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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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DATE: JUN 05 2012 Office: TEGUCIGALPA, HONDURAS FILE: [redacted]

IN RE: [redacted]

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

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility was denied by the Field Office Director, Tegucigalpa, Honduras, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects the applicant is a native and citizen of Honduras who entered the United States unlawfully on November 15, 1995. She applied for temporary protected status (TPS) on January 21, 1999, and she maintained that status until her return to Honduras in March 2009. The applicant 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 her departure from the country. The applicant is married to a U.S. citizen, and she is the beneficiary of an approved Form I-130, Petition for Alien Relative (Form I-130). She seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. §1182(a)(9)(B)(v), in order to reside in the United States with her husband and family.

In a decision dated February 2, 2010, the director concluded the applicant had failed to establish her husband would experience extreme hardship if she were denied admission into the United States. The waiver application was denied accordingly.

On appeal, counsel for the applicant asserts the director did not consider the cumulative hardships in the applicant's case, and that evidence establishes the applicant's husband will experience extreme emotional and financial hardship if the applicant is denied admission into the United States. To support these assertions, counsel submits a letter from the applicant's husband, birth certificates for the applicant's daughters, and financial and country-conditions information. The record also contains Spanish-language documentation.

8 C.F.R. § 103.2(b)(3) provides that:

> Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Because the Spanish-language documentation is not accompanied by a certified English translation, it cannot be considered in the applicant's case. The entire remaining record was reviewed and considered in rendering a decision on the appeal.

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

> (i) [A]ny 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.

Section 212(a)(9)(B)(i) of the Act was added to the Act by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of PL 104-208, September 30, 1996) (IIRIRA). IIRIRA became effective on April 1, 1997, and only periods of unlawful presence spent in the United States after its April 1, 1997, effective date count towards unlawful presence for sections 212(a)(9)(B)(i)(I) and (II) of the Act purposes.

A grant of TPS does not cure unlawful presence that accrued before the grant of TPS. For purposes of adjustment of status, the unlawful presence bar is triggered upon the alien's departure from the United States if the alien accrued sufficient unlawful presence in the United States before TPS was granted. *See Memorandum by USCIS Domestic Operations, Refugee, Asylum and International Operations and Office of Policy and Strategy, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,"* dated May 6, 2009.

The record reflects the applicant was unlawfully present in the United States for over a year between April 1, 1997 and January 21, 1999, when she applied for TPS. The applicant departed the country in March 2009. Inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, which is triggered upon departure, remains in force until the alien has been absent from the United States for ten years. In the present matter, the applicant has remained outside of the United States for less than ten years. She is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act. Counsel does not contest the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B)(v) of the Act provides:

> 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.

Section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (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*, 22 I&N Dec. 560, 565 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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).

Though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I.&N. Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and*

Mei Tsui Lin, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The applicant's U.S. citizen spouse is her qualifying relative under section 212(a)(9)(B)(v) of the Act. The record contains references to hardship the applicant's children would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship under section 212(a)(9)(B)(v) of the Act. Hardship to the applicant's children can thus be considered only to the extent that it causes hardship to her qualifying spouse.

The applicant's husband states he is originally from Guatemala, and has lived in the United States since he was 18 years old. He and the applicant married in 2006, and they have a 4 year-old daughter and a 15 year-old daughter from the applicant's previous relationship. The applicant's husband indicates his stepdaughter's biological father has not been a part of her life and that he has raised her since she was 2 years old. He states that he works full-time in construction and that the applicant cares for the children and takes care of their home. The applicant's husband has lost fifteen pounds since the applicant's departure from the United States in 2009, and he suffers emotionally. Although his stepdaughter initially remained with him in the United States, she experienced depression due to her mother's absence and now lives in Honduras with her mother. However she does not attend school due to her inability to speak and write Spanish fluently. Their younger daughter has been seen by a doctor over eight times due to insect-bite allergies, and food-related vomiting and fever since moving to Honduras. The applicant's husband states that his younger daughter now lives with him in the United States, but that she misses her mother. He also plans to bring his stepdaughter back to the United States to continue her studies. He worries that he has no one to watch the children, and that childcare costs will be expensive. He states he cannot move to Honduras because he has to work and he would not be able to find work there, he would lose the home he owns, and he has lived most of his life in the United States. In addition, he states that economic and social conditions in Honduras are poor, crime and violence are high, persons from the United States are targeted for money, and he indicates that the applicant has been assaulted two times with a knife since returning to Honduras. Country conditions evidence corroborates the claim that Honduras is a poor country, and that the country is experiencing high crime and drug-gang related violence. To establish financial hardship, the record contains a credit card statement reflecting the applicant's husband's late payment fees, and a past due car loan bill.

Upon review, the AAO finds that the evidence in the record, when considered in the aggregate, establishes the applicant's husband would experience hardship that rises beyond the common results of removal or inadmissibility if the applicant were denied admission into the country, and he remained in the United States. Documentary evidence demonstrates the applicant's husband faces hardship meeting his financial obligations. Country-conditions evidence also corroborates the applicant's husband's emotional hardship based on worries about his wife and children's health and safety in Honduras. A U.S. Department of State (DOS) country-conditions report reflects that crime is widespread and "requires a high degree of caution by U.S. visitors and residents alike"; common crimes include kidnapping, rape, assault, property crimes and murder; "foreigners have been targeted for crime due to their perceived wealth"; travel alone or at night should be avoided; and Honduran law enforcement's ability to prevent, respond to, and investigate criminal activity is limited. In addition, "[m]osquito-borne illnesses are an ongoing problem," the risk of contracting malaria in some regions is high, and "[t]the country regularly suffers from outbreaks of dengue fever." *See http://travel.state.gov/travel/cis_pa_tw/cis/cis_1135.html.*

The cumulative evidence in the record also establishes the applicant's husband would experience extreme hardship if the applicant were denied admission into the United States and he relocated with his family to Honduras. The applicant's husband has no other ties to Honduras, and evidence of the country's high poverty and unemployment rates is contained in the record and corroborates his concerns about finding work in Honduras. As discussed above, country-conditions evidence also corroborate the applicant's husband's safety and health concerns about his family. When considered in the aggregate, the evidence establishes the applicant's husband would experience emotional, financial and physical hardship that rises beyond the common results of removal or inadmissibility if the applicant were denied admission into the country and he relocated with his family to Honduras.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. 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. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 299 (BIA 1996). 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 unfavorable factors in this matter are the applicant's unlawful entry and her accrual of unlawful presence in the United States from April 1, 1997 until January 21, 1999. The favorable factors are the hardship the applicant's husband and children would face if the applicant is denied admission into the United States, the applicant's lack of a criminal record, and her good moral character as described in several affidavits in the record.

The AAO finds that although the immigration violations committed by the applicant are serious in nature and cannot be condoned, taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

Upon review of the totality of the evidence, the AAO finds that the applicant has established extreme hardship to her U.S. citizen husband, as required under section 212(a)(9)(B)(v) of the Act. It has also been established that the applicant merits a favorable exercise of discretion. The applicant has therefore met her burden of proving eligibility for a waiver of her ground of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act. Accordingly, the Form I-601 appeal will be sustained.

ORDER: The appeal is sustained.