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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

DATE: APR 10 2013 OFFICE: NEBRASKA SERVICE CENTER File:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

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 Acting Field Office Director, Nebraska Service Center and are now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the applications will be approved.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude; section of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States; and section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) as an applicant who departed the United States while an order of removal was outstanding. The applicant seeks a waiver of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(h) and 1182(a)(9)(B)(v), and permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States with his U.S. citizen father, lawful permanent resident mother, and four U.S. citizen children born in 1997, 1999, 2000 and 2007.

The acting 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 Acting Field Office Director,* dated September 23, 2011. The acting field office director concurrently denied the Application for Permission to Reapply for Admission as a matter of discretion because granting the permission would serve no purpose as the applicant's waiver application has been denied and he remains inadmissible. *Id.* The acting field office director additionally found that "unfavorable factors in this case outweigh any favorable factors," presumably indicating that even had extreme hardship been established the waiver application would have been denied as a matter of discretion. *Id.*

On appeal counsel asserts that the applicant does not require a waiver under section 212(h) of the Act because the crime for which he was convicted is not a crime involving moral turpitude; while the applicant has established that his father and mother will suffer extreme hardship if a waiver is not granted, hardship to the applicant's lawful permanent resident mother was not even considered; and the applicant's positive factors outweigh the negative such that he merits a favorable exercise of discretion. *See Counsel's Appeal Brief,* received October 23, 2011.

The record contains, but is not limited to: Form I-290B, counsel's appeal brief and earlier statements in support of a waiver; various immigration applications and petitions; a hardship declaration from the applicant's mother; a 2009 psychologist's report and 2011 addendum thereto; medical records; birth certificates; and documents related to the applicant's detentions, deportations, removal proceedings and related appeals/motions, and his criminal record. The entire record was reviewed and considered in rendering this decision on 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 shows that the applicant first entered the United States as a 15-year-old minor in or about 1986 with his parents. On September 16, 1992 the applicant pled guilty and was convicted in California of Discharging a Firearm with Gross Negligence, a felony, in violation of C.P.C. § 246.3, for his conduct on or about September 7, 1992 when he was 22-years-old. He was removed from the United States on August 10, 1994 pursuant to an immigration judge's order of the same date. The applicant entered the United States without inspection on or about December 9, 1995. On November 5, 2008 the prior removal order was reinstated and the applicant departed the United States on January 12, 2009. He accrued unlawful presence in the United States from April 1, 1997, the effective date of the unlawful presence provisions under the Act, to January 12, 2009, a period in excess of one year. As the applicant is seeking admission to the United States 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). Because 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 applicant requires permission to reapply for admission under section 212(a)(9)(A)(iii) 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.

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 Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of

conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record shows that on September 16, 1992 the applicant was convicted in California of Discharging a Firearm with Gross Negligence, a felony, in violation of C.P.C. § 246.3, for his conduct on or about September 7, 1992. He was sentenced to 240 days in county jail and 3 years of probation. In or about September 1993 the applicant violated his probation which was revoked on June 15, 1994 and he was sentenced to an additional 90 days in jail.

At the time of the applicant's conviction C.P.C. § 246.3 stated in pertinent part:

> Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense...

Counsel contends that C.P.C. § 246.3 is not a crime of violence or a crime involving moral turpitude. Addressing the latter, counsel asserts that given the Ninth Circuit's determination that assault with a deadly weapon in violation of C.P.C. § 245 does not involve moral turpitude (*Carr v. INS*, 86 F3d. 949, 951 (9th Cir. 1966)), then certainly the less culpable offense of discharging a firearm with gross negligence in violation of § 246.3 does not involve moral turpitude. The acting field office director seemed to agree, finding without explanation that the applicant is not inadmissible under section 212(A)(2)(A)(I)(i) of the Act and does not require a waiver under section 212(h) of the Act. The AAO will not engage in a detailed analysis of the applicant's conviction and whether it constitutes a crime involving moral turpitude, as the waiver application will be approved under section 212(a)(9)(B)(v) of the Act which also satisfies the requirements of section 212(h)(1)(B) of the Act.

The AAO notes that while the offense for which the applicant was convicted involves the willful discharge of a firearm, it does not appear to be a "violent or dangerous crime" as contemplated by 8 C.F.R. § 212.7(d). The words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and the AAO is aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or* any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the

course of committing the offense. We note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). The BIA held in *In re Figre*, (BIA March 18, 2005), that discharging a firearm in a grossly negligent manner which could result in injury or death to a person, in violation of CPC §246.3, is a crime of violence under 18 U.S.C. §16(b) and §101(a)(43)(F) of the Act, consistent with *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and applicable Ninth Circuit case law. However, in *United States v. Narvaez-Gomez*, 489 F.3d 970 (9th Cir. 2007), the Ninth Circuit held that a conviction under C.P.C. § 246 for the malicious and willful discharge of a firearm at an inhabited or occupied structure or vehicle is no longer a categorical crime of violence under *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (*en banc*), unless the offense was committed through the intentional use of force against the person of another rather than reckless or grossly negligent conduct. Moreover, in *United States v. Villanueva-Garcia*, 216 F.3d 1085 (9th Cir. 2000), the Ninth Circuit held that discharge of a firearm with gross negligence conviction under CPC § 246.3 is not an aggravated felony. The AAO finds that the crime for which the applicant was convicted is not a "violent or dangerous" crime as contemplated by 8 C.F.R. § 212.7(d) and thus he is not subject to the "exceptional and extremely unusual hardship" standard.

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 and his children can be considered only insofar as it results in hardship to a qualifying relative. In the present case, the applicant's U.S. citizen father and permanent resident mother are both qualifying relatives. 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 father is a 63-year-old native of Mexico and citizen of the United States. The applicant's mother is a 57-year-old native and citizen of Mexico and lawful permanent resident of the United States. She writes that she and her husband were heartbroken when the applicant left for Mexico in 2009 and their hearts have broken more every day since their four U.S. citizen grandchildren relocated to Mexico in 2010 to be with him. The applicant's mother states that her grandchildren seem to be doing worse every time she visits. She explains that 15-year-old was a very happy honor roll student in the United States and is now very sad, angry and distant, with horrible grades and is regularly belittled and called "stupid" by students in Mexico for being unable to read or write Spanish. The applicant's mother expresses concern for her three young granddaughters, ages 13, 12 and 5, for whom there are no protections from the boys at school. She reports that the eldest, is particularly vulnerable as she is very pretty and the boys touch her inappropriately. She indicates that both older girls have been called "stupid" because they cannot read and write Spanish and that even little is depressed because her family is so

sad. The applicant's mother makes clear that she suffers because her grandchildren suffer and that their hardship has become hers.

The applicant's mother also describes the great suffering of her husband, the applicant's father who has been diagnosed with gout, arthritis, blood dyslipidemia, and has been on disability since November 2010 as the result of a workplace accident in July 2009 when he was thrown from a horse. He is in constant physical pain and receives only a small amount of insurance proceeds from his employer's policy despite needing physical therapy and pain medications for his condition. Licensed Psychologist, interviewed the applicant's mother and father with whom he also conducted a variety of diagnostic tests in both August 2009 and January 2011. Dr. diagnoses the applicant's father with Major Depressive Episode, Moderate and Adjustment Disorder with Mixed Anxiety and Depressed Mood Acute. He reports that the applicant's father has contemplated suicide, finds it hard not to cry on a daily basis, has difficulty falling asleep and experiences intermittent sleep patterns nightly, finds it difficult to decide what to do or to concentrate, has to push himself to do anything, and is obsessed with the applicant's problems no matter how hard he tries not to think about them. Dr. explains that as the applicant's mother and father have been married for more than 40 years, their own physical and psychological conditions are exacerbated by the suffering of the other. The applicant's mother states that her husband's pain causes her stress which exacerbates her own medical problems. M.D. writes that the applicant's mother suffers several chronic medical conditions including hypertension, diabetes and osteoarthritis, all of which are being treated with prescription medication. The applicant's mother notes that she visits the applicant and his children as much as she can but her health seems to worsen by the day, she is having difficulty walking due to diabetic complications and arthritis and does not know how much longer she will be able to travel to Mexico to see them. Dr. states that stresses and anxiety negatively affect diabetes and hypertension which is significant for the applicant's mother because her conditions appear to be aggravated as a result of separation from the applicant. He diagnoses the applicant's mother with Major Depressive Episode, Moderate and Adjustment Disorder with Mixed Anxiety and Depressed Mood Acute and reports that she expressed wishing she was dead, she has difficulty falling asleep at night and experiences intermittent sleep patterns, has to push herself to go to work where she is now distracted and makes mistakes she never made before. Dr. notes that like the applicant's father, the applicant's mother is obsessed with worry concerning the applicant and his children in Mexico.

The applicant's mother writes that with her husband in so much pain she has become the primary breadwinner and works as much as she can in a factory to pay their own bills and send money to the applicant and his children for food and rent. She explains that while the family used to have their own home in the United States, they now live in poverty in Mexico and the applicant cannot even feed his family. The applicant's mother notes that her church recently donated clothing for her son and grandchildren. Dr. reports that as a result of separation from the applicant, the applicant's mother and father spend an additional $1,020 every month from their already depleted finances. This includes $300 monthly to the applicant for rent assistance, $400 in food assistance and $320 in gasoline to meet the applicant and his children in Baja, California, Mexico.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant's mother including her age, significant physical/medical conditions exacerbated by the decline in her mental health and serious psychological conditions which are further aggravated by her concerns for the health and well-being of her husband (the applicant's father) who himself is in medical and psychological decline as a result of separation from the applicant; her grave concerns for the wellbeing and safety of the applicant and his four minor U.S. citizen children in Mexico; the additional burden of working and traveling as often as possible to Mexico to visit the applicant and his children while in a compromised physical and emotional state; and the substantial financial burden of supporting them in Mexico and visiting them there. Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's lawful permanent resident mother has suffered and will continue to suffer extreme hardship due to separation from the applicant.

Addressing relocation, the applicant's mother indicates that she enjoys close family and community ties in the United States where she has resided for more than 25 years with her husband of more than 40 years and with whom, in addition to the applicant, she has three younger children, all of whom reside with them. She explains that relocation would result in the loss of her lawful permanent resident status, her eligibility to collect social security benefits, her job, and access to trusted physicians who are treating her multiple medical conditions. Concerning the applicant's spouse's fears related to Mexico, counsel notes that U.S. State Department country conditions reports show that Mexico is a dangerous country with severe social and economic problems, extreme poverty and violent organized crime and narco-trafficking. The AAO has additionally 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 transnational criminal organization activity including homicide, gun battles, kidnapping, carjacking and highway robbery, and the number of kidnappings and disappearances throughout Mexico is of particular concern. The State Department warns that U.S. citizens should exercise caution in Baja California, particularly at night and notes that the number of murders have increased and there have been targeted assassinations between rival gangs resulting in deaths of bystanders including U.S. citizens.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's mother including her adjustment to a country in which she has not resided in more than 25 years; that she has resided for decades in the United States where she enjoys close family ties – particularly to her disabled husband of more than 40 years and their three youngest children, all of whom reside at home with them; community and workplace ties and ties to trusted physicians; her stated economic, employment, health-related, and safety concerns regarding Mexico; and her current medical and psychological conditions as a result of separation from the applicant and his four minor U.S. citizen children and the foreseeable likelihood that these conditions would continue to deteriorate. Considered in the aggregate, the AAO finds the evidence sufficient to demonstrate that the applicant's lawful permanent resident mother would suffer extreme hardship were she 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 favorable factors in the present case include extreme hardship to the applicant's lawful permanent resident mother and U.S. citizen father as a result of the applicant's inadmissibility, the applicant's significant family ties to the United States – particularly to his four minor U.S. citizen children, his U.S. citizen father and his lawful permanent resident mother, his home ownership in the United States, steady long-term employment, support of his family, payment of taxes, his lack of any criminal record since a single 1992 conviction more than 20 years ago, and that he has remained outside the United States following his 2009 removal/departure, making no known attempts to unlawfully enter the country despite being separated from his parents and younger siblings. The unfavorable factors are the applicant's immigration violations and violations of criminal law. His immigration violations include his entries into the United States without inspection, and his periods of unlawful presence and unauthorized employment in the United States. The applicant's criminal record includes his conviction for discharging a firearm with gross negligence more than 20 years ago. Although the applicant's violations of immigration and criminal 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

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 approved as a matter of discretion.

In proceedings for 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. 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.