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

U.S. Citizenship and Immigration Services

[redacted]

H6

DATE: DEC 15 2011 OFFICE: MANILA, PHILIPPINES 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)

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.

Thank you,

Ellen C. Johnson

Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Manila, the Philippines, 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 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. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. Citizen spouse.

The Field Office Director concluded although the applicant showed his spouse would experience extreme hardship given the applicant's inadmissibility, the applicant did not merit a favorable exercise of discretion and denied the application accordingly. *See Decision of Field Office Director* dated June 19, 2009.

On appeal, counsel for the applicant submits a brief in support. Therein, counsel lists additional evidence included on appeal to show the applicant merits a favorable exercise of discretion, including declarations from the applicant and his spouse, letters of support from members of the applicant's community, background checks, a chart delineating the equities in the applicant's case, as well as copies of U.S. federal income tax returns from 1991 until 2001.

The record includes, but is not limited to, the documents listed above, evidence of birth, marriage, and naturalization, letters from employment agencies and accountants, medical records, letters from medical providers, psychological evaluations, traffic collision police reports, evidence of immigration proceedings, other applications and petitions filed on the applicant's behalf, paystubs, bank account information, other U.S. Federal income tax returns, evidence of money transfers, billing statements, lists of prescriptions and credit card bills, and a U.S Department of State human rights report on the Philippines. 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.-
>
> (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.

> (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.
>
> . . . .
>
> (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 record reflects the applicant was admitted to the United States pursuant to a C-1 non-immigrant visa on October 5, 1991, with authorization to remain until November 3, 1991. The applicant stayed past that date, and filed a Form I-589, Request for Asylum in the United States, on August 7, 1992, which was denied on November 26, 1993. The applicant was placed in deportation proceedings, and on September 5, 1995, the applicant failed to appear and was ordered deported *in absentia*. The applicant similarly failed to appear for deportation on September 7, 1995, after a bag and baggage letter was issued. The applicant married his spouse, on August 23, 1996. On April 13, 2001, filed a Form I-130, Petition for Alien Relative, on the applicant's behalf. On May 16, 2002, the applicant was found and arrested by the legacy Immigration and Naturalization Service, and he was removed from the United States at government expense on June 5, 2002. The applicant accrued unlawful presence from the date the unlawful presence provisions became effective, April 1, 1997, until his departure on June 5, 2002. The applicant is therefore subject to inadmissibility under section 212(a)(9)(B)(i)(II) for having accrued more than one year of unlawful presence. The applicant's qualifying relative in this case is his U.S. Citizen spouse.

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 Field Office Director found the applicant had established extreme hardship to his spouse given both the current separation from the applicant and possible relocation to the Philippines. *See decision of Field Office Director,* June 19, 2009. In support of a finding of extreme hardship, the applicant provided evidence that his spouse suffered from significant ongoing emotional and psychological hardship due to the separation. *See letter from* [redacted] *M.D.,* November 6,

2007, *see also psychological evaluation,* November 23, 2006. The applicant also submitted evidence that her job performance as a distribution clerk at the U.S. Postal Service was deteriorating and she was experiencing some financial hardship given the current separation. *See letter from* December 4, 2008, *see financial documents.* Moreover, the applicant provided letters from the Philippines to demonstrate his spouse would be unable to find employment given her skill set and age, and even if she were to find a job, she would be unable earn enough money given the cost of living in the Philippines. *See letter from* May 29, 2009, *see also letter from* *CPA,* May 29, 2009. Furthermore, the applicant submitted evidence that, due to injuries sustained in two automobile collisions as well as psychological issues, the applicant's spouse has medical conditions which she could not afford to have treated in the Philippines. *See traffic collision reports,* March 21, 2009, January 29, 2009 *see also psychological evaluation,* November 23, 2006. In light of the individual hardship factors viewed in the aggregate, the AAO agrees with the Field Office Director's finding that there is sufficient evidence to show the spouse experiences extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

> We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra,* is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The Field Office Director found the applicant did not warrant a favorable exercise of discretion given that the applicant's favorable factors failed to outweigh the unfavorable factors. Specifically, the Field Office Director found the favorable factors consist of: "(1) family ties in the U.S. (spouse); (2) demonstration of extreme hardship (financial, medical, psychological) to your U.S. citizen spouse; (3) approval of a Form I-130; (4) absence of any criminal record." *Decision of Field Office Director,* June 19, 2009. The Field Office Director correctly noted the applicant acquired the "equity of marriage" after he had been ordered deported. *Id.* Counsel disputes this finding, noting that the applicant and [redacted] had been living together since before he was ordered deported; however, it cannot be disputed that the applicant was ordered deported on September 5, 1995, and was married to the [redacted] on March 23, 1996. *See marriage certificate, see also Order of Immigration Judge,* September 5, 1995. The Field Office Director then noted the applicant's numerous unfavorable factors included his employment without authorization, unlawful presence, failure to appear at immigration proceedings and to his removal appointment, that the government found and arrested him, later removing him at government expense, that the applicant exhibited no remorse for his immigration violations, he failed to establish that he paid taxes on his income, or that the applicant had performed any community service in the United

States or the Philippines. *Id.* The applicant submits an affidavit in which he does express remorse for his actions, and in which he attributes his failure to appear at deportation proceedings to the fact that his aunt, who received notice of the hearing, did not forward the notice to him in a timely manner. *See declaration of applicant,* August 10, 2009. The applicant's assertions regarding notice of the deportation hearing are unpersuasive. The applicant was given notice of his responsibility to provide the immigration court with his correct address. *See Order to Show Cause and Notice of Hearing,* October 23, 1993. Additionally, the applicant was represented by counsel, who was also sent a copy of the hearing notice. *See notice of hearing in deportation proceedings,* September 21, 1994, *see also Notice of Entry of Appearance as Attorney or Representative,* September 20, 1994. If the applicant had moved from his aunt's residence, it was his responsibility to inform the court of his new address; furthermore, then-counsel for the applicant was also given notice of the hearing date.

However, on appeal the applicant has provided additional evidence of positive equities in his case. The applicant submits police clearance documentation showing he has no criminal record in the Philippines. *See Police Clearance, Department of Justice, the Philippines,* May 22, 2007. The applicant also submits evidence of involvement in his community in the Philippines through his church and a cooperative. *Letters from Rev. Fr. Alberto I. San Jose, Jr.,* July 9, 2009, *see also letter from Benildo Adarlo,* July 9, 2009. Moreover, the applicant has submitted copies of Federal income tax returns from 1991 until 2001 as evidence he paid U.S. income tax. *See U.S. federal income tax returns.* This supplemental evidence of positive equities, when viewed in light of the positive equities already found by the Field Office Director, are significant evidence in favor of an exercise of discretion in this matter.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case, when taken as a whole, 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 his burden and the appeal will be sustained.[1]

ORDER: The appeal is sustained.

[1] It is noted in 2002 the applicant filed a Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, which is still pending.