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

U.S. Citizenship and Immigration Services

[redacted]

#4

DATE: DEC 0 8 2012 OFFICE: MEXICO CITY, MEXICO File: [redacted]

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Form I-601 waiver application and the Form I-212 application for permission to reapply for admission were concurrently denied by the District Director, Mexico City, Mexico and are now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality 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 readmission within 10 years of his last departure from the United States. The applicant seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his U.S. citizen spouse.

The District 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 accordingly. *See Decision of the District Director,* dated October 19, 2010.

On appeal the applicant's spouse asserts that the documents presented to the immigration court by prior counsel were misleading and incorrect. *See Form I-290B, Notice of Appeal or Motion,* received November 16, 2010.

The record contains, but is not limited to: Form I-290B; various immigration applications and petitions; numerous hardship letters; numerous letters of support, concern and character reference; medical records; financial records; birth, marriage and divorce records; court transcripts, decisions, and records pertaining to the applicant's removal and cancellation of removal proceedings and appeal; and documents pertaining to the applicant's lengthy criminal record. The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(9) of the Act provides:

> (B) ALIENS UNLAWFULLY PRESENT.-
>
> > (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.

The record reflects that the applicant entered the United States without inspection on or about May 15, 1990 and remained until he departed on November 6, 2008 pursuant to an immigration judge's order granting him voluntary departure. The applicant accrued unlawful presence in the United States from April 1, 1997, the date the unlawful presence provisions in the Act took effect, until November 2008, a period in excess of one year. As the applicant is seeking admission within 10 years of his departure, he was found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The record supports this finding, the applicant does not

contest inadmissibility, and the AAO concurs that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The district director incorrectly found that the applicant is additionally inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien ordered removed under section 240 or any other provision of law. The AAO notes that although an immigration judge on May 28, 2008 ordered the applicant removed, on October 6, 2008 the judge granted the applicant voluntary departure and in compliance with said order the applicant voluntarily departed the United States on November 6, 2008. Accordingly, the AAO finds that the applicant is not inadmissible under section 212(a)(9)(A)(ii) of the Act and is not required to file a Form I-212 application for permission to reapply for admission. The district director's findings to the contrary are hereby withdrawn.

While the district director noted that the applicant has a number of criminal convictions, she declined to analyze whether any of said convictions were for crimes involving moral turpitude which would render the applicant additionally inadmissible under section 212(a)(2)(A)(i) of the Act.

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 record shows that the applicant has five convictions, all in Georgia, to wit: on March 30, 1998 for driving under the influence of alcohol for which he was sentenced to 12 months of probation, a fine, community service, traffic school and 48 hours jail; on August 25, 1999 for simple battery

for which he was sentenced to 10 months of probation, credit for time served; on September 7, 1999 for probation violation, credit with time served; on May 29, 2003 for disorderly conduct, suspended sentence; and on June 11, 2003 for obstruction of officers, for which he was sentenced to five days confinement, credit with time served. The applicant was arrested numerous other times both before and after these convictions and additionally pled no contest on March 6, 2002 to public indecency/indecent exposure; on April 17, 2003 to simple assault; and on June 2, 2004 to criminal trespass. While the AAO finds that none of the applicant's convictions constitute crimes involving moral turpitude rendering him inadmissible under section 212(a)(2)(A)(i) of the Act, it notes that his criminal record is a proper consideration when analyzing whether he warrants a favorable exercise of discretion.

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 can be considered only insofar as it results in hardship to a qualifying relative. In the present case, the applicant's spouse is his 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*, 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.

The applicant's spouse is a 61-year-old native and citizen of the United States who has been married to the applicant since September 2004. She indicates that she has been financially devastated by the applicant's inadmissibility which has resulted in the loss of her home and car and being forced to live in a dangerous public housing apartment building where noise, drug use, and violent crime are rampant. She expresses that separation from the applicant has pushed her to the brink of bankruptcy, leaving her with barely enough money to purchase food and the medications necessary for her survival, and leaving her with no possibility of ever being able to afford to visit him in Mexico even if not precluded from doing so already by her advanced age and fragile health. The applicant's spouse states and documentary evidence corroborates that her monthly income consists of $442 in social security and $252 in social security insurance for a total of $694. She explains that she additionally collects $74 per month in food stamps and that when the applicant was working in the United States, his income contributed to their joint living expenses as well as to her multiple medications.

The record contains no documentary evidence demonstrating the applicant's salary in the United States or showing that he contributed financially to his spouse or to their household expenses. [redacted] asserts that he employed the applicant many times for different remodeling and repair jobs at his homes and businesses but does not provide any details concerning wages. The applicant's spouse writes that if the applicant did not support her, how

would they have been able to live on only $500 per month in Social Security? She adds that the applicant worked for the landlord who paid him every week and that the applicant paid the difference in the rent because her check was not enough to pay the rent. The applicant's spouse indicates that the applicant paid for their power, gas, water, phone, cell phones, food, some of her medicines, doctor bills for both of them, credit card, loan on his truck and other expenses. She notes that he additionally sent money to his mother in Mexico to aid in her support. While she asserts that the applicant has a job waiting for him upon his arrival into the United States, no corroborating documentary evidence has been submitted. The applicant's eldest daughter, contends that she has been unemployed for several years, has a toddler to take care of, and is financially dependent on her boyfriend such that she is unable to support her mother financially. She writes that her sister, cannot help either as she too is unemployed and living with a woman from church. indicates that her sister, is disabled and only has enough money to pay the rent on the single room in which she lives, and that their brother, has four children of his own, lost his job and his home, and is unable to support their mother financially.

The applicant's spouse states that her health has deteriorated in her husband's absence such that her cardiologist is going to try to shock her heart back into rhythm. She indicates that if this does not work she will require heart surgery. writes that the applicant's spouse's primary cardiac condition is atrial fibrillation for which she is being treated with different antiarrhythmics and also requires the blood thinner, Coumadin. states that the applicant's spouse suffers from Atrial Fibrillation, Degenerative Osteoarthritis in her right knee, Venous Varicosity, Hypertension, Paroxysmal Nocturnal Dyspnea, Sleep Apnea, Cervicalgia, and Vitamin D Deficiency. notes that the applicant's spouse's Degenerative Osteoarthritis and Degenerative Disc Disease will continue to worsen, she will have to take Coumadin for the rest of her life, and her Shingles pain may be exacerbated by stressful events. The applicant's spouse explains that she requires a C-pap machine to control her sleep apnea and a CoaguChek KS PT Test machine, and confirms and notes that she may require someone to stay with her in the future due to her medical conditions. contends that the applicant's spouse has experienced extreme hardship due to the stress of being separated from the applicant and living alone.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant's spouse including her significant medical/health-related conditions and limitations; her substantial economic difficulties and asserted dependence upon the applicant financially; and her inability to travel to Mexico to visit him due to economic and physical/health-related limitations. Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. citizen spouse is suffering and will continue to suffer extreme hardship due to separation from the applicant.

Addressing relocation, the applicant's spouse indicates that she was born and raised in the United States, has never resided in Mexico, and cannot speak or understand Spanish enough to adjust to a country and culture so different from her own. The applicant's spouse explains that she has four adult children to whom she is close and other close family and community ties in the United States built over a lifetime. She states that if she leaves the United States for even 30 days she will lose the social security income on which she relies. The applicant's spouse indicates that she cannot

travel to Mexico where country conditions are "horrible." The AAO has reviewed the State Department's current *Mexico Travel Warning*, dated November 20, 2012. Therein, U.S. citizens are warned that crime and violence are serious problems throughout the country and can occur anywhere, U.S. citizens have fallen victim to drug-related and gang-related violence such as homicide, gun battles, kidnapping, carjacking and highway robbery, there is a rising number of kidnappings and disappearances throughout Mexico, and local police have been implicated in some of these incidents. The applicant's spouse explains that her husband is one of eight individuals living in a home which often has no water and requires the catching of water in barrels, no heat in the winter or air conditioner in the summer, and where cooking and washing of clothes takes place outdoors. She states that she would be unable to survive in her condition under such circumstances in Mexico where she would not have access to the specialized medical care, Medicare and Medicaid, or the machines on which she relies in the United States.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse including her adjustment to a country in which she has never resided; her lifetime residence in the United States and close family ties to her four adult children, her grandchildren and other family members; her close community ties built over a lifetime; her reliance on government programs such as social security, social security insurance and food stamps, at least some of which she would likely lose were she to relocate to Mexico; her advanced age and significant medical/physical conditions and reliance on her longtime physicians, government programs such as Medicare and Medicaid, and specialized medical equipment; and stated safety, economic, employment and health concerns regarding Mexico. Considered in the aggregate, the AAO finds the evidence sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate to Mexico.

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 U.S. citizen spouse as a result of the applicant's inadmissibility; the applicant's significant community ties to the United States; and the uncorroborated assertion he would likely have employment waiting for him in the United States through which he could contribute to his spouse's support.

The unfavorable factors in the present case are the applicant's immigration violations which include his entering without inspection and periods of unlawful presence and unauthorized employment in the United States, as well as the applicant's lengthy and extensive criminal record which includes convictions for driving under the influence, simple battery, probation violation, disorderly conduct, obstruction of officers, his pleas of "no contest" to public indecency/indecent exposure, simple assault, and criminal trespass, and his numerous additional arrests for offenses including public drunkenness, cruelty to children, and multiple counts of battery on his current spouse who by asserting marital privilege not to testify against him, foreclosed the ability of the district attorney to prosecute.

In weighing the positive and negative factors in the applicant's case, the record shows that he has a history of dangerous behavior involving the use of alcohol. The applicant's multiple incidents of driving under the influence of alcohol and disorderly and violent conduct related thereto are

troubling. Also troubling is the documentation describing the applicant's physical battering of his current spouse who is significantly older than him by more than 20 years and in feeble physical condition, and his interfering with her ability to report said battery to emergency personnel. The record does not show whether the applicant has continued to drive under the influence of alcohol and engage in disorderly and violent behavior since departing the United States for Mexico in 2008, and the AAO is unaware of whether he has been arrested or cited for additional crimes or incidents there. The applicant's known acts of driving under the influence of alcohol and disorderly and violent behavior in the United States occurred over a period of many years demonstrating a habitual pattern of dangerous criminal conduct throughout his adulthood. The applicant has not submitted any explanation or documentation to show that this period involved unusual circumstances for him that would suggest this behavior was uncharacteristic of him. Nor has the applicant asserted or shown that he has sought or received assistance for alcohol abuse.

The record shows a clear pattern of the applicant's irresponsible use of alcohol and his related disorderly and violent conduct, taking place over a period of many adult years and placing the safety of others at risk. The numerous incidents for which the applicant was convicted, pled no contest, and was arrested over an extensive period of many years show that he has a lack of regard for the laws of the United States and that he presents a serious danger to those residing in the country. The AAO is sensitive to the fact that denial of the present waiver application will result in significant hardship for the applicant's spouse. However, as presently constituted, the record supports that admitting the applicant to the United States would present a risk of serious harm to other individuals here that outweighs the benefits of allowing him to reside in the United States. Thus, the AAO is unable to favorably exercise discretion in the present matter. For this reason, the appeal must be dismissed.

It is noted that this discretionary basis for denying the application remains, irrespective of whether the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.