U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: MIAMI, FLORIDA Date: JUL 10 2008

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under 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:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Miami, Florida. 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 Argentina who was determined 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 seeking readmission within 10 years of his last departure from the United States. The applicant is the spouse of a U.S. Citizen and the beneficiary of an approved Petition for Alien Relative (Form I-130). He 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), in order to remain in the United States with his spouse.

The Acting District Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Acting District Director,* dated May 9, 2006.

On appeal, counsel asserts that the applicant's wife, who suffers from major depression and an anxiety disorder, would suffer extreme emotional hardship if the applicant were removed from the United States. *Form I-290B*, dated June 6, 2006. Counsel states that the applicant traveled to Argentina to visit his gravely ill mother while his adjustment of status application was pending, triggering a ten-year bar to admission for unlawful presence. *Id.* He further contends that no adverse factors are present in the case, and the applicant merits a waiver of inadmissibility in the exercise of discretion. *Id.* In support of these assertions, counsel submitted a brief; a copy of the applicant's wife's naturalization certificate; an affidavit from the applicant's wife; letters from the applicant's stepchildren; letters and records from the applicant's wife's physician and psychiatrist; a psychiatric evaluation for the applicant's wife; and medical records for the applicant documenting his 2006 surgery for a kidney mass. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

In the present case, the record indicates that the applicant entered the United States as a B-2 visitor for pleasure on or about November 2, 1985. The applicant remained in the United States and on April 28, 2001, he filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On August 29, 2001, he was issued Authorization for Parole of an Alien into the United States (Form I-512). The applicant departed the United States in October 2001 and used the advance parole authorization to reenter the country on November 5, 2001.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* The applicant accrued unlawful presence from April 1, 1997, the date section 212(a)(9)(B) of the Act went into effect, until April 28, 2001, the date of his proper filing of the Form I-485. In applying to adjust his status to that of Lawful Permanent Resident (LPR), the applicant is seeking admission within 10 years of his October 2001 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included 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.* at 566. The BIA has further stated:

> 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. *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

In addition, the Ninth Circuit Court of Appeals has held, "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) (remanding to the BIA) ("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). 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).

U.S. court decisions have additionally held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See 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 emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, in *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the court held that the common results of deportation are insufficient to prove extreme hardship and defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. In *Hassan v. INS, supra,* the court further held that the uprooting of family and separation from friends does not necessarily amount to extreme hardship, but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. Moreover, the U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The record reflects that the applicant is a forty-five year-old native and citizen of Argentina who has resided in the United States since November 1985. He married his wife, a forty-seven year-old native of Cuba and naturalized U.S. Citizen, on August 9, 1995. The applicant's wife has three adult U.S. Citizen children who resided with the applicant and his wife in Opa Locka, Florida after their marriage in 1995. *See letters from the applicant's stepchildren, Exhibits 3-5.* The applicant's wife also has a granddaughter who is now two years old. *See affidavit of* [redacted] *Exhibit 2,* dated May 11, 2006. The record further reflects that the applicant's wife has been treated for major depression and an anxiety disorder for several years and has a history of suicide attempts. *See letter from* [redacted] ***Exhibit 6,*** **dated May 20, 2006.**

Counsel contends that the applicant's spouse would suffer extreme hardship if the applicant were removed from the United States because of her significant medical issues, including a history of major depression and anxiety and related physical ailments, including palpitations, anxiety, and hypercholesterolemia. *Brief in Support of Appeal* at 2. Counsel states that the applicant's wife has a history of suicide attempts and that the applicant's removal "would be devastating to her and perhaps even life threatening." *Brief* at 5. In support of this assertion, counsel submitted a psychiatric evaluation conducted in 1999 that states,

> During the past four months, the patient has been undergoing a lot of stress and her depression has exacerbated . . . The patient is a housekeeper and has her own business . . . and is having a hard time sustaining her performance because of all the stress. She also has the feeling of impending doom, that something is going to happen, which gives her a sense of despair; at times, she feels suicidal and feels like hurting herself. Once before, after her divorce, she tried to kill herself by overdosing on pills. *Psychiatric Evaluation prepared by* [redacted] *Exhibit 8,* dated January 23, 1999, at 1.

The evaluation further states that the applicant's wife has "suicidal ideations" and feels "hopeless, helpless, and . . . at times as if life is not worth living." *Id.* at 3. A more recent letter prepared by [redacted]

indicates that the applicant's wife has remained under his care since January 1999 and that she "has a history of suicide attempts and was hospitalized in November 2001." He further states that due to her condition, she may respond similarly if her husband is deported, and she would also suffer emotionally if she relocated to Argentina and was separated from her family, including her then four month-old granddaughter. *See letter from D* [redacted] *Exhibit 6,* dated May 20, 2006. [redacted] further indicates that the applicant's wife "has been having suicidal ideations as a result of her problems." *Id.*

Counsel asserts that the applicant's wife would also suffer financial hardship if she remained in the United States without the applicant and had to live without his income. *Brief* at 5. Counsel did not submit documentation concerning the income and expenses of the applicant and his wife, but the AAO notes that tax returns submitted with an affidavit of support in 2002 indicate that the applicant earned more that half of the income reported on his joint return with his wife, and that she earned less than $10,000 in 1999, 2000, and 2001. Counsel also states that if the applicant's wife relocated to Argentina with the applicant, "they would lose everything they have worked for and would be unable to support themselves due to the grave economic and political crisis in Argentina and both their precarious health situations." *Id.* He further asserts that she would suffer emotional hardship if she leaves the United States, where she had resided since she was nine years old, and is separated from her children and grandchild and the psychiatrist who has been treating her for over seven years. *Id.*

The evidence on the record establishes that the applicant's wife would suffer extreme hardship whether she remains in the United States without the applicant or relocates to Argentina to reside with him. The psychiatric evaluation and letters from the applicant's wife's psychiatrist and physician establish that she has a history of major depression and anxiety as well as related physical ailments. The psychiatrist indicates that she has a history of serious mental illness and has contemplated or attempted suicide during stressful times in her life, including after her divorce and when the applicant was experiencing health problems. *See Psychiatric Evaluation, Exhibit 8.* He further states that the applicant's wife has been having "suicidal ideations" and might respond similarly if the applicant were deported. *See letter from* [redacted] *Exhibit 6.* In light of her history of severe depression and anxiety, the AAO finds that being separated from the applicant or relocating to Argentina and being separated from her children and grandchild would result in emotional hardship beyond that typically experienced by family members as a result of deportation.

The AAO also finds that the applicant's wife would experience financial hardship if the applicant were removed from the United States due to the loss of his income. Further, her psychiatrist indicated in his 1999 evaluation that the strain of being the main breadwinner at a time when the applicant was experiencing medical problems and could not work exacerbated her condition, and as a result she was not functioning well at work. Therefore, the applicant's wife, who states that she cannot support her household without the applicant's income, would suffer financial hardship that would exacerbate her mental condition if the applicant were removed. Counsel also asserts that the applicant's wife would suffer financial hardship if she relocated to Argentina because she and the applicant would be unable to find work there due to economic and political conditions. No documentary evidence was submitted by counsel to support this assertion. The AAO notes however, that the applicant and his wife own a house in Opa Locka, Florida, and further notes that the applicant has resided in the United States for more than twenty years and has undergone surgery for a kidney tumor and possible renal cell carcinoma as well as previous surgeries for an abscess. *See Exhibits 8 and 10.* In light of his age, length of time out of the country, and medical history, it is likely that the applicant would

have some difficulty finding employment if he were removed to Argentina. This lack of employment opportunity in Argentina, combined with the possible loss of their home in the United States, would result in hardship to the applicant's wife if she relocated to Argentina.

When considered in aggregate, the factors of hardship to the applicant's wife should she remain in the United States or relocate to Argentina constitute extreme hardship. This finding in largely based on evidence submitted with the appeal that documents her history of major depression, anxiety, and suicide attempts. Separation from the applicant or from her family, combined with the financial hardship that would result from losing the applicant's income, would cause the applicant's wife great emotional distress that would jeopardize her mental health. Further, as noted above, separation from close family members is a primary concern is assessing extreme hardship. *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998).

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. 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(a)(9)(B)(v) 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, "[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 factor in the present case is the applicant's immigration violation, remaining in the United States without authorization from 1985 until filing for adjustment of status in 2001. The AAO notes that the applicant was arrested in 1989 on theft charges, but was not convicted of any crime therefore this cannot be considered an adverse factor.

The favorable factors in the present case are the hardship to the applicant's wife; the applicant's lack of a criminal record or additional immigration violations; the affidavits from his stepchildren stating that the applicant is a hard worker and person of good moral character who has been a father to them since marrying

their mother when they were young; and his length of residence, stable employment history and property ties in the United States.

The AAO finds that applicant's violation of the immigration laws cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh this adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.