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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]

H4

DATE: MAY 3 1 2012 OFFICE: SAN BERNARDINO, CALIFORNIA File: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(d)(11) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(d)(11) and 1182(a)(9)(B)(v) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212) were concurrently denied by the Field Office Director, San Bernardino, California, and are now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the applications will be approved.

The record reflects that the applicant, a native and citizen of Mexico, entered the United States without inspection in February 1999. On May 9, 2000 the applicant was granted voluntary departure in lieu of removal on or before September 6, 2000. When the applicant failed to depart by the required date, the grant of voluntary departure was converted to a removal order. The applicant accrued unlawful presence until she was removed from the United States in June 2004, a period in excess of one year. As such, the applicant accrued unlawful presence from February 1999 until June 2004, when she departed the United States. The applicant was thus found to be inadmissible to the United States pursuant to sections 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 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien previously removed. The applicant is married to a U.S. citizen. 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 addition, the applicant seeks permission to reapply for admission into the United States within 10 years of his departure under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii). Finally, the applicant was found to be inadmissible to the United States under section 212(a)(6)(E)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(E)(i), for aiding and abetting an alien to enter the United States in violation of law.

The Field Office Director determined that the applicant had failed to establish extreme hardship to a qualifying relative. The Field Office Director further noted that approving the Form I-212 would serve no purpose as the I-601 had been denied. The applicant's Form I-601 and Form I-212 were concurrently denied. *Decision of the Field Office Director,* dated May 17, 2011.

The record contains, but is not limited to: Forms I-290B and approved fee waivers for both; numerous immigration applications and petitions; hardship letters; family impact evaluation; applicant's letter, employment letter, and character reference letters; country conditions documents; financial and medical records; visa applications; birth and marriage records and family photos; and inadmissibility and removal records for the applicant and several of her children. The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(6)(E) of the Act provides:

> (i) Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible. . . .
>
> (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection

(d)(11).

Section 212(d)(11) of the Act, 8 U.S.C. § 1182(d)(11), provides:

> The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

The record reflects that on or about February 8, 1999 the applicant entered the United States without inspection, bringing multiple children with her. Based on the foregoing, the applicant was found to be inadmissible pursuant to section 212(a)(6)(E)(i). As the record shows that the smuggled aliens were the applicant's own children, the AAO finds in its discretion that for purposes of family unity the applicant is eligible for a waiver under section 212(d)(11) of the Act.

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.
>
> ...
>
> (v) Waiver.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

A waiver of inadmissibility under section 212(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 the

applicant's children can be considered only insofar as it results in hardship to a qualifying relative. In the present case, the applicant's spouse is the 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 record reflects that the applicant's U.S. citizen spouse is a 62-year-old native of Mexico and citizen of the United States who has been married to the applicant since 1967, when he was just 18-years-old. The applicant's spouse indicates that he has been separated from his wife and children since 2004 when they were removed from the United States. He explains that this separation of nearly eight years has caused him tremendous emotional and economic hardship, as well as the growing physical hardship of working as a machine operator in his 60s in order to support himself and his family in Mexico, and still travel many hours to visit them 2-3 times per year. Substantial documentary evidence has been submitted which demonstrates the applicant's spouse's income and expenses, showing a modest budget that leaves him only $68 per month to put toward traveling to Mexico to visit his spouse and children. The applicant's spouse contends that his earnings in the near future will be even less as he applies for reduced social security benefits and is eventually unable to work the physically demanding job and hours he maintains now to support his family. The AAO notes that the granting by USCIS of the applicant's Form I-912, Request for Fee Waiver, in order to file the present appeal further demonstrates the applicant's spouse's economic circumstances.

The applicant's spouse asserts great emotional suffering in the absence of his wife which he believes will only worsen under the stress of continued separation. [redacted] reports that the applicant's spouse expressed that he and the applicant love each other very much, started dating when they were very young, have been together for decades and he was devastated when she was deported. [redacted] diagnoses the applicant's spouse with Major Depressive Disorder and notes that his condition is considered a serious mental illness by the U.S. Department of Health and Human Services. [redacted] explains that even the applicant's spouse's visits to Mexico are becoming more difficult and wearisome, aggravating his financial and physical stress and causing him great emotional anguish and distress. [redacted] explains that the applicant's spouse is very worried about the applicant's health, particularly her Diabetes which has gotten worse in Mexico due to inadequate medical resources. [redacted] reports that the applicant's spouse worries daily for the applicant's safety in Mexico, as well as the safety of his children - particularly his youngest daughter, [redacted] with whom he shares a close bond. She relays that the applicant's spouse has even told the applicant to keep [redacted] inside the house rather than placing her at risk for attack or murder on the way to/from school. [redacted] asserts that a continued separation from the applicant will exacerbate the applicant's spouse's major depression and aggravate his anxiety to the point he could develop serious physical and mental health issues.

The applicant's spouse states on appeal that it is extremely painful for him to live with constant worry for his wife and daughter's safety and that the crime, violence and danger in Nuevo Laredo became so bad that he moved them to Zacatecas where his mother-in-law has a small home. The AAO has reviewed country conditions evidence submitted in the record as well as the U.S. State Department's *Mexico Travel Warning*, dated February 12, 2012, which confirms that violent crime such as homicide, gun battles, kidnapping, carjacking highway robbery, and drug-related violence are serious problems throughout the country, including in Zacatecas where the applicant's spouse's family is now living.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant's spouse including his lengthy marriage of nearly fifty years to the applicant; his fears concerning her safety and the safety of their children in Mexico; the significant economic and emotional hardships he has suffered since his family's removal in 2004 and will continue to suffer while they are separated; and the close relationship he shares with his youngest daughter who has been residing with the applicant since their removal. Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship due to separation from the applicant.

Addressing relocation-related hardship, the applicant's spouse asserts that at 62-years-of age, he would be unable to find employment in Mexico sufficient to support himself, his wife and his minor daughter. The applicant's spouse explains that even in the United States he earns only $10.75 per hour in his physically demanding job as a machine operator. He maintains, and country conditions evidence confirms, that such jobs in Mexico pay only pennies on the dollar compared to in the U.S. and he would be competing for the few positions available with men a fraction of his age. The applicant's spouse states that his U.S. job provides him with a health insurance plan on which the applicant would be included if allowed to return to the United States. He demonstrates that he also owns his own home in the U.S. and would be unable to continue paying the mortgage were he to relocate. The applicant's spouse contends that he would have certainly relocated to Mexico over the nearly eight years he has endured separation from his family if there was any way he could survive financially and support his family doing so.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse including adjustment to a country in which he has not lived for many decades; his emotional and physical condition; his U.S. home ownership and employment as well as the loss of his employment-related benefits and social security; separation from U.S. family members, friends and community; and his economic, employment, health-related, and significant safety concerns in Mexico for himself and his family. Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. citizen spouse would suffer extreme hardship if he were to relocate to Mexico to be with the applicant.

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 BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The

equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *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 and numerous attestations by others to her good moral character and essential presence in the community; her U.S. home ownership; the payment of taxes; and the applicant's apparent lack of a criminal record. The unfavorable factors are the applicant's immigration violations including her aiding and abetting of her children to enter the United States without inspection or authorization; her own U.S. entry without inspection or authorization; her failure to comply with the terms of the Immigration Judge's grant of voluntary departure; the applicant's removal order; and her periods of unauthorized presence and employment in the United States.

Although the applicant's violations of immigration law are significant and cannot be condoned, the positive factors in this case outweigh the negative factors. Therefore, pursuant to section 212(a)(9)(B)(v) of the Act, the AAO finds that a favorable exercise of discretion is warranted. In addition, for purposes of family unity, the AAO finds that the applicant is eligible for a waiver under section 212(d)(11) of the Act.

The AAO notes that the field office director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision. The Form I-212 was denied solely based on the denial of the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility, it will withdraw the field office director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

As noted above, on May 9, 2000, the applicant was granted voluntary departure in lieu of removal on or before September 6, 2000. When the applicant failed to depart by the required date, the grant of voluntary departure was converted to a removal order. The applicant was removed from the United States in June 2004. As such, she is inadmissible under section 212(a)(9)(A) of the Act and must request permission to reapply for admission.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be granted as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility and permission to reapply for admission, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the applications approved.

ORDER: The appeal is sustained. The applications are approved.