

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 7000
Washington, DC 20529-2090



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

[Redacted]

H7

DATE: Office: MEXICO CITY, MEXICO [Redacted]

DEC 11 2012

IN RE: Applicant: [Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. section 1182(a)(9)(B)(v); section 212(i) of the Act, 8 U.S.C. § 1182(i); and section 212(d)(11) of the Act, 8 U.S.C. § 1182(d)(11).

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 Field Office Director, Mexico City, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico. He 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), section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), and section 212(a)(6)(E), 8 U.S.C. § 1182(a)(6)(E) of the Act. She is married to a United States citizen. She 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), and section 212(d)(11) of the Act, 8 U.S.C. § 1182(d)(11).

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on November 12, 2010.

On appeal, the applicant's spouse states that he is struggling physically and financially and asks that United States Citizenship and Immigration Services (USCIS) approve the applicant's waiver request. *Form I-290B*, received on December 13, 2010.

The record includes, but is not limited to, a statement from the applicant's spouse; a translated medical record pertaining to the applicant's son; a statement from [REDACTED] Health Care Manager, dated December 4, 2010, pertaining to the applicant's spouse; a statement from [REDACTED], dated January 13, 2010, pertaining to the applicant's spouse; photographs of the applicant, her spouse and their family; copies of pay stubs, employment letters and tax returns for the applicant's spouse. The entire record was reviewed and all relevant evidence 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. . . .

The record indicates that the applicant entered the United States without inspection in 1998. The applicant departed the United States and re-entered in 1999, presenting a false passport. She remained in the United States until she departed in October 2009. As the applicant has resided unlawfully in the United States for over a year, from at least 1999 until October 1999, and is now

seeking admission within 10 years of her last departure from the United States, she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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) Misrepresentation, states in pertinent part:

- (i) In general. 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 chapter is inadmissible.

Section 212(a)(6)(C)(iii) authorizes a waiver, in the discretion of the Attorney General, as proscribed by Section 212(i):

- (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) of this section in the case of an immigrant 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 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 record indicates that the applicant entered the United States by presenting false documents to an immigration inspector 1999. As such, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for having presented false documents when entering the United States. The applicant does not contest this finding.

Section 212(a)(6)(E) of the Act states, in relevant part:

- (i) In general. Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

- (ii) Special rule in the case of family reunification. Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the

Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (d)(11) of this section.

Section 212(d)(11) States, in relevant part:

(11) The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) of this section in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 1153(a) of this title (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

A conviction for smuggling is not necessary to render an alien inadmissible under section 1182(a)(6)(E), section 212(a)(6)(E) of the act. *In Re Ruiz-Romero*, 22 I&N Dec. 486, 490 (BIA 1999)(reasoning that the title of the section was non-substantive, and did not describe the full extent of activities that may be regarded as "alien smuggling" or "related to alien smuggling," and were intended to describe activities which would suffice, even in the absence of a conviction, to exclude or deport an alien).

In this case the record indicates that the applicant entered the United States with her six month old child in February 1998 by presenting false documents. She was detained by border patrol agents, but released based on the fact that she had an infant with her.

In this case, it is clear that the applicant attempted to smuggle her small child into the United States. Because record clearly establishes that the subject of the applicant's conduct was a spouse, parent, son or daughter, and she is eligible for consideration for a waiver under section 212(d)(11) of the Act. The record indicates that the applicant has three children, two of whom live in the United States, and a husband who resides in the United States as well. The AAO will exercise favorable discretion on the basis of family reunification concerns. Although the AAO has seen fit to waive the applicant's inadmissibility under section 212(a)(6)(E), the applicant must establish that

a qualifying relative will experience extreme hardship in order to waive her inadmissibility under sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act.

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 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-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.

On appeal, the applicant’s spouse asserts that he suffers from several medical conditions and needs the assistance of the applicant in order to help care for him and their three children. *Form I-290B*, received December 13, 2010. He explains that his son is experiencing medical problems in Mexico, and that his whole family is emotionally impacted by the absence of the spouse. The applicant’s spouse asserts that he cannot afford to travel back and forth to Mexico to visit his spouse and son, and that he would be unable to support his spouse and three children living in two separate countries if he were to remain in the United States with his two daughters. *Statement of the Applicant’s Spouse*, received December 13, 2010. He also notes that he would be unable to afford child care for his youngest daughter while he works to support his family in the United States.

The record contains numerous documents from medical doctors pertaining to the applicant’s spouse, including a specific statement that the applicant’s spouse suffers from Type II Diabetes Mellitus, allergic rhinitis and GERD. *Statement of Dr. Ibrahim El-Ali*, dated January 13, 2010. There are also documents corroborating that the applicant’s spouse is currently taking medication for his conditions. Based on this evidence the AAO finds that the applicant’s spouse suffers from medical conditions that complicate his ability to care for his children and himself without the assistance of a spouse, an uncommon physical hardship.

The record also contains financial documentation corroborating the employment and earnings of the applicant’s spouse. There are invoices and copies of other bills corroborating the financial obligations of the applicant’s spouse. Based on the fact that the applicant and her spouse have three children and the evidence in the record with regard to the financial obligations of the applicant’s spouse the AAO can determine that the applicant’s spouse would experience some financial impact due to separation from the applicant.

When these hardship factors are considered in the aggregate with the other common impacts of separation, the AAO finds that they rise above the common impacts to a degree constituting extreme hardship.

With regard to hardship upon relocation, the applicant's spouse notes that the conditions in Mexico would result in an physical and economic hardships for him and the applicant. *Statement of the Applicant's Spouse*, received December 13, 2010. He states that his son has medical conditions as well.

As noted above, the record indicates the applicant's spouse has several medical conditions, including diabetes and allergic rhinitis. Disrupting the continuity of medical care he has with his personal medical doctors, and his health care resources such as medical insurance and the availability of pharmaceuticals, would constitute a significant physical hardship. The AAO will consider this factor when aggregating the impacts on the applicant's spouse.

The record also contains a translated medical receipt pertaining to the applicant's son. The document contains a statement from a medical doctor indicating the applicant's son has a heart murmur and anemia. The AAO finds this evidence informative, and recognizes that each of these medical conditions can be serious. Based on this evidence the AAO can determine that having to provide for a child with potentially serious medical conditions while having to relocate abroad would result in significant hardship on the applicant's spouse.

The AAO also notes the presence of several employment letters on behalf of the applicant attesting to his work history and experience, a community and financial tie that would have to be severed in the event of relocation.

When these hardship factors are considered in the aggregate with the common impacts of relocation, the AAO finds them to rise above the common impacts to a degree of extreme hardship. As such, the AAO finds that the applicant has established a qualifying relative will experience extreme hardship.

As the applicant has established that a qualifying relative will experience extreme hardship both upon relocation and separation, the AAO may now consider whether she warrants a waiver 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-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 AAO finds that the unfavorable factors in this case include the applicant's multiple entries without inspection, her unlawful presence, her misrepresentation and the smuggling of her child into the United States. The favorable factors in this case include the applicant's length of residence in the United States, the presence of her husband and other family members in the United States, the hardship her qualifying relative would experience due to her inadmissibility and the lack of any criminal record while residing in the United States. Although the applicant's immigration violations are serious matters, the favorable factors in this case outweigh the negative factors, therefore favorable discretion will be exercised. The field office director's decision will be withdrawn and the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.