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



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



H6

Date: **SEP 28 2012**

Office: SAN DIEGO (CHULA VISTA)

FILE: 

IN RE: Applicant: 

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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, San Diego, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application approved.

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 Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more, and under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured or sought to procure admission to the United States through fraud or misrepresentation. She is married to a lawful permanent resident, is the beneficiary of an approved Petition for Alien Relative (Form I-130), and is seeking a waiver of inadmissibility in order to reside in the United States with the petitioner.

The district director concluded the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and, accordingly, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601). *Decision of the Field Office Director, July 5, 2011.*

On appeal, the qualifying relative asserts that USCIS misapplied the legal standard in finding the applicant had not shown undue hardship to a qualifying relative and also offers new evidence. In support of the appeal, he submits an updated hardship statement and new supporting documentation including, but not limited to, psychological reports; medical records, death and birth certificates; newspaper articles; pay stubs; utility bills; and proof of other expenses. The entire record was reviewed and considered in rendering this decision.

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

(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...

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

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)(1) of the Act provides:

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 her children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's lawfully resident husband 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-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 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*, 138 F.3d at 1293 (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 shows that the applicant entered the United States from Mexico as a B-2 visitor in October 2000 using a newly-issued Border Crossing Card (BCC) and remained until March 2001. She re-entered the country with her BCC in March 2002 and overstayed her period of admission by not departing until June 2006. This departure triggered inadmissibility for unlawful presence of one year or more. A short time later, on June 25, 2006, the applicant sought re-admission using her BCC and claiming nonimmigrant intent. Having previously been discovered to be living illegally in the United States, she was referred to secondary inspection and admitted that, contrary to her original claim, she was actually returning to the United States to resume residing with her husband and two children and was the beneficiary of a 2005 spousal I-130 petition. She was permitted to withdraw her request for admission and returned to Mexico, where she filed a waiver application in 2010.

Since filing an appeal of the July 2011 waiver denial, the qualifying relative has supplemented the record to show the birth of his third child with the applicant in January 2012 and the death of his first child in May 2012. In addition to providing birth and death certificates, he documents the impact of these events on the extreme hardship analysis in this case. The record establishes that the elder son

of the applicant and her husband died on May 30, 2012 as a result of injuries sustained the previous day in a car accident, which the applicant's husband and their younger son survived.

The applicant's husband contends he has suffered, and will continue to suffer, emotional and financial hardship if he remains in the United States while the applicant resides abroad due to her inadmissibilities. He claims to be stressed and depressed by separation from the applicant since 2006 and that his emotional state has declined since the death of their eldest child earlier this year. A July 2011 psychological evaluation reports the qualifying relative suffering from insomnia, nightmares, difficulty concentrating, lack of motivation, and suicidal ideations, in diagnosing him with major depression and acute stress disorders. The evaluation notes in detail his thoughts about killing himself. The report also diagnoses the couple's then seven- and ten-year old sons as suffering from depression, acute stress, and nightmares due to absence of their mother, with whom they had been living in Mexico until their parents determined violent conditions there made it too unsafe for them to remain. An August 2012 report by a school psychologist observes the younger son experiencing emotional difficulties requiring grief counseling due to the recent death of his elder brother, with whom he attended the same elementary school, at the same time he suffers from separation anxiety due to his mother's absence. July and August 2012 hardship statements from the applicant's husband reflect that the emotional toll of his wife's absence has been exacerbated by the death of their son, his inability to address the surviving son's own emotional needs, and his fear for the safety of his wife and infant daughter in Mexico.

The record reflects the couple had their now-deceased son in 2000, when the qualifying relative was 22 and the applicant only 16 years old. The paternal grandmother, who helped raise the children when they returned to the United States after living with their mother in Mexico, confirms the psychologist's concern about her son's ability to function without his family. Corroborating this concern are the qualifying relative's statements showing that what was initially a typical reaction to separation from a beloved spouse became desperation after the death of their child. There is clear evidence that bereavement has elevated his emotional hardship to the point that he is overwhelmed by his situation and separation from the applicant. *See Statement of [REDACTED] July 2, 2012.*

As for the claimed financial hardship, there is evidence that the applicant's absence has imposed an unsustainable burden on her husband. Although not bringing income to the household while here, the applicant contributed by maintaining the family's home, which her husband bought in 2005, and caring for the children. The record shows that the qualifying relative's job history has not been stable, but that he now appears to be earning at a higher annual rate after a period of unemployment. However, documentation supports the claim that his wages are insufficient to maintain two households and that the applicant has been unable to find work in the Mexican border town where she lives with her infant daughter in a rented apartment to help defray the cost of the second household. The record shows that he conveyed financial responsibility for his vehicle to a brother due to the inability to afford make monthly payments and suggests his ability to pay his mortgage may be at risk. Evidence of the couple's overall economic situation establishes that, without the applicant's presence in the United States, her qualifying relative is experiencing financial hardship.

The evidence on the record, when considered in the aggregate, establishes that the emotional and financial hardship the applicant's husband is experiencing by remaining in the United States without the applicant rises to the level of extreme.

The record also shows that the qualifying relative would suffer extreme hardship in the event that he relocated to Mexico to reunite his family. He is a 13-year permanent resident whom the record shows has extensive ties to the United States, where he works, owns real estate, and has lived since the age of 21. His entire immediate family has immigrated, including permanent resident parents and several siblings who are either permanent residents or naturalized citizens. His mother took care of his two boys when they returned from Mexico to attend U.S. schools while he continued a job out of town. Among the hardships of moving back to the country he left in 1999 are lack of remaining ties there and poor job prospects due to documented difficult economic conditions. The chief hardship, and the consideration that led the applicant and her husband to have their children leave Mexico, is the narcotics-related violence in the Mexican state of Sonora. U.S. government sources confirm that Mexican drug cartels are active where the applicant grew up and now lives with a nine month old daughter, and that relocating with their surviving son would expose them to criminal activity, including murder, gunfights, kidnapping, carjacking, and highway robbery. *See Travel Warning—Mexico*, U.S. Department of State, February 8, 2012.

The record reflects that the cumulative effect of the applicant's husband's strong ties to the United States and absence of ties back home, his long residence in the United States and loss of employment, and exposure to endemic violence, were he to relocate, rises to the level of extreme. The AAO thus concludes that, if the applicant is unable to reside in the United States due to her inadmissibility, a qualifying relative would suffer extreme hardship by relocating to Mexico to reside with his wife.

Review of the documentation in the record, when considered in its totality, reflects that the applicant has established her U.S. permanent resident spouse would suffer extreme hardship were the applicant unable to reside in the United States. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. 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 . . . 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 "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 the applicant's husband would face if the applicant were to continue residing in Mexico, regardless of whether he joined the applicant or remained in the United States; the applicant's lack of any criminal record; payment of taxes; fulfillment of family obligations in the United States; and the passage of more than six years since her attempt to procure entry unlawfully into the United States. The unfavorable factors in this matter are the applicant's overstay of her authorized admission, unlawful presence, and attempt to procure readmission by misrepresenting her immigrant intent.

Although the applicant's violations of the immigration laws cannot be condoned, the positive factors in this case outweigh the negative factors. Given the gravity of the emotional loss to the family, the passage of time since the applicant's violations of immigration law, and her more than six years outside the country, the AAO finds that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The waiver application is approved.