U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: CIUDAD JUAREZ, MEXICO Date: FEB 05 2007

IN RE: [redacted]

APPLICATION: Application for Waiver of Ground of Inadmissibility under Section 212(a)(9)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. §1182(a)(9)(B)

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 Officer-in-Charge (OIC), Ciudad Juarez, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, [redacted] (Mr. [redacted] 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 being unlawfully present in the United States for one year or more. Mr. [redacted] 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 travel to the United States to join his wife [redacted] (Ms. [redacted] who is a U.S. citizen.

The OIC concluded that Mr. [redacted] had failed to establish that extreme hardship would be imposed on his qualifying relative, his wife, and denied the Application for Waiver of Ground of Inadmissibility (Form I-601) accordingly. *Decision of the OIC*, dated June 5, 2006.

On appeal, counsel for the applicant asserts that the OIC made errors of law and fact in denying the waiver of inadmissibility, including: applying an impermissibly high burden of proof on the applicant, improperly disregarding Ninth Circuit law regarding expungements; discounting evidence demonstrating hardship and failing to consider hardships in a cumulative fashion; giving improper weight to arrests which did not result in a conviction; and incorrectly balancing discretionary equities. *Notice of Appeal to the Administrative Appeals Office (AAO) (Form I-290B),* dated June 15, 2006. In support of these assertions, counsel submitted a brief addressing these issues. *Applicant's Brief,* dated July 27, 2006. The AAO agrees that the OIC decision failed to fully consider the evidence of hardship in this case and failed to give proper weight to the equities in denying the request for a waiver on a discretionary basis.

Documents in the record, submitted in support of Mr. _____ request for a waiver (*Application for Waiver of Ground of Inadmissibility (Form I-601)*, filed December 7, 2004), includes a letter from Ms. [redacted] describing how her life would be affected if her husband's waiver were not approved, noting,

> It would mean leaving my family, leaving my aging mother, leaving my friends and peer support networks, leaving my chosen profession that I would be unable to continue in Mexico, and it would mean giving up and moving away from the only country, language, culture, land and people I have known my entire life. . . . I am one of seven siblings in my family, all of whom (with the exception of my deceased brother) are in the NW with their families. . . . I am Catholic and Filipino, from my father's side and European American and Native American on my mother's side. . . . My mother is nearly eighty years old and my stepfather is over eighty . . . She has suffered a number of strokes in the last few years. . . . Should [redacted] waiver not be approved, I would have to leave the Northwest and move to Mexico. I would do that, because I love [redacted] and I want to continue to build a life with him. I can't imagine my life without him. But I also can't bear the thought that it would mean that I have to leave my family. . .

Letter from [redacted], October 23, 2005. Ms. [redacted] adds details about her profession, explaining that the path she chose in 1995, which has had a deep impact on her life, led her to her current position as one

of the Artistic Co-Directors for Portland Taiko; she describes "taiko" as an art form, "a beautiful combination of music and rhythm, theater and dance choreography" with roots embedded in Japanese culture, "while in the United States, [it] is strongly connected to the history, culture and people in the Asian American community." *Id.* She states that she "had dreamed of being a performing musician when [she] was younger, but never imagined [she] could do so in such an incredible art form while being deeply connected to her Asian American community." *Id.* She states that if her husband's waiver is not approved and she relocates to Mexico, where there is no taiko, she would not only be giving up her source of employment but would also be giving up her Asian American community, explaining, "[t]aiko, my Asian American community and my life as a performer and leader in this art form feels deeply connected to the very soul and center of my being. As dramatic as that may sound, it is how much taiko is a part of life – my waking and sleeping hours. It would be devastating to me to have to give that up." *Id.* She writes that the stress of separation from her husband has caused her emotional, financial and physical difficulties, making it difficult for her to sleep, maintain their home and focus on work; she compares the sense of loss to having lost her brother when she was ten years old when he was killed in Vietnam. *Id.* In a prior letter, she expresses her deep attachment to her husband and how separation would affect her, stating "I would continue to rise each morning, go to work and do what I must, but the alive feeling with which I can now do all of those things – the zest, the happiness, the grounded way that I am able to connect, perform, be with people would be badly affected. It feels as if I would face again an almost unbearable loss – like that of my brother. Although not the same as that, it feels that strongly." *Letter from* [redacted] *April* 20, 2004.

Also included in the record is an evaluation letter by a Clinical Psychologist based on a clinical interview of Ms. [redacted] and psychological testing, and a telephone interview with a long-time friend, concluding that Ms. [redacted] is suffering from "major depression and anxiety disorder" due to her husband's inability to return to the United States for the past 18 months; the evaluation letter also concludes that if Ms. [redacted] were to move to Mexico, she would not be able to continue as a performance artist, resulting in "a major loss of her sense of competence and her self-esteem as a professional woman" and it would also mean separation from her family and friends and support system developed over years. *Evaluation Letter,* [redacted] Ph.D., P.C., October 24, 2005. Additional letters in the record, including from Ms [redacted] friends who have known her for 15 or 20 years, a student of taiko whom she mentored, her current and former employers (the Executive Director of Portland Taiko, and two former Co-Directors), the Executive Director of a community center in Portland, and her brother and stepfather, confirm the statements made by Ms. [redacted] regarding her depression and anxiety over the separation from her husband, the financial strain she is under due to her husband's absence, her involvement in the Asian American community in the Pacific Northwest region, and her history of community activism and leadership role in Taiko Portland, both as a performer and in community outreach and educational programs. The letters of support from her employer and former employers at Portland Taiko confirm that there is no taiko in Mexico or opportunity for Asian American cultural expression. The letters refer to Ms. [redacted] extended and close family in the Pacific Northwest and also refer to Mr. [redacted] as a hardworking honest individual who is an asset to the community.

Other than the documents described above which refer to Ms. [redacted] financial problems, the record contains no evidence of the couple's earnings or expenses. Mr. [redacted] s a mechanic, and according to Ms. [redacted] and others, the couple did not have financial problems until he left the United States and was denied readmission. The record contains court records showing that Mr. was convicted of "attempt

possession of a controlled substance schedule 1" in Oregon in 1984, and that the conviction was expunged in May 2001; FBI records show arrests in 1976 and 1977 for illegal entry; and two arrests in 1977 (no court record or disposition) where the arrest charges were attempted armed robbery and robbery; and an arrest in 1986 for "assault 4th degree – domestic abuse," with notation that no complaint was filed. The entire record was reviewed and considered in rendering this decision.

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.

Regarding the OIC's finding that Mr. [redacted] inadmissible pursuant to this section, the record reflects that he first entered the United States without inspection in 1984, when he was approximately 12 years old; he returned to Mexico briefly several times and reentered each time without inspection. His most recent reentry was in 1993, after which he resided in Portland, Oregon until he traveled to Mexico for visa processing in May 2004. He thus accrued unlawful presence in the United States from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until he returned to Mexico, a period of more than one year. In applying for an immigrant visa Mr. [redacted] is seeking admission within 10 years of his 2004 departure from the United States. He is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for one year or more and again seeking admission within 10 years of the date of his departure. Counsel for the applicant does not contest this finding.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully

resident spouse or parent of the applicant. Hardship the applicant himself experiences if he is denied admission is relevant to section 212(a)(9)(B)(v) waiver proceedings only to the extent that it results in hardship to a qualifying relative in the application, in this case, Mr [redacted] U.S. citizen wife, Ms. [redacted] *Matter of Recinas, et al.,* 23 I&N Dec. 467, 471 (BIA 2002). 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-Moralez,* 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, 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 566. In examining whether extreme hardship has been established, the BIA has held:

> 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).

U.S. courts have stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[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 Board of Immigration Appeals (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). One of the central purposes of the waiver is to provide for the unification of families and avoid the hardship of separation. *Matter of Lopez-Monzon,* 17 I&N Dec. 280 (Comm. 1979). Failure to weigh all family factors is reversible. *Delmundo v. INS,* 43 F.3d 436, 442-43 (9th Cir. 1994). Separation of family will therefore be given the appropriate weight in the assessment of hardship factors in the present case.

The extreme hardship standards applied when considering a waiver are the same as those applied in suspension cases. *Matter of Kao & Lin,* 23 I&N Dec. 45, 49 n.3 (BIA 2001). In the context of section 212(i) waiver proceedings, the BIA held that "[a]lthough it is, for the most part, prudent to avoid cross application between different types of relief of particular principles or standards, we find the factors articulated in cases

involving suspension of deportation and other waivers of inadmissibiliity to be helpful, given that both forms of relief require extreme hardship and the exercise of discretion." *Cervantes-Gonzalez, supra,* at 565.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The AAO notes that extreme hardship to the applicant's spouse must be established in the event that she accompanies him and resides in Mexico or in the event that she remains in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record in this case reflects that Ms. [redacted] was born in Portland, Oregon in August 1958 and has lived in or near Portland her entire life. Her family, including her mother, who is 80 years old, and stepfather, siblings and nieces and nephews live in the region, and they have a close relationship. She also has a network of long-time friendships and community ties in Portland, including to the Asian American community in the region through her work in Portland Taiko. She has no ties to Mexico other than her relationship with her husband. Although she has indicated that she cannot imagine leaving her family and community and occupation, she also states that she cannot tolerate living apart from her husband and would join him in Mexico to avoid separation. Letters and a psychological evaluation in the record give added weight to her statements regarding the difficulties she has had coping with separation from her husband; numerous letters from family, friends, and current and past employers also note her depression and anxiety and lack of ability to fully function in her work and personal life in Mr. [redacted]'s absence.

If Ms. [redacted] were to leave the United States to avoid separation from her husband, she would lose her livelihood and ability to contribute to the Asian American community, which has been an important part of her life for many years. She would also be uprooted from the only life she has known and be separated from close friends and family. To avoid these hardships, Ms. [redacted] could choose to remain in the United States separated from her husband. However, based on evidence in the record, the stress, anxiety and depression that she currently suffers due to such separation would be exacerbated by such an arrangement. The evidence indicates that Ms. [redacted] has suffered unusual pain in the past due to the loss of her brother when she was a child; that, partially as a result of this loss, she had difficulty opening up to another close relationship and did not marry until 2001, several years after she met and formed a close relationship with the applicant; and that the hardships of their current separation are unusually difficult for her given her background.

Considering the relevant facts of this case in the aggregate leads to the conclusion that Ms. [redacted] would suffer extreme hardship were she to join her husband in Mexico or remain in the United States without him. Separation has been extremely difficult, emotionally and psychologically, for her. Living in the United States apart from her husband has resulted in anxiety and depression that has affected all aspects of her life, including her ability to work. A discounting of the hardship Ms [redacted] would face in either the United States or Mexico if her husband were refused admission is not appropriate. Although any one factor alone may not be extreme, a consideration of the entire range and combination of factors concerning hardship in this case takes the case beyond those hardships ordinarily associated with removal or inadmissibility. *See Matter of O-J-O, supra.*

The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that Ms [redacted] faces extreme hardship if the

applicant is refused admission. 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.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case are Mr. [redacted] prior period of unlawful presence in the United States, for which he now seeks a waiver, and his prior arrests. The favorable and mitigating factors in the present case are the extreme hardship to the applicant's wife if he were refused admission, his otherwise clean background and lack of any record of arrest for over 20 years, and his positive involvement in the community as evidenced by letters of support from numerous friends and members of the community of Portland.

The AAO finds that, although the immigration violation committed by the applicant was serious and cannot be condoned, when 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.