

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



**U.S. Citizenship
and Immigration
Services**

775

FILE: [REDACTED] Office: MANILA

Date:

IN RE: [REDACTED]

MAR 14 2011

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h), (i).

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Officer-in-Charge (OIC), Manila, Philippines. The matter and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of the Philippines who was found to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willfully misrepresenting a material fact to procure admission into the United States; section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking admission within 10 years of his last departure from the United States; and section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for admitting to having committed acts which constitute the essential elements of a violation of a law relating to controlled substances. The applicant is applying for waivers of inadmissibility in order to reside in the United States with his U.S. citizen spouse, children, mother and father.

The OIC determined that the applicant established that his inadmissibility has resulted in extreme hardship to his qualifying family members, but denied the waiver application as a matter of discretion. *Decision of the OIC*, dated May 22, 2007.

On appeal, counsel asserts that the USCIS field office erred and abused its discretion in denying the applicant's waiver application. *Notice of Appeal (Form I-290B)*, dated June 4, 2007.

In support of the waiver application, the record includes, but is not limited to, statements from the applicant and his family members, medical documentation, financial documentation, country condition reports, a psychological examination, the applicant's children's birth certificates, the applicant's spouse's naturalization certificate, the applicant's parents' naturalization certificates, and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

The AAO conducts the final administrative review and enters the ultimate decision for U.S. Citizenship and Immigration Services on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

The AAO notes that the applicant was also found inadmissible under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), as an alien previously removed. The applicant submitted an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212) at the same time as his Form I-601. The OIC issued separate decisions denying both the Form I-212 and the Form I-601. Counsel submitted one appeal mentioning both the applicant's Form I-212 and Form I-601 in the appeal.

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.

The record reflects that the applicant departed the United States for the Philippines in November 1999 while he was in removal proceedings. On May 24, 2000, the applicant was ordered removed from the United States in absentia. At the time the applicant filed his Form I-212, he was seeking admission to the United States within 10 years of the date of his removal. However, 10 years have now passed since the Immigration Judge's removal order. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). As such, the applicant is no longer inadmissible under section 212(a)(9)(A) of the Act and the request for permission to reapply for admission is now moot.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

(i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other

documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The AAO notes that aliens making false claims to U.S. citizenship on or after September 30, 1996 are ineligible to apply for a Form I-601 waiver. *See* Sections 212(a)(6)(C)(ii) and (iii) of the Act. Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 afford aliens in the applicant's position, those making false claims to U.S. citizenship prior to September 30, 1996, the eligibility to apply for a waiver.

In considering a case where a false claim to U.S. citizenship has been made, Service [CIS] officers should review the information on the alien to determine whether the false claim to U.S. citizenship was made before, on, or after September 30, 1996. If the false claim was made before the enactment of IIRIRA, Service [CIS] officers should then determine whether (1) the false claim was made to procure an immigration benefit under the Act; and (2) whether such claim was made before a U.S. Government official. If these two additional requirements are met, the alien should be inadmissible under section 212(a)(6)(C)(i) of the Act and advised of the waiver requirements under section 212(i) of the Act.

Memorandum by Joseph R. Greene, Acting Associate Commissioner, Office of Programs, Immigration and Naturalization Service, dated April 6, 1998 at 3.

The record reflects that the applicant entered the United States on November 20, 1987 as a U.S. citizen under the assumed name [REDACTED] by using a false U.S. passport. Since the applicant's misrepresentation was prior to September 30, 1996, he is inadmissible under section 212(a)(6)(C)(i) of the Act, for having willfully misrepresented a material fact to procure admission into the United States, and he is eligible for a waiver under section 212(i) of the Act. The applicant does not contest this ground of inadmissibility on appeal.

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

- (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

-
- (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The director determined that the applicant accrued unlawful presence of more than one year after April 1, 1997, the date of enactment of unlawful presence provisions under the Act. An alien is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year, and seeking admission to the United States within 10 years of the date of the alien's departure. As previously stated, an application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). The record reflects that the applicant departed the United States in November 1999, and has not returned since his departure. Since 10 years have now passed since the applicant's departure from the United States, he is no longer inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(2) of the Act states in pertinent part:

(A) Conviction of certain crimes. –

- (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, or
 - (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible. . . .

The director found the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(II) and the Ninth Circuit's decision in *Pazcoquin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002) because he "admitted that he utilized marijuana three times in one day when he was 19 years old during an examination in conjunction with his visa application on January 27, 2006." *Decision of the Officer-in-Charge*, dated May 22, 2007.

The applicant acknowledges that during his medical examination that he submitted to in conjunction with his application for an immigrant visa, he admitted to using marijuana. The applicant asserts that he later informed the consular officer that he had used marijuana on three occasions in one day.

The applicant contends that he is eligible for a wavier of a single use of marijuana. *Declaration of* [REDACTED] dated August 12, 2006.

The AAO notes the decision in *Pazcoquin* was based on a petition for review from a decision by the BIA, but that decision has not been designated as a precedent decision and is not controlling in this matter. *See* 8 C.F.R. § 103.37(g).

In *Matter of K-*, 7 I&N Dec. 594 (BIA 1957), the Board of Immigration Appeals (BIA) established a standard for determining the “validity” of an admission for purposes of inadmissibility under section 212(a)(2)(A)(i) of the Act (formerly section 212(a)(9)). The BIA held that a “valid admission of a crime for immigration purposes requires that the alien be given an adequate definition of the crime, including all essential elements, and that it be explained in understandable terms,” a rule intended to insure “that the alien would receive fair play and to preclude any possible later claim by him that he had been unwittingly entrapped into admitting the commission of a crime involving moral turpitude.” *Id.* at 597. It is further noted that the BIA held that the admission at issue in that case, which was made to a police officer and included in a sworn statement signed by the alien, could not be considered an admission of acts constituting the essential elements of a crime involving moral turpitude because the notification requirement had not been met. *Id.* at 596-97.

Although the applicant has admitted to his use of controlled substances, there is no evidence showing that he was provided with an adequate definition of any crime, including all essential elements, in understandable terms by the physician conducting his medical examination, the consular officer, or by anyone else at that or at any other time. The applicant has never been charged with or convicted of such a crime, and the director does not specify in his decision a statute or law for which the acts admitted to by the applicant constitute a violation, other than citing to the Ninth Circuit’s decision in *Pazcoquin*, which is not controlling in this case.

The AAO notes that in *Pazcoquin* the Ninth Circuit Court of Appeals considered a similar set of circumstances in determining that the petitioner’s admission of prior drug use to a psychiatrist could be used in finding the petitioner inadmissible under section 212(a)(2)(A)(i)(II) of the Act despite the fact that the psychiatrist did not provide the petitioner with a definition of a crime to which he was admitting the essential elements. 292 F.3d at 1216. The court noted that the BIA had not addressed the issue at length in the unpublished decision on review, but had explained only that the “record reveals that the Service attempted to comply with requirements set forth in *Matter of K*, *supra*, during the inspection process and at the exclusion hearing. However, it was the applicant who was unwilling to proceed.” *Id.* Nevertheless, the *Pazcoquin* court found that because the psychiatrist was not examining the petitioner for the purpose of obtaining an admission of a crime, as was the police officer who interrogated the respondent in *Matter of K-*, the admission to the psychiatrist could be the basis for a finding of inadmissibility under section of the Act even though the psychiatrist failed to provide the petitioner with a definition of a crime. 292 F.3d at 1217.

The AAO finds the Ninth Circuit’s rationale for not strictly applying the standard set forth in *Matter of K-* unpersuasive, and will continue to apply the requirements articulated by the BIA in *Matter of K-* in cases arising outside that circuit. The AAO finds no support in the language of *Matter of K-*

for exempting a certain category or categories of admissions obtained in the process of determining admissibility, or indeed, for exempting any admissions that are used to find an alien inadmissible under section 212(a)(2)(A)(i)(ii) of the Act. The AAO cannot set aside BIA precedent as pertaining to admissions made by the applicant, the *Pazcoquin* decision and any non-precedent BIA decisions notwithstanding.

Therefore, the AAO finds that the evidence in the record is insufficient to support a finding that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, and this part of the OIC's decision cannot be affirmed. The Secretary of Homeland Security (and by delegation, the AAO) has final responsibility over guidance to consular officers concerning inadmissibility for visa applicants. *See Memorandum of Understanding Between Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002*, issued September 30, 2003, at ¶ 3. Even were the applicant inadmissible under section 212(a)(2)(A)(i)(II), he would likely be eligible to seek a waiver of inadmissibility under section 212(h) based on the amount of marijuana involved.

Nevertheless, the applicant is still inadmissible under section 212(a)(6)(C)(i) of the Act, for having willfully misrepresented a material fact to procure admission into the United States. A section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the alien himself experiences upon deportation is relevant to section 212(i) waiver proceedings only to the extent it results in hardship to a qualifying relative, in this case the applicant's spouse, mother and father. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact

that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., *In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

On appeal, counsel asserts that the applicant has significant family ties in the United States, including his U.S. citizen spouse and parents, and his 13-year-old and 5-year-old U.S. citizen sons. Counsel notes that most of the applicant’s siblings are U.S. citizen or lawful permanent residents. Counsel states that the applicant presented evidence of his family members’ health conditions as evidence of hardship, including his spouse’s emotional and psychological problems, his mother’s diabetes, his father’s hypertension and ulcer, and his son’s asthma. Counsel contends that the applicant’s spouse is

suffering financial hardship because she cannot support two households with her limited income in either the United States or the Philippines. Counsel notes that the applicant's spouse cannot find employment in the Philippines. Counsel states that the applicant's spouse resides in a room with her parents and children because she cannot afford her own space. Counsel asserts that the applicant's parents struggle financially, and reside with the applicant's siblings who cannot afford to care for them on a permanent basis. Counsel contends that the applicant's younger child would be unable to adjust to residence in the Philippines. Counsel notes that while the applicant's oldest child regularly travels to the Philippines to stay with his father, his frequent travel makes it difficult for him to adjust to residence in a particular place. *Appeal Brief*, dated July 2, 2007.

The OIC determined that, "A review of the documentation in the record, when considered in its totality, establishes the existence of emotional, medical, financial, family, and professional hardship to the Applicant's U.S. citizen spouse and U.S. citizen parents which would result from the Applicant's inadmissibility, that reach the level of extreme as envisioned by Congress if the Applicant is not allowed to immigrate to the United States." *Decision of the OIC* at 7. Upon review of the record, the AAO agrees with the OIC's determination that the applicant has established extreme hardship to his qualifying family members as a result of his inadmissibility.

In a declaration dated August 10, 2006, the applicant's spouse asserts that she has had expenses supporting her family, including paying for childcare, health insurance, rent, food, gas, car insurance, clothing, and other necessities. She states that she has had to take time off work without pay because her younger son, [REDACTED] has asthma. She notes that her older son, [REDACTED], was residing with the applicant in the Philippines, and she had to pay for trips to the Philippines to visit them. She notes that she attempted to reside in the Philippines to keep her family united, but because of the financial conditions, she had to return to the United States with both of her children. She states that when she returned to the United States she moved into her parents' residence. She notes that [REDACTED] subsequently returned to the Philippines because she was having difficulty raising both children as a single parent. She states that she is concerned about how the emotional impacts of her separation from the applicant on their children. She contends that her financial hardship of supporting her family in the United States and the Philippines is causing her emotional hardship. She states that she must support her parents, with whom she resides, because they are elderly and do not speak English. She asserts that she is unable to sleep, feels depressed, and cannot concentrate.

The AAO acknowledges that the applicant's spouse is experiencing emotional hardship as a result of the applicant's removal, and this emotional hardship is further exacerbated by her separation from her older son, [REDACTED]. The applicant's spouse noted in her declaration that she decided to have [REDACTED] return to the Philippines in May 2006 because she could not support both children as a single mother. *Declaration of [REDACTED]* at 7. The record contains a psychological evaluation of the applicant's spouse from [REDACTED], dated April 14, 2006. [REDACTED] concluded in her evaluation that the "scope, duration, and intensity of [REDACTED] emotional and psychological symptoms have been strongly converted into diffuse physical ailments, which render her incapable of performing her normal duties and responsibilities satisfactorily." [REDACTED] further concludes that the applicant "has symptoms, which fit the established criteria for a diagnosis of Anxiety Disorder N.O.S. and Depressive Disorder N.O.S. Her frequent bouts of crying spells,

forgetfulness, insomnia, and her quick mood changes, have rendered her temporarily partially psychologically disabled.” *Psychological Evaluation* at 13. In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, referring to the separation of an alien from qualifying relatives, held that “the most important single hardship factor may be the separation of the alien from family living in the United States,” and that “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” (Citations omitted). Accordingly, the AAO will give considerable weight to the emotional hardships the applicant’s spouse is suffering as a result of her separation from the applicant.

Furthermore, the record establishes that the applicant’s spouse is experiencing financial hardships as a result of her separation from the applicant. A letter from her employer reflects that she is employed as an Accounts Payable Clerk and, as of the date of the letter, was earning \$13.50 per hour for full-time employment of 42-45 hours per week. *Letter from* [REDACTED] dated April 5, 2006. The record shows that the applicant’s spouse has sent remittances to the applicant. *See PNB Remittance Centers, Inc. Receipt for Money Remittance*. The record also contains numerous medical reports for the applicant’s son, [REDACTED]. Although none of the reports are written in plain language from a medical professional, the documents reflect that [REDACTED] suffers from asthma, and on December 23, 2005, he was seen for “an acute exacerbation of reactive airways” and “treated with inhaled albuterol by nebulizer.” *Kaiser Permanente Certification of Medical Impairment*, dated December 23, 2005. Although the applicant’s spouse’s annual salary of \$31,590 is above the Department of Health and Human Service’s 2006 federal poverty guidelines for a family of three, the AAO acknowledges that the aggregate expenses incurred by the applicant’s spouse for remittances to the applicant, travel to the Philippines, medical treatment for her son’s asthma, and time off work to take her son to the doctor, constitutes financial hardship.

All elements of hardship to the applicant’s spouse, should she remain in the United States, have been considered in aggregate. Based on the foregoing financial and emotional hardships, the applicant has established that his spouse will continue to suffer extreme hardship should she remain in the United States separated from the applicant.

The record also reflects that the applicant’s spouse would suffer extreme hardship upon relocation to the Philippines to maintain family unity. The applicant’s spouse is employed in the United States, and her departure would cause her to leave her position, and search for employment in the Philippines. According to the Central Intelligence Agency’s *The World Factbook*, 32.9% of the population in the Philippines resides below the poverty line. The applicant’s spouse has described her attempts to reside in the Philippines to keep her family unified, but because of the financial conditions, she had to return to the United States. *Declaration of* [REDACTED] at 6-7. She has stated that during her residence in the Philippines, the applicant was earning \$8.00 a day, selling chickens in the public market. *Id.* at 6; *Declaration of* [REDACTED] at 6. As noted, the record contains evidence of the applicant’s spouse’s remittances to the applicant. *See PNB Remittance Centers, Inc. Receipt for Money Remittance*. The AAO has considered the details provided in the applicant’s spouse’s declaration and evidence of the economic conditions in the Philippines, and

finds that the applicant has established that his spouse would suffer financial hardship upon permanent relocation to the Philippines.

Furthermore, the record reflects that the applicant's spouse has significant family ties in the United States, including her lawful permanent resident mother and father, with whom she resides. As previously stated, the question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. 12 I&N Dec. at 811-12. Here, the applicant's spouse resides with her parents, and according to her mother, she takes her mother to doctor's appointments and her father to work. See *Letter from [REDACTED]* dated April 14, 2006. Although the applicant's spouse's separation from her parents does not alone constitute extreme hardship, the severance of her family ties if she relocates to the Philippines will be given due weight in an aggregate determination of hardship.

Finally, counsel has noted that the applicant's nine-year-old son, Archie, will be unable to adjust to residence in the Philippines. The AAO acknowledges that court decisions have found extreme hardship in cases where the language capabilities of the children were not sufficient for them to have an adequate transition to daily life in the applicant's country of origin. For example, in *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Ninth Circuit found the BIA abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her. In the instant case, the applicant has not explained the language capabilities of his son. However, the AAO acknowledges that the applicant's son's relocation to the Philippines will cause him to be uprooted from his community and school system. The AAO will accordingly give some weight to the hardship the applicant's spouse would suffer from having to relocate her younger son to the Philippines.

All elements of hardship to the applicant's spouse, should she relocate to the Philippines, have been considered in aggregate. While the aforementioned hardships do not alone constitute extreme hardship, they rise to the level of extreme hardship when considered in their totality. Accordingly, the applicant has established that his spouse will suffer extreme hardship should she relocate to the Philippines to maintain family unity.

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 favorable factors in this matter are: the applicant's family ties in the United States, including his U.S. citizen spouse, children and parents; the aforementioned financial and emotional hardships to

the applicant's U.S. citizen spouse and children; the passage of 23 years since the applicant's immigration violation; the applicant's residence in the Philippines for the previous 10 years; and the fact that the applicant does not appear to have a criminal record. The record also contains evidence that the applicant's U.S. citizen parents are suffering from health conditions – his mother has diabetes and his father has a gastric ulcer and hypertension – that have been exacerbated as a result of their separation from the applicant.

As stated by the director, the unfavorable factors in the applicant's case include: his admission to the United States by misrepresentation; his failure to attend removal hearings resulting in an in absentia removal order; his unlawful presence in the United States; and his employment without authorization.

Additional unfavorable factors cited by the director include: "Filing of a Form I-687 in April 1991 under the Immigration Reform and Control Act for which the Applicant was not clearly eligible based upon his entry in November 1987"; "Applicant's first marriage to [REDACTED] on January 23, 1998 while in removal proceedings for which the Applicant sought unsuccessfully to adjust status to permanent residence"; and "Gaining an advantage over other aliens seeking immigrant visa issuance abroad or who abide by immigration laws." *Decision of the OIC* at 8.

The AAO notes, however, that United States Citizenship and Immigration Services (USCIS) is precluded from considering information contained in a legalization file for any purpose other than a legalization determination. *See* Section 245A(c)(5) of the Act, 8 U.S.C. § 1255a(c)(5). The AAO notes further that the record does not show that a determination has been made that the applicant entered into marriage with [REDACTED] for the purpose of evading the immigration laws under section 204(c) of the Act, 8 U.S.C. § 1154(c). Finally, since the applicant has resided in the Philippines for over 10 years, and is applying for admission abroad, there is no indication that he has gained the type of advantage that would be gained by an inadmissible alien applying to adjust his status within the United States. Accordingly, we will decline to consider these three additional factors in our discretionary determination.

The OIC noted that since the applicant gained his equities during his unlawful presence in the United States, his equities can be given only slight weight. *Decision of the OIC* at 8. In *Matter of Cervantes-Gonzalez*, the BIA took into consideration the qualifying family member's expectations at the time that she married the respondent (applicant), and stated that:

The respondent's wife knew that the respondent was in deportation proceedings at the time they were married. In contrast to the respondent's assertions on appeal, this factor is not irrelevant. Rather, it goes to the respondent's wife's expectations at the time they were wed. Indeed, she was aware that she may have to face the decision of parting from her husband or following him to Mexico in the event he was ordered deported. In the latter scenario, the respondent's wife was also aware that a move to Mexico would separate her from her family in California. We find this to undermine the respondent's argument that his wife will suffer extreme hardship if he is deported.

22 I&N Dec. 560, 566-67 (BIA 1999).

On appeal, counsel asserts that [REDACTED] had a child with [REDACTED] before he was placed in proceedings. Thus, while [REDACTED] married after he was placed in proceedings, the facts of his case suggest that the hardships resulting from this marriage should be given weight because of the long-term nature of [REDACTED] relationship with [REDACTED] and the fact that the couple already share a child." Counsel further asserts that, [REDACTED] relationship with [REDACTED] and the hardship to [REDACTED] parents and siblings cannot be discounted, as [REDACTED] has been related to these individuals since birth."

The AAO has considered the basis of the OIC's determination and counsel's rebuttal, and finds that the hardships acquired by the applicant's spouse are undermined by the fact that she renewed her relationship with the applicant after he was placed in removal proceedings. However, the other positive factors in the record, including the applicant's numerous family ties in the United States, the medical hardships of the applicant's parents, the passage of 23 years since the applicant's immigration violation, the applicant's residence in the Philippines for the previous 10 years, and the fact that the applicant does not appear to have a criminal record, are significant.

The AAO finds that the applicant's immigration violations are serious in nature and cannot be condoned. Nevertheless, the AAO finds that the positive factors outweigh the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained, and the application will be approved.

ORDER: The appeal is sustained.