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

U.S. Citizenship and Immigration Services

[redacted]

H6

DATE: JUN 02 2011 Office: ACCRA, GHANA FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Accra, Ghana. 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 Liberia who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a controlled substance violation, section 212(a)(2)(C)(i) of the Act, 8 U.S.C. § 1182(a)(2)(C)(i), for having been a trafficker of a controlled substance, section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii), for making a false claim to U.S. citizenship, and 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 more than one year and seeking readmission within ten years of his last departure from the United States. The applicant's spouse and three children are U.S. citizens and he seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that the applicant is inadmissible for at least one provision of the law for which there is no waiver and the application was denied accordingly. *Decision of the Field Office Director*, dated March 27, 2009.

On appeal, counsel asserts that the applicant is not inadmissible under sections 212(a)(2)(A)(i)(II), 212(a)(2)(C)(i) and 212(a)(6)(C)(i) of the Act; and that he has established extreme hardship to his spouse. *Form I-290B Attachment*, undated.

The record includes, but is not limited to, counsel's brief, medical records for the applicant's disabled son, the applicant's spouse's statements, financial records, photographs and country conditions information on Liberia. The entire record was reviewed and considered in rendering a decision on the appeal.

The field office director found the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act for having committed a controlled substance violation.

Section 212(a)(2) of the Act states in pertinent part:

> Criminal and related grounds. —
>
> (A) Conviction of certain crimes. –
>
> (i) In general. – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> . . . .
>
> (I) a violation of (or conspiracy or attempt to violate)

> any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

Counsel asserts that the applicant has not been convicted of a controlled substance violation as the charges against him were dismissed. *Brief in Support of Appeal.* The field office director's decision does not specify the controlled substance violations resulting in the finding of inadmissibility, however the record reflects that the applicant was arrested on November 10, 1993 for obtain/sell controlled dangerous substance in public under New Jersey Statutes 2C: 33-2.1, possess controlled dangerous substance or analog under New Jersey Statutes 2C: 35-10A(1), manufacture/distribute controlled dangerous substance under New Jersey Statutes 2C: 35-5A(1) and possession of drug paraphernalia under New Jersey Statutes 2C: 36-2.

On March 2, 2000, the Superior Court of New Jersey dismissed the following charges under the Pretrial Intervention Program: possession of drug paraphernalia, loiter to obtain/sell controlled dangerous substance, possession of controlled dangerous substance and possession of controlled dangerous substance with intent to distribute. The record reflects that the applicant was indicted on two of the charges (possess controlled dangerous substance or analog under New Jersey Statutes 2C: 35-10A(1), and manufacture/distribute controlled dangerous substance under New Jersey Statutes 2C: 35-5A(1)) and he did not plead guilty to either of these charges. The record does not reflect that the applicant was indicted, and hence did not plead guilty, on the other two charges. As such, he is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having committed a controlled substance violation as he did not plead guilty to any of his charges and they were dismissed.

The field office director found the applicant inadmissible pursuant to section 212(a)(2)(C)(i) of the Act for having been a trafficker of a controlled substance.

Section 212(a)(2)(C)(i) of the Act states:

> Any alien who the consular officer or the Attorney General [now Secretary] knows or has reason to believe
>
> > (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so...is inadmissible.

Counsel asserts that 9 FAM 40.23, N.2(b) is applicable. *Brief in Support of Appeal.* The Foreign Affairs Manual (FAM) provides non-binding guidance to the AAO in these matters.

9 FAM 40.23, N1.1 states:

> a. The first clause of INA 212(a)(2)(C) has been found to apply in a broad range of cases, including a single purchase of drugs with the intent to resell them, but without the resale actually having occurred. It has also been held that an alien is a trafficker even though the alien receives no personal gain or profit from the transaction if the alien acts knowingly and consciously as a conduit between supplier and customer. The Attorney General has held that a "single act of conscious participation as an "illicit trafficker" is within the meaning of INA 212(a)(2)(C).
>
> b. It must be noted that, unlike INA 212(a)(2)(D), the language in the first clause of INA 212(a)(2)(C) makes no mention of "engaging" in any proscribed activities. Therefore, the term "illicit trafficker" does not require that one has been "engaged" continuously in illicit trafficking. Rather, it denotes a person whose involvement with narcotic drugs includes trafficking, whether primary or incidental.
>
> Since the standard of proof for this provision "reason to believe" is substantially lower than that required for a conviction, it has been held that a consular officer may have reason to believe an alien is a trafficker even though criminal charges against the alien which relate to the facts forming the basis of ineligibility as a trafficker have been dismissed.

Counsel states that trafficking requires a commercial element (the transfer of funds). *Brief in Support of Appeal.* The AAO notes that 9 FAM 40.23, N1.1 and *Matter of R-H*, 7 I&N Dec. 675 (BIA 1958) mention that an alien is considered to be a trafficker if he/she receives no personal gain or profit from the transaction if the alien acts knowingly and consciously as a conduit between supplier and customer.

The charge which relates to trafficking is located at New Jersey Statutes 2C: 33-2.1, loitering for purpose of illegally using, possessing or selling controlled substance.

New Jersey Statutes 2C: 33-2.1 states:

> a. As used in this section:
>
> "Public place" means any place to which the public has access, including but not limited to a public street, road, thoroughfare, sidewalk, bridge, alley, plaza, park, recreation or shopping area, public transportation facility, vehicle used for public transportation, parking lot, public library or any other public building, structure or area.
>
> b. A person, whether on foot or in a motor vehicle, commits a disorderly persons offense if (1) he wanders, remains or prowls in a public place with the purpose of unlawfully obtaining or distributing a controlled dangerous substance or controlled substance analog; and (2) engages in conduct that, under the circumstances, manifests

a purpose to obtain or distribute a controlled dangerous substance or controlled substance analog.

c. Conduct that may, where warranted under the circumstances, be deemed adequate to manifest a purpose to obtain or distribute a controlled dangerous substance or controlled substance analog includes, but is not limited to, conduct such as the following:

(1) Repeatedly beckoning to or stopping pedestrians or motorists in a public place;

(2) Repeatedly passing objects to or receiving objects from pedestrians or motorists in a public place;

(3) Repeatedly circling in a public place in a motor vehicle and on one or more occasions passing any object to or receiving any object from a person in a public place.

d. The element of the offense described in paragraph (1) of subsection b. of this section may not be established solely by proof that the actor engaged in the conduct that is used to satisfy the element described in paragraph (2) of subsection b. of this section.

9 FAM 40.23, N.2 states:

a. Under INA 212(a)(2)(C), if *you have* "reason to believe" that the alien is or has been engaged in trafficking, the standard of proof is met and *you should* make a finding of *inadmissibility*.

b. "Reason to believe" might be established by a conviction, an admission, a long record of arrests with an unexplained failure to prosecute by the local government, or several reliable and corroborative reports. The essence of the standard is that the consular officer must have more than a mere suspicion—there must exist a probability, supported by evidence, that the alien is or has been engaged in trafficking. *You are* required to assess independently evidence relating to a finding *of inadmissibility*.

c. *You must* assess all evidence relating to a finding of *inadmissibility*. This evidence might include conclusions of other evaluators. Such conclusions, no matter how trustworthy, cannot alone support a finding of *inadmissibility*.

Counsel states that the applicant has a single, 15 year old arrest which was dismissed; there is no conviction, admission or series of arrests; and there is no corroborating evidence of the applicant's alleged trafficking behavior. *Brief in Support of Appeal.* In order for an applicant to be inadmissible under section 212(a)(2)(C) of the Act, the only requirement is that an immigration officer "knows or has reason to believe" that the applicant is or has been an illicit trafficker in a controlled substance or

is or has been a knowing aider, abettor, assister, conspirator, or collude with others in the illicit trafficking in any such controlled substance, or endeavored to do so. Section 212(a)(2)(C) of the Act; *Alarco-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000). In order for an immigration officer to have sufficient "reason to believe" that an applicant has engaged in conduct that renders him inadmissible under section 212(a)(2)(C) of the Act, the conclusion must be supported by "reasonable, substantial, and probative evidence." *Id.* (citing *Hamid v. INS*, F.2d 1389, 1390-91 (9th Cir. 1976)). The AAO finds that there is not "reasonable, substantial, and probative evidence" that the applicant is or has been an illicit trafficker in any controlled substance or in any listed chemical, or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical. As such, he is not inadmissible under section 212(a)(2)(C)(i) of the Act.

The field office director states that a consular officer found the applicant to be inadmissible under section 212(a)(6)(C)(ii) of the Act. *Decision of the Field Office Director.*

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

> (I) IN GENERAL- Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.
>
> (II) EXCEPTION- In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

The field office director states that the record contains a Form I-9, Employment Eligibility Verification, apparently bearing the applicant's signature and attesting that he is a citizen or national of the United States; the alternative claim of citizen or national on the Form I-9 allows him to avoid section 212(a)(6)(C)(ii) inadmissibility; the applicant is not inadmissible under section 212(a)(6)(C)(ii) of the Act; and the applicant's misrepresentation would be treated as a basis for a discretionary denial. *Id.* The AAO notes that the record does not contain a Form I-9, Employment Eligibility Verification, apparently bearing the applicant's signature and attesting that he is a citizen or national of the United States. The record does not contain an admission by the applicant that he submitted a U.S. passport, birth certificate or other evidence of U.S. citizenship in regard to a Form I-9. Because there is nothing in the record establishing that the applicant has falsely represented himself to be a U.S. citizen, the AAO finds that the applicant is not inadmissible under section 212(a)(6)(C)(ii) of the Act.

The record reflects that the applicant entered the United States without inspection on or about July 25, 1987 and returned to Liberia on December 5, 2008. The applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions of the Act, until his departure on December 5, 2008. The applicant is 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 a period of more than one year and seeking readmission within ten years of his December 5, 2008 departure from the United States.

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.

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.

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 his 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 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. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta 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 a qualifying relative, 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.

The first part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event of relocation to Liberia. The record reflects that the applicant's spouse was born in Haiti. The record reflects that the applicant and his spouse have three young U.S. citizen children. The record reflects that the applicant and his spouse have a child with spastic quadriparesis, cerebral palsy, reactive airway disease and nasal stenosis; he receives regular botox for his spacticity; and he is not mobile. *Letter from* [redacted], dated December 18, 2008. The record reflects that the applicant's disabled son is receiving educational and therapy services in the United States. Counsel states that the applicant's spouse is terrified about the high level of crime and violence in Liberia, the high levels of unemployment and poverty, and the lack of adequate medical care for her children. *Brief in Support of Appeal.* The record includes U.S. Department of State country conditions information on Liberia which reflect that hospitals and medical facilities are poorly equipped and incapable of providing many services; the crime rate in Liberia is high; there are safety issues; and lodging, fuel, transportation and phone services are unevenly available.

Considering country conditions in Liberia, the applicant and his spouse's son's disability and the difficulties of raising him and three children in Liberia, and the applicant's spouse's lack of ties to Liberia, the AAO finds that the applicant's spouse would suffer extreme hardship if she relocated to Liberia.

The second part of the analysis requires the applicant to establish extreme hardship in the event that a qualifying relative remains in the United States. Counsel states that the applicant's spouse is falling into poverty; she has had her electricity repeatedly turned off; her children rely on electric nebulizers; her automobile has been repossessed; she is in danger of losing her home; and the applicant was contributing his salary to pay for their expenses when he was in the United States. *Brief in Support of Appeal.* The applicant's spouse states that she has been late with her mortgage payments; she cannot afford the mortgage late fees; her car has been repossessed; her electricity has been shut off before; she has been unable to pay her water bill for the last three months; she is having problems paying her student loans; and she would have to incur the expenses of travel to Liberia. *Applicant's Spouse's Statement*, dated May 11, 2009. Counsel states that the applicant's

disabled son is completely dependent on both parents to accomplish his daily grooming and feeding routines. *Brief in Support of Appeal.* The record includes a mortgage statement for the applicant and another person; an urgent notice regarding vehicle repossession; an automobile bill showing unpaid monthly payments; an $891.57 electric bill; a 10 day water shut off notice; a request for medical certification from the applicant's spouse's electric company due to her disabled son's medical issues; a past due cable bill; a U.S. Department of Education debt collection bill; and other bills with outstanding balances.

The applicant's spouse states that her disabled son cannot attend his special needs camp without the applicant's assistance; her house is not wheel chair equipped and the applicant carries and moves their disabled son; the applicant helps with homework assignments; and she has suspended therapy sessions for her disabled son as he cannot move him. *Applicant's Spouse's Statement.* The record includes a letter from [redacted]. It states that the applicant's son is a patient. It further states that the applicant's spouse is physically exhausted and cannot keep up the routine for her disabled son alone; it is imperative that she have assistance; and it is medically necessary to have both parents available to care for him. *Letter from* [redacted].

The applicant's spouse states that she lost her father when she was 11 years old; she is reliving those feelings; she was emotionally abused by a prior spouse; and she would be emotionally devastated to be separated from the applicant. *Applicant's Spouse's Statement.* The record includes a psychological evaluation which details the applicant's spouse's emotional hardship and includes a diagnosis of major depressive disorder, single episode moderate, and adjustment disorder with anxiety and depression. *Psychological Evaluation*, dated May 23, 2009.

Based on the applicant's spouse's emotional and financial issues, the applicant's role in caring for their disabled son, and the applicant's spouse raising three young children on her own, the AAO finds that the applicant's spouse would suffer extreme hardship if she remained in the United States without the applicant.

The AAO additionally finds that the applicant merits a waiver of inadmissibility 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, "[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 main adverse factors in the present case are the applicant's unlawful presence and unauthorized period of stay, entry without inspection and unauthorized employment.

The favorable factors include the presence of the applicant's U.S. citizen spouse and children, extreme hardship to his spouse and the absence of any criminal convictions.

The AAO finds that the immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that 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.