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

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUL 24 2013 OFFICE: DETROIT, MICHIGAN FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Detroit, Michigan. The matter came before the Administrative Appeals Office (AAO) on appeal and the appeal was dismissed. The matter is again before the AAO on motion to reopen and reconsider. The motion will be granted, and the underlying application will be approved.

The applicant is a native and citizen of Canada who was found to be inadmissible to the United States under 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 country for more than one year and seeking readmission within ten years of his last departure from the United States. 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 live in the United States with his U.S. citizen spouse and children.

The Field Office Director concluded that the applicant 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. *See Decision of the Field Office Director,* dated August 7, 2012.

On appeal, the AAO concluded that the applicant's spouse would suffer extreme hardship based on separation, but not relocation, and dismissed the appeal accordingly. *See Decision of the Administrative Appeals Office,* dated April 9, 2013.

In response, counsel asserts that the inadmissibility should not apply and that the evidence submitted demonstrates that the applicant's spouse would suffer extreme hardship if the waiver was denied. *See Form I-290B, Notice of Appeal or Motion* (Form I-290B), filed May 8, 2013, *and counsel's brief.*

A motion to reopen must state new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Counsel submits several letters, reports, and records as evidence. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Counsel has not submitted precedent decisions or established that the AAO incorrectly applied law or USCIS policy. The AAO finds that by submitting new evidence with his motion, the applicant has met the requirements of 8 C.F.R. § 103.5(a)(2), and the motion will be granted.

The record has been supplemented on motion with: Form I-290B and counsel's brief, letters from the applicant, the applicant's spouse, sister-in-law, brother-in-law, parents-in-law, pastors, counselor and psychologist, medical records, business and tax documents, and an article regarding country-conditions. 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:

> (i) [A]ny alien (other than an alien lawfully admitted for permanent residence) who-
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> . . .
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The record reflects that the applicant entered the United States under a valid TN nonimmigrant visa on July 17, 2000. He remained in valid status until December 20, 2004. He thereafter stayed in the United States without valid status until he departed in December 2010, thus accruing unlawful presence for more than one year under section 212(a)(9)(B)(i)(II) of the Act. Counsel does not contest the applicant's inadmissibility.

Section 212(a)(9)(B)(v) of the Act provides in pertinent part:

> Waiver.-The [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.

A waiver of inadmissibility under section 212(i) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member, which includes the U.S. citizen or lawful permanent resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. In this case, the applicant's spouse is the only qualifying relative. 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).

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,* 22 I&N Dec. 560, 565 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or U.S. citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly

when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

Though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I.&N. Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g.*, *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The AAO has previously found extreme hardship to the applicant's spouse based on separation from the applicant. There is no indication the applicant's spouse's personal circumstances have changed such that she would not experience such separation-related hardship.

In assessing relocation-related hardship, the applicant's spouse, family members, and church community indicate that the applicant's spouse becomes extreme anxious and suffers from self-reported obsessive compulsive disorder (OCD) when under stress. She, her sister and mother indicate that the applicant's spouse has dealt with these mental health issues for several years. A psychologist reports that the applicant has depressive disorder and is symptomatic of Post-Traumatic Stress. This psychologist expressed concern over the applicant's spouse's OCD because of its inherently deliberating nature. The applicant, her family and church community indicate that the applicant's mental health illnesses would be exacerbated if she were to live apart from her family in the United States. Letters indicate the close family ties she has to her sister, parents and church community. Her brother-in-law indicates that they live fifteen minutes away from the applicant's home and his wife, the applicant's spouse's sister, sees the applicant's spouse at least twice a week. The letters mention their strong emotional bond and support they give each other and each other's children. The applicant's spouse's parents live approximately one hour away from the applicant and have assisted in raising their grandchildren, come to the applicant's spouse aid at a moment's notice, and supported her emotionally through difficult times, namely the applicant's alcohol dependency in 2009 and absence while in Canada in 2011. The music director of their church and the applicant's spouse's brother-in-law categorize the applicant's spouse's family as one of the most close-knit families they have known with a high level of interdependency, causing their potential separation from each other to be devastating to all family members.

The applicant and his spouse's reverends and friends from their church comment on the applicant's spouse's active and engaged involvement in their church and personal relationships built after several years of searching for a spiritual community. The records indicate that the applicant and his spouse have also enrolled their two sons at the Christian academy of their church, under the ministry of [redacted] Reverends from their church comment that there are few [redacted] churches in all of Canada and explain that a particular faith community is not expendable, especially in the applicant's spouse case of dependency on the church community for counseling and mentorship.

The applicant, the applicant's spouse, counselor and psychologist express concern regarding the applicant's relapse of alcohol abuse if their family were to relocate to Canada. Statements by the applicant, his spouse, family, church members, counselors and medical records illustrate that the applicant went through rehabilitation of counseling, seeing a trained psychologist, and attending a substance abuse program to reach consistent sobriety as of September 2009. During the time period of his alcohol dependency, the applicant's spouse states that she was wrought with anxiety, sadness, sleeplessness and difficulty while being pregnant with their first child. The applicant indicates that in the fall of 2010 he again sought professional help for experiencing Post-Acute Withdrawal Syndrome. The applicant's counselor and psychologist note that the stress of uprooting and starting anew in Canada would jeopardize the applicant's lifelong recovery, and as a result causing hardship to the applicant's spouse.

The applicant's spouse also states that their family is dependent on the applicant's salary and that she has recently begun her own photography business in their local area. Business and tax records indicate that she registered her business in August 2012 and received a profit that year of approximately $2,243.00. She as well as her family and church members indicate that her

business of photographing high school senior and families is progressing due to her local networks. The applicant also states and documents show that they purchased their first home in Dublin, Ohio in August 2012, and the applicant's name is solely on the home loan.

The applicant's spouse further worries about the health care system in Canada and their ability to have medical care immediately. Country-conditions articles submitted indicate that there is a substantial waitlist for procedures and a lack of resources which caused thousands of people to seek medical treatment outside of Canada. *See* "Statistics Show Canadian Healthcare Inferior to American System," US News & World Report, July 28, 2009; *see also* "Report: Thousands fled Canada for health care in 2011," The Daily Caller, July 11, 2012. A letter from a physician states that their daughter born April 2013 may also have a benign heart murmur and will require regular medical appointments. The doctor states that if the diagnosis is not completed in the United States, this would cause worry, stress and anxiety to the applicant's spouse.

Considering cumulatively all assertions of relocation-related hardship to the applicant's spouse, including her mental health conditions, close family ties in the United States, bond with her local church community, her newly developed business, their mortgage, and health care issues in Canada, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship due to relocating to Canada to be with the applicant.

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 favorable factors in the present case include extreme hardship to the applicant's spouse as a result of the applicant's inadmissibility; the applicant's employment in the United States; his ability to pay taxes; his involvement in his community; his good moral character as demonstrated by several letters; and his lack of a criminal record. The unfavorable factors are the applicant's immigration violation of unlawful presence for overstaying his visa and periods of unauthorized employment. Although the applicant's violations of immigration law are significant and cannot be condoned, the positive factors in this case outweigh the negative factor. Therefore, the AAO finds that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden and the application will be approved.

ORDER: The motion is granted, and the underlying Form I-601 application is approved.