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**U.S. Citizenship
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HB

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FILE:

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Office: LOS ANGELES, CA

Date:

IN RE:

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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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Los Angeles, CA denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. 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)(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 United States for more than one year. The applicant is the son of a naturalized citizen of the United States. He seeks eligibility for adjustment of status under the provisions of section 245(i)(1) of the Act, 8 U.S.C. § 1255(i)(1), or a waiver of inadmissibility in order to remain in the United States with his naturalized citizen parent.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on his naturalized citizen mother, and therefore denied the Application for Waiver (Form I-601). *Decision of the District Director, May 27, 2005.*

On appeal, counsel contends that the applicant is eligible for adjustment of status under the provisions of section 245(i)(1) of the Act: he is a beneficiary of an I-130 petition filed prior to April 30, 2001, he paid the \$1,000 fine, and he need not establish that he was physically present in the United States on December 21, 2000 as his petition was filed prior to January 14, 1998. Counsel states that the applicant was absent from the United States between April 24, 2000 and June 8, 2000. Counsel submits a letter concerning the medical condition of the applicant's mother so as to establish a basis for the I-601 waiver.

The entire record, including the appeal and the evidence submitted on appeal, has been reviewed in rendering this decision.

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

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

...

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

...

The applicant entered the United States without inspection in 1985, 1988, and 2000, as shown in the documents entitled "Application for Waiver of Ground of Excludability," "Alien's Change of Address Card,"

and "Record of Sworn Statement in Affidavit Form." The Record of Sworn Statement in Affidavit Form establishes that he was unlawfully present for more than one year, from April 1, 1997 until some time in the year 2000, when he left the country. He is therefore inadmissible under section 212(a)(9)(B) of the Act.

The director found the applicant ineligible for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act.

Eligibility for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is first dependent upon a showing that the bar would impose an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the alien himself, or to his children, is not a permissible consideration under the statute.

The record indicates that the applicant's only qualifying relative is his naturalized citizen mother. The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, at 565. In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion favorably to the applicant. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

It has been held that "the family and relationship between family members is of paramount importance" and that "separation of family members from one another is a serious matter requiring close and careful scrutiny. *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987) *citing Bastidas v. INS*, 609 F.2d 101 (3rd Cir. 1979). However, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit Court of Appeals defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Ninth Circuit emphasized that the common results of deportation are insufficient to prove extreme hardship. The U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the

mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

To establish eligibility for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, counsel submits into the record a letter (Exhibit E) from a clinical psychiatrist with the County of Los Angeles, Department of Mental Health, Compton Mental Health Center. The clinical psychiatrist states that the applicant's mother has been a patient at the mental health center since January 13, 1989 until the present and is being treated for "Major Depression, Recurrent, Severe with Psychotic Features (296.34)" and is taking medication for her condition. The clinical psychiatrist also states that the applicant's mother is socially isolated and requires constant family support, which the applicant has provided for her. The clinical psychiatrist indicates that the removal of the applicant could increase his mother's stressors, resulting in a hospitalization episode. According to the clinical psychiatrist, the applicant's mother is disabled and has a fixed income, which is not enough to support herself and her minor daughter. It is noted that the record contains the beneficiary's earnings statements.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does support a finding that the applicant's mother faces extreme hardship if the applicant is removed. It demonstrates that she has a history of mental illness that is presently being treated with medication, and is socially isolated and requires constant family support, which the applicant has provided for her. The treating clinical psychiatrist indicated that the removal of the applicant could result in his mother having a hospitalization episode. It is noted that although the clinical psychiatrist stated that the applicant's mother is disabled and has a fixed income that is not enough to support herself and her minor daughter, no corroborating evidence establishes that the applicant financially supports his mother and her minor daughter. The Application for Waiver of Ground of Excludability indicates that the applicant lives with his mother and U.S. citizen son.

When considered in the aggregate, it is clear that the applicant's mother faces significant emotional difficulties if the applicant is removed from the United States. These difficulties do rise above what could be considered a typical consequence of one family member's removal. The applicant has therefore showed that his naturalized citizen mother would suffer extreme hardship if he were removed from the United States.

It is noted that returning to Mexico would cause extreme hardship to the applicant's mother: she would be forced to disrupt the long-standing mental health treatment that she has been receiving since January 1989.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). In evaluating whether relief is warranted in the exercise of discretion, the factors adverse to the alien may include the nature and underlying circumstances of the removal ground at issue:

[T]he 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-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must:

[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 applicant's illegal entry into the United States in 1986, and his subsequent entries into the U.S. pursuant to advance parole in March 1999 and July 2000, and his lengthy unlawful presence in the United States.

The favorable factors in the present case are the applicant's family ties in the U.S.; the extreme hardship to the applicant's mother and U.S. citizen son if he were removed; the applicant's lack of a criminal record in this country, other than unpaid traffic tickets; and the long duration of residence in the country, which began at the age of 15.

The AAO finds that although the immigration violations committed by the applicant are serious in nature and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the applicant merits a waiver of inadmissibility.

On appeal counsel states that the applicant is eligible for adjustment of status under the provisions of section 245(i)(1) of the Act. The AAO disagrees. Adjustment of status under 245(i)(1) of the Act allows an alien who entered the United States without inspection to pay a fee and to apply for adjustment of status to that of lawful permanent resident. Section 245(i) of the Act, 8 U.S.C. § 1255(i)(1). To be eligible, the alien must be the beneficiary of a petition under 8 U.S.C. § 1154 that was filed before April 30, 2001, and if the petition was filed after January 14, 1998, he must have been physically present in the country on December 21, 2000. 8 U.S.C. § 1255(i)(1)(B)-(C). If an alien satisfies these criteria, the Attorney General must determine, among other factors, whether the alien is admissible to the United States for permanent residence. 8 U.S.C. § 1255(i)(2). While 245(i) excuses entry without inspection, the applicant must still be admissible. Admissibility is defined by section 212 of the Act, 8 U.S.C. § 1182. It is noted that unlawful presence in the United States under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), is not excused by the provisions of 245(i).

In proceedings for an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) 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. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.