U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
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PUBLIC COPY

U.S. Citizenship and Immigration Services

#5

[redacted]

DATE: OCT 18 2011 OFFICE: PHOENIX, AZ FILE: [redacted]

IN RE: APPLICANT: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

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

If you believe the 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,

Ellen C. Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to 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 readmission within 10 years of his last departure from the United States. He was also found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured a visa through fraud or misrepresentation. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. Citizen spouse and children.

The Field Office Director concluded the applicant failed to establish that his spouse would suffer extreme hardship over and above the normal economic and social disruptions involved in the removal of a family member and denied the application accordingly. *See Decision of Field Office Director* dated June 4, 2009.

On appeal, counsel for the applicant contends the applicant has "unusual and outstanding equities." *Form I-290B Notice of Appeal or Motion,* July 4, 2009. Counsel explains the applicant and his spouse's infant child recently died, and that the applicant's spouse suffers from psychological / emotional issues. *Id.* Counsel further asserts that the applicant is the spouse's caretaker. *Id.* In support of the appeal, the applicant submits a psychological evaluation, evidence of blood donation, and the applicant's FBI record check.

The record includes, but is not limited to, a psychological evaluation, evidence of blood donation, FBI records, birth, marriage, death, and citizenship certificates, documentation from the applicant's spouse's and children's physicians, and affidavits from the applicant. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (B) ALIENS UNLAWFULLY PRESENT.-
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> (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .
>
> (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.

> (ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.
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> . . . .
>
> (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.

The applicant admitted under oath that he entered the United States without inspection in 1992, and remained until he returned to Mexico in January 2008. After he entered the United States on his H-2B non-immigrant visa, he remained past the expiration of the period of stay authorized by the Attorney General, November 30, 2008, and filed an adjustment of status application on December 14, 2008. The applicant has since remained in the United States. Therefore, the applicant accrued unlawful presence from April 1, 1997 to January 2008.[1] In applying to adjust his status to that of Lawful Permanent Resident (LPR), the applicant is seeking admission within 10 years of his January 2008 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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

> (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:

> (1) The [Secretary] may, in the discretion of the [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 [Secretary] that the refusal of admission to the United States of such

[1] April 1, 1997 is the date when the unlawful presence provisions became effective.

> immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

After the applicant left for Mexico in January 2008, the record reflects he obtained a non-immigrant visa as an H-2B non-agricultural worker. In the non-immigrant visa application, the applicant indicated he had never been in the United States. The applicant used that visa to enter the United States in March 2008. The applicant is therefore inadmissible to the United States for procuring a visa through fraud or misrepresentation of a material fact – that he had in fact been present in the United States and had accrued over one year of unlawful presence.

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.

Although the applicant's spouse does not submit a statement on her hardship, nor does counsel submit a brief in support of appeal, the applicant's spouse's history and psychological conditions are described in a psychological evaluation by [redacted] Therein, the psychologist explains the applicant's spouse's family history: "Her parents were never married. Her father made no contact with her from age five until a year ago. She and her mother are estranged... The mother voluntarily gave the children to family members to raise... She also noted her mom was sometimes physically abusive as well as neglectful. Life with her grandmother was not much better. Her grandmother was emotionally abusive... She admitted to drinking alcohol and taking illegal substances during this time." *Psychological evaluation,* July 2, 2009. The psychologist describes the applicant's spouse's educational background, stating she "began school at age five and left school in 11th grade. She noted that school was difficult for her. She had concentration and attention deficits. She often wondered if she should have had special education. She often failed core courses. Even now she has trouble writing and reading. She was truant often in high school... So even though Mrs. Teran stayed in high school until the 11th grade, her level of education is much lower." *Id.*

The psychologist then explains the applicant's spouse's psychological hardship due to her three U.S. Citizen children, and in particular, her grief over the child who died as an infant. The psychologist lists the three children – a "two-year-old female, one-month-old female, and an infant girl who died at age six months." *Id.* The applicant submits a birth certificate for a [redacted] born on August 28, 2006. *Child's birth certificate,* June 3, 2008. The applicant's spouse is listed as the mother, and no father is listed. The psychologist then discusses the stress caused by another child's death. The day of the death, the applicant's spouse "took the sick child to the doctor who diagnosed a virus and sent her home. Later that day the daughter stopped breathing. After [redacted] performed CPR, the daughter was taken to the hospital by paramedics and died... her husband remained home for a week following the death. She notes that he was her emotional stronghold." *Psychological evaluation,* July 2, 2009. As evidence of the daughter's

death, the applicant submits a letter from the medical examiner, opining that "the cause of death is congenital heart abnormality(ies) associated with hypertrophic and dilated cardiomyopathy and history of supraventricular tachycardia." *Letter from Medical Examiner, Maricopa County, Arizona,* July 8, 2008. The examiner confirms the "manner of death is natural." *Id.* The psychologist concludes the applicant's spouse "meets symptoms of post-traumatic stress disorder. She has recurrent and intrusive distressing recollections of the day her daughter died nearly every day. She sees images and is preoccupied with thoughts of her daughter. She feels excessively guilty for her daughter's death." *Psychological evaluation,* July 2, 2009. The psychologist also opines the applicant's spouse "meets criterion for depression; she feels sad most of the day, she has little interest in activities, finds no joy or fun in activities, she sleeps poorly, has loss of energy, poor concentration, sensitive to criticism, and excessive feelings of guilt. She feels on edge frequently, and cries for no reason. She has experienced depression for more than a year since her daughter died. She excessively worries about her children's safety." *Id.*

The applicant also submits letters from medical professionals as well as medical reports. One letter confirms a "2-year-old sibling has an abnormal AV valve and the baby is being followed by... [redacted] although an earlier letter states that child has "no acute cardiopulmonary disease." [redacted] Therein, the letter states the third child (now born), has a "normal fetal cardiac structure with normal ventricular size and function." *Id.* Another letter from a physical therapist opines that the applicant's spouse has "SI dysfunction with pain, muscle weakness, and positional faults of the pelvis." [redacted]

The psychologist explains if separated, the applicant's spouse "would not be able to meet the demands of normal daily activities." *Psychological evaluation,* July 2, 2009. She adds: the applicant's spouse "is overwhelmed with her current tasks and relies on the help of her husband at night to care for the children... It is likely that her mental state would deteriorate if her husband moves to Mexico. She would likely experience greater depression as a result of his move... She most likely would not be able to cope with working and caring for her children, which could result in a multitude of problems: homelessness, alcohol / drug use, extreme poverty. She is at risk for drug abuse, given her history. She is at risk for child neglect, given her early family experiences. It is likely that she would not be able to find a job that pays enough to provide for three people, because of her poor education, low average intelligence, poor attention and concentration and immature social skills." *Id.* The psychologist explains how the applicant assists his spouse, stating he "is teaching her how to have a family life that meets the minimum healthy standards: parents taking care of children financially, emotionally, and physically, being physically present to your children (being home daily), attending to your children's basic needs, and the married couple being emotionally responsive and respectful to one another. He appears to be teaching her how to be a stable and reliable adult." *Id.*

If the applicant's spouse were to relocate to Mexico, the psychologist suggests she would suffer a "different kind of hardship... She might be able to adapt to the culture but with extreme difficulties. She does not speak Spanish well, she does not read or write in Spanish. She would

most likely be unemployable. Her reliance and dependence on her husband would become greater. She would experience prolonged grief because of her inability to visit her daughter's gravesite... her standard of living would decrease because of living in a third world country, which would be a stressor." *Id.*

The record contains evidence on the applicant's spouse's financial situation. The psychological evaluation states she "has had seven jobs in the last seven years. The longest held job was for one year. She does mainly unskilled work: cleaning homes, dry cleaners. She has little education for any other type of work." *Psychological evaluation,* July 2, 2009. Attached to the Form I-864, Affidavit of Support Under Section 213A of the Act, the applicant's spouse submitted tax returns showing her individual annual incomes as $7,007.00, $14,185.00, and $13,651.00 for the years 2007, 2006, and 2005 respectively. *See U.S. Individual Income Tax Returns.*

The applicant has submitted some evidence of financial hardship. The applicant and his spouse have three children. As shown in her U.S. individual income tax returns, it is apparent that the applicant does not make enough money individually to meet either 100 percent or 125 percent of the current poverty guidelines for a household of five. *See U.S. Individual Income Tax Returns; see also I-864P, Poverty Guidelines.* Her finances are exacerbated by her child Natalie, who has a heart condition. [redacted] February 6, 2009. Without the applicant's income, the record reflects the applicant's spouse suffers from substantial financial hardship.

The applicant has shown his spouse would experience significant psychological / emotional problems upon separation. It is evident from the psychological evaluation that the spouse suffered from abuse and neglect as a child, struggled with school, and lacked positive parental figures while growing up. *See psychological evaluation,* July 2, 2009 ("She has a significant history of childhood neglect and abandonment. Her mother was unable to care for her and sent her to live with her maternal grandmother at age 9.") It is also apparent that she suffers considerably because of her infant daughter's sudden death. *Id.* The psychologist describes how the applicant helps his spouse with her psychological issues: "Her husband is teaching her how to have a family life that meets the minimum healthy standards: parents taking care of children financially, emotionally, and physically, being physically present to your children (being home daily), attending to your children's basic needs, and the married couple being emotionally responsive and respectful to one another. He appears to be teaching her how to be a stable and reliable adult. If his influence were removed she would be gravely impacted." *Id.* The evaluation makes it clear that the spouse was unable to learn those skills as a child due to ineffective, abusive, and neglectful parenting. *Id.* The psychologist lastly recommends "psychological counseling for [redacted] with an emphasis on grief counseling. [She] also recommend[s] parenting class, household management, GED classes, and job skill training. If her husband remains in the country, providing for her well-being and helping with the children, she may have the opportunity for self-improvement." *Id.* In conclusion, the psychologist opines, "She will have the opportunity to break the cycle of poverty and neglect demonstrated by her parents." *Id.* The AAO therefore concludes that, in this particular case, the applicant has shown his spouse's psychological/emotional and financial

hardships, when considered cumulatively, constitute extreme hardship upon separation from the applicant.

The AAO also finds the record establishes extreme hardship to the applicant's spouse upon relocation to Mexico. There is an indication that the child is currently being treated by a specialist for a heart condition in the United States.[2] Moreover, the applicant's spouse was born in the United States, and she "does not speak Spanish well; she does not read or write in Spanish." *Psychological evaluation,* July 2, 2009. Given the evidence in the record on the spouse's low income employment in the United States, her unique psychological conditions due to her upbringing and the death of her child as well as her lack of Spanish language skills, the AAO finds there is sufficient evidence to show the applicant's spouse would suffer hardship above and beyond those normally experienced by family members of inadmissible aliens upon relocation to Mexico. *Id.*

Considered in the aggregate, the applicant has established that his spouse would face extreme hardship if the applicant's waiver request is denied and the applicant and his spouse were separated.

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

[2] In addition to the letter, the record contains copies of medical records, including hand-written progress notes containing medical terminology and abbreviations that are not easily understood, and laboratory results. The documents submitted were prepared for review by medical professionals or are otherwise illegible or indiscernible and do not contain a clear explanation of the current medical condition of the applicant's spouse or child.

> 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 include the evidence of extreme hardship to the applicant's spouse upon separation from the applicant, the applicant's family ties in the United States, his residence of long duration in the country, and his lack of a criminal background. The unfavorable factors include his unlawful entry and presence in the United States as well as his misrepresentation on the H-2B non-immigrant visa application.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility

for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

We note that the Field Office Director denied the Form I-485, application to adjust status, solely on the basis of the applicant's inadmissibility under sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act and the director's denial of the Form I-601 waiver application. *Decision of the Field Office Director*, dated April 13, 2009. The Field Office Director's denial of the Form I-485 was premature, as the applicant timely filed the instant appeal. Because the appeal will be sustained, there remains no basis, in the present record, for the denial of the adjustment application. Accordingly, the Field Office Director should reopen the adjustment application pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(i) and issue a new decision.

ORDER: The appeal is sustained.