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



**U.S. Citizenship
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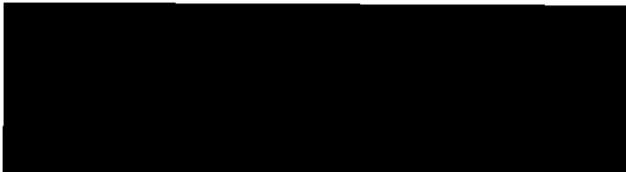
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FILE: [REDACTED] Office: BALTIMORE, MD Date: **SEP 01 2010**

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:



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,

A handwritten signature in cursive script that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland. A subsequent appeal to the Administrative Appeals Office (AAO) was rejected as untimely and returned to the district director to be considered as a motion to reopen. The district director denied the motion to reopen and the motion is now before the AAO on appeal. The appeal will be sustained.

The applicant is a native and citizen of Honduras who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse and three U.S. citizen children.

In a decision dated March 23, 2006, the district director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of theft in Maryland. The district director also found that the applicant failed to demonstrate that his U.S. citizen spouse and/or children would suffer extreme hardship as a result of his inadmissibility to the United States. The application was denied accordingly.

In the decision of the untimely appeal that was treated as a motion to reopen, dated January 18, 2008, the district director found that the applicant did not merit the favorable exercise of discretion nor did the evidence submitted establish that his spouse and/or children would suffer extreme hardship as a result of his inadmissibility. The motion was denied accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated January 28, 2008, counsel states that the district director's decision was erroneous and that the applicant submitted evidence of financial hardship, emotional hardship, and hardship that would result from his family relocating to Honduras.

The AAO notes that the entire record was reviewed in rendering a decision on appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this “does not mean that the parties would be free to present any and all evidence bearing on an alien’s conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself.” *Id.* at 703.

The record shows that the applicant was [REDACTED] The applicant pled guilty to Theft, less than \$300 in value on February 2, 1996. The applicant, who was born on June 28, 1970, was 25 years old at the time he committed the acts that resulted in his arrest. The applicant was sentenced to probation and the maximum sentence for this offense under Maryland Code § 342 is 18 months imprisonment. The record indicates, in the psychological evaluation submitted by the applicant, that the applicant was arrested for stealing a jacket from a store.

§ 342 of the Maryland Code states:

(a) Obtaining or exerting unauthorized control. -- A person commits the offense of theft when he willfully or knowingly obtains control which is unauthorized or exerts control which is unauthorized over property of the owner, and: (1) Has the purpose of depriving the owner of the property...

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person’s property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”). In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. The reasoning in *Jurado* is applicable to the present case. Based on the evidence in the record, the AAO finds that the applicant’s crime was retail theft. He was thus convicted of knowingly taking goods of another with the intent to permanently deprive that person of such goods, a crime involving moral turpitude, and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Thus, the AAO finds that the applicant’s convictions for theft under Maryland Code § 342 constitutes a crime involving moral turpitude.

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

....

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relative that qualifies is the applicant's spouse. Hardship to the applicant is considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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 are possible 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 to be taken is difficult, and it 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 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*, 22 I&N Dec. 560, 565-66 (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 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).

The record of hardship includes: counsel’s brief, a psychological evaluation for the applicant’s family, an affidavit from the applicant’s spouse, copies of the birth certificates for the applicant’s children, a custody order for the applicant’s child, a letter from the applicant’s employer, a letter from the applicant’s spouse’s employer, financial documentation for the applicant, a labor report on employment in Honduras, medical documents regarding the applicant having cancer when he was 16 years old, statements from the applicant’s sister and father in Honduras, a statement from the applicant’s spouse, and numerous letters of recommendation for the applicant.

In her undated brief, counsel states that the applicant’s family would face extreme economic, psychological, and emotional hardship as a result of being separated from the applicant. In a psychological evaluation, dated April 19, 2006, [REDACTED] finds that the applicant’s spouse is suffering from Adjustment Disorder with Mixed Anxiety and Depressed Mood, Acute, as a result of the possibility that her husband may be removed from the United States. [REDACTED] also finds that the applicant’s spouse suffers from Specific Phobia of Driving, as a result of the emotional trauma of a car accident she experienced as an adolescent. [REDACTED] also finds that the applicant’s son, [REDACTED] shows signs of clinical depression, including sadness, tearfulness, hopelessness, and helplessness. She states that these symptoms probably occurred after the loss of his biological mother, who was deported to Honduras, and is are now exacerbated by the possibility his father will also be deported. She states that as a young, teenage boy it is extremely important that he has a consistent, positive, male role model to help in transition into adolescence. [REDACTED] also states that the applicant’s daughter, although not exhibiting any mental health problems, would be negatively affected by the removal of her father from the United States.

In a statement dated January 10, 2007, the applicant's spouse states that the applicant was given sole custody of his son [REDACTED] after [REDACTED] biological mother was deported to Honduras. She states that although she treats Brian like her own son, she is not his legal parent and fears that he would be put into foster care if the applicant was removed. She states that losing his mother has been very hard on Brian's emotional well-being and that she and the applicant have been working hard to repair the damage that loss has caused. She states that [REDACTED] is 13 years old and if the applicant were deported he would grow up without a father figure during his teenage years. She also states that she cannot handle three children without the emotional, psychological, and financial support of the applicant.

The applicant's spouse also explains that she works from nine in the morning until six in the evening and that the applicant is at home with the children while she is at work. She states further that the applicant goes to work at eight in the evening after she returns home. She states that the applicant cares for their six month old daughter all day while she is at work and picks up their other daughter from school at 2:15 p.m.. She states that if the applicant is removed their family schedule would radically change. She states that she would have to enroll her youngest daughter in day care which would cost \$1,220 per month and that her other daughter would have to enroll in after school care which would cost \$700 per month. She states that if the applicant were removed from the United States she would not be able to meet her financial obligations. She indicates that because childcare is cost prohibitive as compared to her monthly income, she would be forced to leave her job and her health insurance to be at home with her children.

The AAO notes that the record includes a letter from the applicant's spouse's employer dated April 13, 2006, indicating that the applicant's spouse has been employed with their company since 1992 and that she earns \$36,795 per year. The record also includes a letter from the applicant's employer, dated April 14, 2006 and stating that the applicant's spouse has been employed with their company since 1991 and earns \$36,016 per year. In addition to this financial documentation the record includes: the applicant's mortgage statement showing a monthly payment of \$1,220, a homeowner's insurance premium of \$826, a document listing the applicant's spouse's enrollment in health insurance benefits, copies of life insurance and auto insurance for the applicant and his spouse, a car loan statement showing a payment of \$429 per month, statements of monthly utility bills, a tuition statement for full-time childcare, and a bank statement. The AAO notes that the record also contains an analysis of the applicant's family's budget if the applicant were removed. The analysis shows that the applicant's family expenses would increase by \$1,478 per month and that given the absence of the applicant's income, his family would not be able to pay their monthly expenses by \$3,659 per month.

The AAO notes that the record also contains a letter from the applicant's sister in Honduras, dated April 20, 2006, in which she states that the applicant has three small children in Honduras for whom he sends \$400 per month to help with their care. The applicant's sister states that the children's mother died five years ago. Similarly, the applicant's father states in a letter dated April 20, 2006, that the applicant sends him \$100 per month to help him with food and medical expenses. Furthermore, the record indicates that the applicant previously worked as a police officer in Honduras. The record includes a letter, dated May 9, 2006 from the Administrative Chief at the Metropolitan Police Office No. 2 in the city of San Pedro Sula, Cortes, which states that the salary of a police officer is 5,200 lempiras per month. The AAO notes that 5,200 lempiras is approximately \$275 per month.

The AAO also notes that U.S. Citizenship and Immigration Services currently offers Temporary Protected Status to nationals of Honduras residing in the United States. A Temporary Protected Status designation acknowledges that it is unsafe to return to a country because of ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions. Temporary Protected Status for Hondurans has been designated through January 5, 2012.

The AAO finds that the applicant has established that his family would suffer extreme hardship as a result of relocation. The record indicates that although the applicant has family in Honduras, he is helping to support these family members with the income he earns in the United States; sending them a total of \$500 a month. In addition, the applicant submitted documentation showing that if he returned to his former employment in Honduras he would only earn \$275 a month. Thus, the AAO finds that the economic hardship the applicant's spouse and three children would face upon relocation in addition to safety concerns in Honduras amounts to the applicant's spouse and children facing extreme hardship as a result of relocating to Honduras.

Furthermore, the AAO finds that separation would cause extreme financial and emotional hardship for the applicant's family.

Family separation 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 type of familial 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 otherwise 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 familial relationship involved, the hardship resulting from family separation is based on the actual consequences 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. Indeed, the specific facts of a case may dictate that even the separation of a spouse and children from an applicant does not constitute extreme hardship. In *Matter of Ngai*, for instance, the

Board did not find extreme hardship because the claims of hardship conflicted with evidence in the record and because the applicant and his spouse had been voluntarily separated from one another for 28 years. 19 I&N Dec. at 247. 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 emotional and financial suffering that would be experienced by the applicant's spouse and children surpasses the hardship typically encountered in instances of separation because of the applicant's spouse's demonstrated reliance on the applicant to help with childcare and finances as well as the circumstances regarding the applicant's children and custody of the applicant's son. The AAO has carefully considered the facts of this particular case and finds that the emotional and financial hardship suffered by the applicant's spouse and his children rises to the level of extreme hardship. The AAO therefore concludes that the applicant has established that his spouse and children would suffer extreme hardship if his waiver of inadmissibility is denied.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant 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 adverse factor in the present case is the applicant's criminal record. The favorable factors in the present case are the applicant's family ties to the United States; extreme hardship to his U.S. citizen spouse and children if he were to be denied a waiver of inadmissibility; the applicant's lack of a criminal record or offense since 1996; the applicant's consistent record of employment; and, as

indicated by letters from his family, employer, and pastor, the applicant's value to the community, his good moral character, and his attributes as a good father, husband, and employee.

The AAO finds that the crime committed by the applicant is 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.