

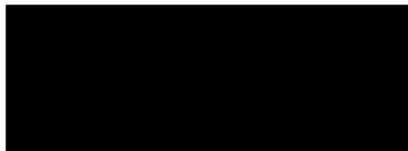
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U.S. Department of Homeland Security  
U.S. Immigration and Citizenship Services  
Office of Administrative Appeals  
20 Massachusetts Avenue, N.W. MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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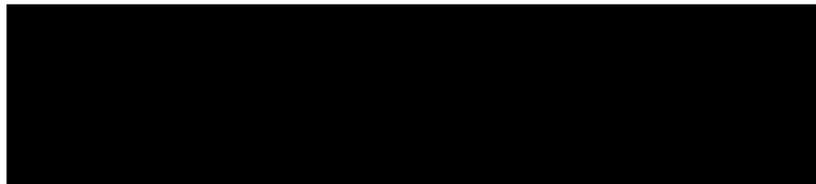
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FILE: [REDACTED] Office: CIUDAD JAREZ, MEXICO Date: JUL 08 2011

IN RE: Applicant: [REDACTED]

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

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,

for Perry Rhew  
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A), for having been convicted of committing a crime involving moral turpitude; and under 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.

The applicant sought a waiver of inadmissibility pursuant to sections 212(h) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(h) and 1182(a)(9)(B)(v) of the Act. The director concluded that the applicant had failed to establish that his admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant filed a timely appeal.

On appeal, counsel disputes the finding that the applicant is inadmissible for having committed a crime involving moral turpitude. Counsel contends that the applicant's criminal offense of attempted obstruction of justice qualifies for the petty offense exception.

Though counsel does not dispute the applicant's inadmissibility under 212(a)(9)(B)(i)(II) of the Act for unlawful presence, counsel states that the district director failed to consider all of the factors, which are more than financial, in the hardship determination. Counsel conveys that the applicant's wife, who was born in the United States on [REDACTED] met the applicant in 2002 and married him in [REDACTED]. Counsel states that the applicant and his wife have two young U.S. citizen children, who were born on [REDACTED] and [REDACTED]. Counsel maintains that the applicant's father-in-law is a U.S. citizen, and his mother-in-law and mother are both lawful permanent residents. Counsel conveys that the applicant's wife has a close relationship with all of her siblings, who either still live at home or live nearby. Counsel declares that five of the applicant's wife's siblings were born in the U.S. citizens and that one sibling is a lawful permanent resident.

Counsel indicates that due to financial straits the applicant's wife and children live with the applicant's in-laws. Counsel declares that the applicant's wife had to stop attending junior college because she no longer had her husband's support. Counsel asserts that the applicant's wife has had difficulty obtaining a decent job and depends on family members and her in-laws for financial assistance. Counsel declares that the applicant's wife has a hearing impairment and cannot afford a bilateral hearing aid and cannot work full time without childcare. Counsel maintains that the applicant's wife is anxious due to separation from her husband and concern about the effect of separation on their children. Counsel declares that the applicant's wife cannot afford to travel to Mexico to visit her husband.

Counsel indicates that the applicant was born on [REDACTED] in [REDACTED], Moroleon, Guanajuato, Mexico. Counsel declares that if the applicant's wife and children joined the applicant in Mexico, they would leave their present lifestyle, forgo a good education, separate from extended family members, and live in a country with high unemployment rate, crime, and a poor healthcare and educational system. Counsel avers that the applicant has not been steadily employed since he left

the United States, and thus it is unlikely that the applicant's wife will obtain a job in Mexico that will pay enough for her to afford a hearing aid. Counsel declares that the gross national income per capita in Mexico for 2007 was \$8,340, and was \$46,040 for the United States.

Finally, counsel avers that the applicant's mother is suffering due to the applicant's absence and because she is aware of her son's frustration in not being able to help his wife and children.

We will first address the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of committing crimes involving moral turpitude.

The record reflects that in Illinois on November 10, 2003, the applicant pled guilty to and was convicted of attempted obstruction of justice in violation of 720 ILCS 5/31-4(a). Judgment was withheld, and the applicant was ordered to pay a fine and costs and was placed on supervised probation for 12 months.

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 . . . 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-

....

(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 (Board) 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 applicant was convicted of violation of 720 ILCS 5/31-4(a), which provides that “[a] person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he knowingly . . . [d]estroys, alters, conceals or disguises physical evidence, plants false evidence, [or] furnishes false information.” Violation of 720 ILCS 5/31-4(a) is a Class 4 felony.

We observe that in *Padilla v. Gonzales*, the Seventh Circuit held that conviction under Illinois’s obstruction of justice statute involves moral turpitude. 397 F.3d 1016, 1021 (7<sup>th</sup> Cir. 2005). *Padilla* was charged with giving officers a false name and driver's license when stopped for a traffic violation in order to prevent his arrest for driving with a revoked license. *Id.* at 1020. The Seventh

Circuit stated that concealing criminal behavior was found to involve moral turpitude, and reasoned that “Padilla’s crime entails an intent to conceal criminal activity, and his crime likewise involves moral turpitude.” *Id.* at 1021.

Thus, in view of the foregoing discussion of *Padilla*, the AAO finds that the applicant’s conviction for attempted obstruction of justice under 720 ILCS 5/31-4(a) involves moral turpitude, rendering the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

In addition, we are in agreement with counsel’s contention that the applicant’s criminal offense is eligible for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act. The applicant was convicted of an attempt offense. Illinois law under 720 ILCS 5/8-4 provides that “the sentence for attempt to commit any felony other than those specified in items (1), (2), (3), and (4) of this subsection (c) is the sentence for a Class A misdemeanor.” The maximum penalty for a Class A misdemeanor is less than one year in jail. *See* 730 ILCS 5/5-4.5-55.

The petty offense exception applies when an alien commits only one crime and the maximum penalty possible for the crime does not exceed imprisonment for one year, and the alien was not sentenced to a term of imprisonment in excess of 6 months. The record reflects that the applicant was not sentenced to any imprisonment and the maximum penalty for a Class A misdemeanor is less than one year in jail. Thus, the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act applies in the instant case. The applicant is consequently not inadmissible under section 212(a)(2)(A) of the Act.

We will now address the finding of inadmissibility for unlawful presence under section 212(a)(9)(B) of the Act. That section provides, in part:

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(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 . . . 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.

....

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection in 2001 and remained until he left in May 2007. The applicant

began to accrue unlawful presence from 2001 until May 2007, when he left the United States and triggered the ten-year bar, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The waiver for unlawful presence is found under section 212(a)(9)(B)(v) of the Act. That section provides that:

- (v) Waiver. – The Attorney General [now Secretary, 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.

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 child can be considered only insofar as it results in hardship to a qualifying relative. The applicant’s U.S. citizen spouse and his lawful permanent resident mother are the qualifying relatives 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).

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 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).

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.*

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*, 138 F.3d at 1293 (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.

In rendering this decision, the AAO will consider all of the evidence in the record such as letters, affidavits, declarations, birth certificates of the applicant’s wife and children, naturalization certificates, photographs, income tax records, invoices, school records, a U.S. Department of State report on Mexico, statistical data from the [REDACTED] database by the [REDACTED] Bank, a document about hearing loss, data about the effects of fatherlessness, a listing by mexicanlaws.com of minimum wages in Mexico, and other documentation.

The applicant’s wife states in her affidavit dated February 17, 2009 that she is the sixth of twelve children, and that she has a close relationship with her parents and siblings, six of whom are U.S. citizens by birth. She conveys that she was born in the United States and grew up here. The applicant’s wife indicates that she struggled in school because of hearing problems, and received special education services until she completed high school. We note that the submitted school records reflect that the applicant’s wife was provided special education services during high school due to a speech and language impairment as a result of hearing loss. The applicant’s wife states that she cannot afford a hearing aid and that it is very difficult for her to hear with background noise and in large groups of people.

The applicant’s wife describes a close relationship with her husband, and how she has struggled financially since he left the United States. She conveys that she studied in an accounting program at a community college for more than a year, but could no longer afford the program when her husband left the country. Lastly, the applicant’s wife indicates that she does not work and is financially

supported by her in-laws. She states that her father is no longer working and has minor children to support so she will soon need to financially assist her parents. The applicant's wife avers that she has not paid her telephone bill in four months and was awarded a medical card for her children and herself, but it does not cover the cost for a hearing aide.

We note that letters in the record are consistent with the applicant's wife's assertions that she has been in financial straits since the applicant left the United States. The applicant's father-in-law conveys in his letter dated January 27, 2009, that it is a financial hardship for him to support his daughter and grandchildren. The sister of the applicant's wife states in the letter dated February 2009 that the applicant's wife has been affected emotionally, financially, and physically since the applicant left in May 2007. She conveys that her sister is depressed and cries every night and has difficulty finding a job. The applicant's wife's brother declares in the letter dated February 10, 2009 that his sister worked long hours and did not earn enough to support her two children, and relies on family members for financial assistance.

Furthermore, the letter dated October 20, 2005 indicates that the applicant's wife was awarded financial assistance for college. Her registration statement reflects a major of accounting and the start of three courses in January 2006, and withdrawal of these courses on April 18, 2006.

Also, the record contains a Form W-2, Wage and Tax Statements for 2008 showing the applicant's wife received unemployment benefits of \$2,730 and earnings of \$10,319.

Moreover, the record shows that the applicant's wife has a hearing impairment. Her school records indicate that her deficits in hearing affect her auditory reception of language and oral expression, and that her accommodation was to have preferential seating and written directions and explanations. Further, her records state that she required an assistive technology device.

Finally, the submitted U.S. Department of State Country Reports on Human Rights Practices – 2007 for Mexico, states that the daily minimum wage in Mexico ranged from \$4.33 to \$4.60, and that “[t]he minimum wage did not provide a decent standard of living for a worker and family.” U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2004: Mexico*, 10 (February 28, 2005). Also, the furnished World Bank data shows the gross national income per capita for 2007 of \$46,040 for the United States and \$8,340 for Mexico. World Development Indicators database, World Bank, revised 17 October 2008.

With regard to remaining in the United States without the applicant, the asserted hardships to the applicant's wife are both emotional and financial. We find that the alleged financial hardship is in accord with the evidence of Form W-2 statements, which show the applicant's spouse received unemployment benefits in 2008; and with letters describing the applicant's spouse as in financial straits, living with her parents, and receiving financial assistance from others. Furthermore, the letters by family members attest to the emotional hardship that the applicant's wife has experienced as a result of separation from the applicant. When these unique factors are considered together, we find they demonstrate extreme hardship to the applicant's wife.

With regard to living in Mexico, counsel conveys that the applicant's wife is concerned about separation from family members, and about Mexico's high unemployment rates, crime, and health

and educational system. Counsel avers that it is improbable that the applicant's wife will obtain a job in Mexico that will pay enough for a hearing aid. Counsel declares that the gross national income per capita in Mexico for 2007 was \$8,340, and for the United States it was \$46,040. Counsel conveys that the applicant has not been steadily employed. Lastly, counsel avers that the applicant's wife spent her entire life in the United States and has no ties to Mexico and no one there to help her find a job.

The evidence in the record establishes that the applicant and his wife's employment has primarily been in performing menial, low-paying jobs as laborers in landscaping (the applicant), and factory work (his wife); the applicant has provided no financial assistance to his wife and children since he has been in Mexico; the applicant's wife has a hearing impairment and requires a hearing aid; Mexico's gross national income per capita is significantly lower than the United States'; minimum wage in Mexico does not provide a decent standard of living for a worker and his family; the applicant's wife is emotionally and financially dependent on her family members in the United States; and the applicant's wife was born and raised in the United States and has no ties to Mexico.

When the above-mentioned factors are considered together, they show that inasmuch as the applicant's wife has a hearing impediment and the applicant and his wife have always performed menial jobs, it is unlikely they will earn more than minimum wage. According to the U.S. Department of State, minimum wage does not provide a decent standard of living for a worker and his family. Thus, we find that the evidence in the record suggests that the applicant's wife will be impoverished in Mexico and separated from family members in the United States, with whom she has been emotionally and financially dependent. As such, the applicant has shown that the unique factors in this case, when considered together, establish extreme hardship to his wife if she joined him to live in Mexico.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

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).

*Id.* at 301.

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 factors in the present case are the criminal conviction in 2003 for attempted obstruction of justice, entry into the United States without inspection, unlawful presence, and any unauthorized employment in the United States.

The favorable factors are the extreme hardship to the applicant’s wife and children and mother, and the letters by the applicant’s wife, mother, and in-laws commending his character. In addition, it has been seven years since the applicant’s criminal conviction in November 2003. The AAO finds that the applicant’s immigration violations are serious in nature and so is the applicant’s criminal conviction; nevertheless, when taken together, we find 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

**ORDER:** The appeal is sustained.