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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JAN 10 2013 OFFICE: CIUDAD JUAREZ, MEXICO I

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§1182(a)(9)(B)(v) and 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,

Michael Shumway

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

DICUSSION: The waiver application was denied by the Field Office 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 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 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 admission within ten years of her last departure. The applicant is the spouse of a Lawful Permanent Resident and the mother of five U.S. citizens. She seeks waivers of her inadmissibilities under sections 212(h) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(h) and 1182(a)(9)(B)(v), in order to reside in the United States.

The Field Office Director determined that the applicant had established that her admissibility would result in extreme hardship for a qualifying relative, but denied the Form I-601, Application for Waiver of Ground of Excludability, as a matter of discretion, finding the mitigating factors in the applicant's case to be outweighed by the negative. *Decision of the Field Office Director,* dated May 13, 2010.

On appeal, counsel asserts that the favorable factors in the applicant's case far outweigh the negative. *Notice of Appeal or Motion*, dated June 1, 2010.

The evidence of record includes, but is not limited to: counsel's briefs; statements from the applicant's spouse and children; statements of support from the applicant's brother-in-law, friends and the para educator at the school attended by the applicant's children; documentation of the applicant's spouse's financial obligations; earnings statements for the applicant's spouse; juvenile court records relating to one of the applicant's sons; a psychoeducational evaluation of the applicant's youngest son; an Individualized Educational Program for the applicant's youngest son; a psychological evaluation of the applicant's spouse and two of her children; and court records relating to the applicant's criminal history. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(2)(A)(i)(I) of the Act provides:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The record reflects that the applicant pled guilty to misdemeanor Aid by Misrepresentation - Over $400, California Welfare and Institutions Code § 10980(c)(2) on November 30, 2001. She was sentenced to one day in jail, with credit for one day served; placed on probation for three years; fined $100, ordered to pay restitution in the amount of $2,157; and required to complete 80 hours of volunteer work and to pay other court-ordered fees. Although, the record also indicates that the

applicant was arrested on March 30, 2003 for Willful Infliction of Corporal Injury, California Penal Code § 273.5(a), an April 28, 2008 statement issued by the Office of the District Attorney, County of San Diego, reports that no charges were filed against her in connection with this arrest. Accordingly, the applicant's only conviction is for the violation of California Welfare and Institutions Code § 10980(c)(2).

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

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

In the present case, the applicant has been convicted of a single crime, a violation of California Welfare and Institutions Code § 10980(c)(2), a "wobbler" statute that allows for either a misdemeanor or a felony conviction. *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003). The court disposition in the present case reflects that the applicant was convicted of a misdemeanor violation of Welfare and Institutions Code § 10980(c)(2), for which the maximum sentence of imprisonment was one year. In that the maximum penalty for the applicant's offense did not exceed one year and she was sentenced to only one day in jail, her conviction falls under the petty offense exception of section 212(a)(2)(A)(ii) of the Act. Therefore, regardless of whether the applicant's offense constitutes a crime involving moral turpitude, she is not inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act.

Section 212(a)(9)(B) states in pertinent part:

> (B) Aliens Unlawfully Present.-
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> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . 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.

The record reflects that the applicant entered the United States without inspection in August 1986. In 1994, she traveled to Mexico for one week and then returned, residing in the United States until April 20, 2008. Based on this history, the AAO finds the applicant to have accrued more than one year of unlawful presence in the United States. As she is seeking admission within ten years of her April 2008 departure, she is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

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.

In his May 13, 2010 decision, the Field Office Director found that the applicant had established that her spouse, the only qualifying relative for the purposes of this proceeding, would experience extreme hardship as a result of her inadmissibility. The AAO concurs with the Field Office Director's finding of extreme hardship.

In reaching a determination that the applicant's spouse would experience extreme hardship in Mexico, we have taken note of his long-term residence in the United States; his family ties to the United States; the impact of relocation on his status as a Lawful Permanent Resident; the spread of drug-related violence in Mexico, as most recently outlined in the November 20, 2012 Department of State travel warning for Mexico; and the difficulties that would result from moving his youngest learning-disabled stepson into an unfamiliar educational system and culture. We have also concluded that the applicant's spouse would experience extreme hardship if the waiver application is denied and he continues to reside in the United States. When considered in the aggregate with the hardships normally created by separation, the applicant's spouse's financial problems, including the foreclosure on the family's home; and the burden of being a single parent for a learning-disabled stepson with growing behavioral problems and for a stepson who is in the juvenile justice system for drug use are sufficient to establish that he would suffer extreme hardship if his separation from the applicant continues. Accordingly, the applicant has established statutory eligibility for a waiver under section 212(a)(9)(B)(v) of the Act.

The AAO turns to a consideration of whether or not the applicant is also eligible for a favorable exercise 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 . . . 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 "balance 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 applicant's case are her unlawful presence in the United States for which she now seeks a waiver, her periods of unlawful employment and her 2001 violation of California Welfare and Institutions Code § 10980(c)(2). The mitigating factors include the applicant's Lawful Permanent Resident spouse and her five U.S. citizen children; the extreme hardship her spouse would experience if the waiver application is denied; the absence of any criminal convictions since 2001; multiple statements from the applicant's spouse and children reflecting their emotional dependence on the applicant; and a number of statements from individuals who knew the applicant during the time she lived in the United States, including a January 20, 2009 statement from , the Para Educator/Interpreter-Translator, District and 2008 and 2009 statements from describes the applicant's active involvement in her children's education and indicates that he has known the applicant since 1996 in his capacity as a youth leader of the Church of Jesus Christ of Latter Day Saints. He states that while she lived in the United States, the applicant devoted her limited free time to charitable causes, including "helping in church activities, doing service projects and cooking meals for those in need."

The AAO acknowledges the negative factors in the applicant's case. Nevertheless, we find that when taken together, the mitigating factors outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained

ORDER: The appeal is sustained.