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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CHICAGO, ILLINOIS Date: APR 05 2011

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, 8 U.S.C. § 1182(a)(9)(B)(v)

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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that 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 more than one year and seeking readmission within ten years of her last departure from the United States. The record indicates that the applicant is married to a United States citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 reside in the United States with her United States citizen spouse and children.

The District Director found 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 Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated July 28, 2008.

On appeal, counsel asserts that denial of the applicant's waiver application would result in extreme hardship to her spouse and children. *See Form I-290B,* filed August 28, 2008 and the accompanying brief in support of the appeal.

The record includes, but is not limited to, affidavits by the applicant's spouse, a brief from counsel in support of the appeal, copies of medical records from Sherman Hospital, Elgin, Illinois, from 2006 through 2008, relating to the applicant's spouse, a letter from Dr. [redacted] regarding the applicant's spouse, copies of bank statements and other financial documents, copies of the applicant's spouse's Earnings Statements, a copy of a joint U.S. Individual Income Tax Return (Form 1040), for 2007, for the applicant and her spouse, copies of various bills, and supportive statements from family members. The entire record was reviewed and considered in arriving at 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-
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> . . . .
>
> (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

> (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 [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 reflects that the applicant last entered the United States on July 3, 2002, with a valid non-immigrant visa and has remained in the country since her last entry. On January 26, 2007, the applicant's United States citizen spouse filed a Form I-130 on the applicant's behalf, which was approved on April 30, 2007. On November 20, 2007, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). The district director found the applicant inadmissible under section 212(a)(9)(B)(i)(II) of the Act, and on June 10, 2008, the applicant filed a Form I-601 waiver of the inadmissibility. On July 28, 2008, the District Director denied the Form I-485 and Form I-601, finding that the applicant failed to establish extreme hardship to her spouse. The record reflects and the applicant admitted that she had accumulated unlawful presence in the United States based on her prior legal entries into the country.[1] The exact periods of unlawful presence are not clear. But, even with the most generous calculation, she would still have more than 180 days and would be inadmissible under section 212(a)(9)(B)(i)(1) 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 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-Moralez,* 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

[1] See Record of Sworn Statement by [redacted] dated March 23, 2008.

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 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 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 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 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.*

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 Board 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.* [redacted] 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. [redacted] 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.

In this case, the record reflects that the applicant's spouse, [redacted] is a 40-year-old native of Mexico and citizen of the United States. The applicant and her husband were married in Chicago, Illinois, on September 4, 2004, and they have two children, [redacted] 11 years old, and [redacted] 9 years old.

The applicant's spouse, Mr. states that he will suffer extreme hardship if the applicant's waiver request is denied and she is removed to Mexico. Mr. [redacted] states that due to his demanding work schedule, he and the applicant made the decision that the applicant will remain at home to take care of the children and the family while he works and provides financially for the family. Mr. [redacted] states that as a result of this arrangement, their children have come to depend on the applicant for their every day needs, and that he too has come to rely on the applicant to take care of things so that he can concentrate on his work. Mr. [redacted] also states that he has a serious medical problem, panic attack, and that when he has an attack, which has been occurring more frequently of late, he does not know himself and has to be taken to the nearest emergency room. Mr. [redacted] states that he has relied on the applicant to take care of the family and things at home while he is incapacitated or hospitalized. Mr. [redacted] states that if the applicant is removed from the United States, it will be very difficult for him and his children because he would have to either hire a care provider to take care of his children while he is at work, or he would have to reduce his work schedule or look for other employment that will offer him some flexibility to be able to care for his children without the applicant's help. Either way, Mr. [redacted] states, he will suffer financial hardship. *See Affidavit of* [redacted] dated August 28, 2008.

In this case, a preponderance of the evidence demonstrates that the applicant's husband, Mr. [redacted] would suffer extreme hardship if the applicant is removed from the United States to Mexico and he remains in the United States. The record contains sufficient medical documentation to demonstrate that Mr. Barrios has a severe medical condition that will impact on his ability to adequately care for himself and his children as well as financially provide for his family without the applicant's help. Dr. [redacted] Espinosa, who has been Mr. [redacted] physician since 2003, states that Mr. [redacted] suffers from recurrent panic attacks and severe anxiety attacks that are most often extremely debilitating, that he has made multiple emergency room, hospital, and office visits pertaining to his condition despite being on medication, and that at times, Mr. [redacted] has been unable to work for many days at a time due to his medical condition. Dr. [redacted] states that Mr. [redacted] anxiety disorder is being exacerbated by the added stress regarding the applicant's struggle to remain in the United States with her family. *See Letter from Dr.* [redacted] The medical records from Sherman Hospital, Elgin, Illinois show that the applicant's spouse made multiple emergency room visits from 2006 to 2008 with a diagnosis of severe panic attacks, and that his visit on July 11, 2008, resulted in an overnight stay at the hospital. Thus, based on the evidence in the record, the applicant has demonstrated that her spouse would suffer extreme hardship if her waiver request is denied and she is removed from the United States to Mexico.

The AAO notes that extreme hardship to a qualifying relative must also be established in the event that he or she relocates abroad based on the denial of the applicant's waiver request. With respect to this criteria, Mr. [redacted] states that he has lived in the United States since 1988, he has a good paying job with benefits, which he will be forced to forfeit if he relocated to Mexico with the applicant, his mother

and sister, both United States citizens, reside close to him and they are a very close family. Mr. [redacted] states that he will have difficulties finding a job in Mexico because he has no contacts and he is unfamiliar with the job market there and that even if he is able to find a job, the money will not be enough for him and his family to live on. Mr. [redacted] also states that given his medical condition, he is concerned that he will not get the kind of medical care he needs, and he is concerned for his and his family's health and safety in Mexico because of the high crime rate there and the inadequate health care system in Mexico. Mr. [redacted] also states that he does not want to raise his children in Mexico because he wants them to have the best schooling and health care, which they can only get in the United States. The evidence in the record demonstrates that given his family ties in the United States, his health, financial and safety concerns, Mr. [redacted] would be concerned about his and his family's safety, health, education, and financial well-being at all times in Mexico.

In addition, the AAO notes that the United States Department of State has issued a travel alert for Mexico. As noted by the U.S. Department of State:

> Although narcotics-related crime is a particular concern along Mexico's northern border, violence has occurred throughout the country, including in areas frequented by American tourists. U.S. citizens traveling in Mexico should exercise caution in unfamiliar areas and be aware of their surroundings at all times. Bystanders have been injured or killed in violent attacks in cities across the country, demonstrating the heightened risk of violence in public places. In recent years, dozens of U.S. citizens living in Mexico have been kidnapped and most of their cases remain unsolved.

Travel Warning – Mexico, U.S. Department of State, Bureau of Consular Affairs, dated September 10, 2010.

A review of the documentation in the record, when considered in the aggregate, demonstrates that the applicant has established that her United States citizen spouse would suffer extreme hardship if the applicant's waiver request is denied. Here, the entire range of factors considered in the aggregate takes the case beyond those hardships ordinarily associated with deportation or inadmissibility, and supports a finding of extreme hardship.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

> We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra,* is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The negative factor in this case is the applicant's unlawful presence in the United States. The positive factors in this case include the extreme hardship the applicant's United States citizen spouse and

children will face if the waiver is denied, his family ties in the United States, and a lack of criminal record.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

ORDER: The appeal is sustained.