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 2 1 2012 OFFICE: MEXICO CITY, MEXICO File: [redacted]

IN RE: [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:

[redacted]

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 Field Office 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 and children. The applicant was also found to be inadmissible under section 212(a)(9)(A)(ii) of the Act as an applicant who departed the United States while an order of removal was outstanding.

The Field Office 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 Field Office Director,* dated February 1, 2011.

On appeal counsel asserts that if a waiver is not granted the applicant's U.S. citizen spouse will suffer extreme hardship. *See Counsel's Appeal Brief,* undated.

The record contains, but is not limited to: Forms I-290B and counsel's briefs in support of the appeal and prior motion to reopen; various immigration applications and petitions; hardship letters; a mental health assessment and a physician's letter; a letter from the applicant; letters and drawings from the applicant's children; letters from and medical records concerning the applicant's mother-in-law; letters of support and character reference; health-related internet articles; an employment verification letter; billing statements; Mexico country conditions reports; marriage and birth certificates; documents related to the applicant's removal proceedings and unsuccessful appeals; and the applicant's criminal record. The entire record was reviewed and considered in rendering a 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 in or about August 1997 and remained until he departed in June 2009 while an order of removal was outstanding. The applicant accrued unlawful presence the entire duration of his stay in the United

States, 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). As the applicant departed the United States while an order of removal was outstanding, he was additionally found to be inadmissible pursuant to 212(a)(9)(A)(ii) of the Act. The record supports these findings, the applicant does not contest inadmissibility, and the AAO concurs that the applicant is inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(A)(ii) of the Act.[1]

The record shows that that the applicant was arrested on January 23, 2005 by a border patrol agent, placed in removal proceedings, and ordered removed by an Immigration Judge on September 26, 2005. The applicant appealed his removal to the Board of Immigration Appeals (BIA) which remanded the case to the Immigration Judge on September 26, 2006. The record shows that the applicant was unable to attend his November 13, 2006 master calendar hearing because he was incarcerated for a DUI conviction. The applicant was again ordered removed by an Immigration Judge on October 15, 2007 who denied his request for voluntary departure finding that the negative factors outweighed the positive. The applicant appealed again to the BIA, which on May 12, 2009 dismissed the appeal noting that the applicant's illegal entry into the United States, his multiple convictions for driving under the influence, that one of his DUI convictions resulted in a 10-month period of incarceration, and his failure to ever pay income taxes in the United States demonstrates a lack of good moral character which the Immigration Judge properly considered in his discretionary finding.

While the field office director noted that the applicant has a number of criminal convictions, he declined to analyze whether any 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.

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[1] According to the Form I-213, Record of Deportable/Inadmissible Alien, signed by the applicant on January 25, 2005, the applicant stated that he most recently entered the United States without inspection on or about September 22, 1999. The record shows that this followed the applicant being either expeditiously removed or allowed to voluntarily return to Mexico three days earlier. The AAO notes that if the applicant was indeed removed to Mexico in September 1999, re-entered the United States without inspection shortly thereafter, and remained until his June 2009 departure he is additionally inadmissible under section 212(a)(9)(C) of the Act and is currently statutorily ineligible to apply for permission to reapply for admission. Because the record, as currently constituted, does not contain documentary evidence of an actual removal or order of removal, the AAO will not at this time find the applicant inadmissible under section 212(a)(9)(C).

(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 was convicted on August 27, 2001 on five separate counts under Florida Motor Vehicle Statute (FMVS) section 316.193, for his conduct on January 20, 2001 to wit: two counts Driving Under the Influence Causing Property Damage in violation of section 316.193 (3)(C)(1)1, two counts Driving Under the Influence Causing Personal Injury, in violation of section 316.193 (1)A, and one count Driving While Under the Influence with Personal Injury in violation of section 316.193 (1)A, for which he was sentenced in total to 36 months of probation and ordered to pay fines and restitution. The applicant was convicted on March 10, 2003 for his conduct on December 24, 2002, for Driving with Unlawful Blood Alcohol with a Prior Conviction, for which he was sentenced to 12 months of probation, assessed a monetary fine, ordered to spend 30 days in jail, complete an ADVANCE DUI Program, and had his driver's license suspended for five years. The applicant was arrested little more than three months later, on April 4, 2003, for Driving Under the Influence of Alcohol or Drugs 2nd Offense and Court Sentence, and for Operating a Motor Vehicle without a Valid License. The applicant was convicted on March 17, 2005 for No Valid Driver License, for his conduct on March 15, 2005 and sentenced to credit for time served in county jail. The applicant was most recently convicted on August 11, 2006 for Driving Under the Influence with Property Damage After Prior Conviction, in violation of FMVS section 316.193(3)(C)1, and for Driving While License Cancelled, Suspended or Revoked, in violation of FMVS section 322.34(2)(a), for his conduct on April 8, 2006. He was sentenced to 11 months and 29 days in jail and assessed other penalties, and it was while serving this sentence that the applicant was unable to attend his November 13, 2006 immigration hearing because he was incarcerated.

The Field Office Director did not address whether the applicant's criminal history renders him inadmissible under section 212(a)(2)(A)(i) of the Act for having been convicted of a crime involving moral turpitude. However, the applicant's convictions for DUI that resulted in property damage and personal injury, including at least one such offense while his license was suspended due to a prior DUI conviction, may constitute at least one crime involving moral turpitude

rendering him inadmissible under section 212(a)(2)(A)(i) of the Act. However, as the applicant is clearly inadmissible under section 212(a)(9)(B)(i)(II) of the Act, and he does not warrant a favorable exercise of discretion, the AAO need not settle the question of whether he is also inadmissible under section 212(a)(2)(A)(i) of the Act.

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 34-year-old native and citizen of the United States who has been married to the applicant since March 2005 and with whom she has three minor children, ages two, seven, and 11 years. She states that she loves and misses the applicant very much, that he is her best friend and the most important person in her emotional support system, and since being separated from him she cries almost every night and cannot imagine her life without him. The applicant's spouse indicates that she feels extremely vulnerable without the applicant who made her and the children feel safe when he was around. [redacted] writes that the applicant's spouse presented on June 24, 2010 with symptoms of clinical depression and told her that her depressive symptoms have been impacting her work. [redacted] notes that the applicant's spouse "has scheduled" her for therapy sessions, but no documentary evidence has been submitted to corroborate any sessions or show that the applicant's spouse's work performance has declined in the applicant's absence. A single paragraph letter from [redacted] indicates that while pregnant with her youngest child the applicant's spouse was at risk for several medical conditions, and the applicant's spouse describes a very difficult pregnancy and delivery in the applicant's absence. She also expresses fear that the applicant will be kidnapped, mugged or killed in Mexico where such occurrences are common, and contends that he was already mugged, beaten and left in a ditch there in March 2010.

The applicant's spouse states that she is the sole financial provider for her household as the applicant has been unable to secure employment in Mexico, she had to return to work sooner than she would have liked after her most recent pregnancy and must rely on her mother, who suffers diabetes, to care for the baby, and she cannot afford airplane tickets for herself and her children to visit the applicant. The applicant's spouse lists her monthly expenses and copies of corroborating bills have been submitted. An employment verification letter dated June 8, 2010 indicates that the applicant's spouse earns $28,164 annually, but no documentary evidence has been submitted to

demonstrate the applicant's income prior to his departure or showing that he contributed financially to the household in any way. As transcripts from the applicant's removal proceedings reveal that he has never paid income taxes in the United States, documentation may not exist from which an accurate assessment of his economic contribution might be made. While the AAO recognizes that separation has likely resulted in some decrease in overall income to the applicant's spouse's household and a greater financial burden upon her, the evidence is insufficient to establish that she is unable to support herself and her children in his absence.

The AAO acknowledges that separation from the applicant has and will continue to cause various difficulties for his U.S. citizen spouse. However, the evidence in the record is insufficient to demonstrate that the challenges encountered by the qualifying relative, when considered cumulatively, are beyond those ordinarily associated with the removal or inadmissibility of a loved one and meet the extreme hardship standard.

Addressing relocation, the applicant's spouse indicates that she was born and raised in the United States, has never resided in Mexico and does not speak Spanish fluently. She states that she is very close to her family, all of whom reside legally in the United States, and particularly to her mother who suffers from diabetes and other chronic illnesses and who depends on her for many things. Corroborating medical records and letters from the applicant's spouse's mother have been submitted for the record. The applicant's spouse indicates that relocation would result in the loss of her steady employment in the United States and its income and health insurance on which she and her family rely, and notes that raising three young children is expensive even on one income and as the applicant has been unable to secure employment in Mexico, the entire family would face almost certain poverty. She states that her daughter, [redacted] uses a nebulizer for breathing problems and that the last time they visited the applicant in Mexico [redacted] had to use it constantly because the air is so contaminated. The applicant's spouse maintains that she is currently seeking medical help in the United States, though this is not corroborated by the record. She expresses concern about Mexico's current unemployment, economy, medical/health-care system, education system, and uncontrollable violence. In addition to country conditions reports submitted for the record, the AAO has reviewed the U.S. 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 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 and lacks fluency in the language; her lifetime residence in the United States and close family ties – particularly to her mother who relies on her for many things; her close community ties built over a lifetime; her steady employment in the United States and employer-provided benefits; the likelihood that both she and the applicant would be unemployed in Mexico and the difficulty this would cause in supporting their three young children; her concerns for Mexico's air quality and her daughter's related health; and stated concerns about Mexico's unemployment, economy, education, medical system and rampant violence which she notes often includes targeting U.S.

citizens. 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.

Although the applicant has demonstrated that his qualifying relative spouse would experience extreme hardship if they were to relocate to Mexico to join him, we can find extreme hardship warranting a waiver of inadmissibility only where an applicant has shown extreme hardship to a qualifying relative in the scenario of relocation *and* the scenario of separation. The AAO has long interpreted the waiver provisions of the Act to require a showing of extreme hardship in both possible scenarios, as a claim that a qualifying relative will relocate and thereby suffer extreme hardship can easily be made for purposes of the waiver even where there is no actual intention to relocate. *Cf. Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to relocate and suffer extreme hardship, where remaining the United States and being separated from the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *also cf. Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from separation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative in this case. Accordingly, the applicant has not established that he is statutorily eligible for a waiver under section 212(a)(9)(B)(v) of the Act.

The AAO further notes that even had extreme hardship been established, the waiver application would have been denied in the exercise of discretion. The record shows that the applicant has a history of dangerous behavior involving the use of alcohol. The applicant's multiple incidents of driving under the influence of alcohol, during which he caused bodily harm to others and property damage, are troubling. Also troubling is that the applicant continued drinking and driving after each conviction, resulting in even more arrests, convictions, and enhanced penalties such that he could not attend his immigration hearing because he was incarcerated. As noted by the immigration judge, the applicant's drinking and driving resulted in his incarceration, which in turn resulted in him being separated from his spouse and children for a considerable period of time. The record does not show whether the applicant has continued to drive under the influence of alcohol since departing the United States for Mexico in June 2009, and the AAO is unaware of whether he has been arrested or cited for additional crimes or incidents there. The applicant's numerous known acts of driving under the influence of alcohol, some while already on probation for the same crime and while his driver's license was suspended, demonstrate a habitual pattern of dangerous and reckless criminal conduct during 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 placing the safety of others at risk. The numerous incidents show that the applicant has a lack of regard for the laws of the United States and that he presents a serious risk to the safety and well-being of others in the country. Thus, the AAO finds that at this time, as the record is currently constituted, the applicant would not merit a favorable exercise of discretion even had he established extreme hardship to a qualifying relative.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility 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.