes the applicant's claims that he was beaten and robbed while making a deposit at a bank and that a shoot out took place in front of his house. *Applicant's Statement*, at 3. The record includes a letter from the applicant's current employer verifying that the applicant was robbed while making a bank deposit. *Letter from Applicant's Employer*.

Considering the applicant's spouse's fear for the applicant's safety, her financial debt, her son's asthma, and the normal hardships created by the separation of spouses, the AAO finds that the applicant's spouse would suffer extreme hardship if she remained in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) 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-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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 adverse factors in the present case are the applicant's convictions as a juvenile offender, his failure to reveal this information at his consular interview, his unlawful residence in the United States and his unauthorized employment.

The favorable factors include the presence of the applicant's U.S. citizen spouse and child, the extreme hardship to his spouse if his waiver request is denied and his child's health problems.

The AAO finds that the immigration violations committed by the applicant cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.