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

(b)(6)

DATE: JAN 2 2 2013 OFFICE: MEXICO CITY

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(d)(11) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(d)(11).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

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

Thank you,

Ron Rosenberg, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Mexico City, Mexico. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the underlying application is approved.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (or the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking readmission within 10 years of departure from the United States and under section 212(a)(6)(E) of the Act, 8 U.S.C. § 1182(a)(6)(E), for knowingly encouraging, inducing, assisting, abetting or aiding her minor son to enter the United States in violation of the law. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed on her behalf by her U.S. citizen spouse. She seeks a waiver of inadmissibility (Form I-601) pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and section 212(d)(11) of the Act, 8 U.S.C. § 1182(d)(11), in order to reside with her husband in the United States.

In a decision dated March 23, 2010, the Field Office Director concluded that the required standard of proof of extreme hardship to a qualifying relative was not met and the application for a waiver of inadmissibility was denied accordingly. The applicant appealed that decision and the AAO dismissed the appeal on May 2, 2012, finding that the applicant failed to establish extreme hardship to her U.S. citizen spouse. The applicant filed a motion to reopen the AAO decision.

On motion, the applicant submitted a new brief and evidence and states that her spouse will in fact suffer from extreme hardship.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In support of the waiver application, the record includes, but is not limited to letters from the applicant's spouse, evidence of the applicant's spouse's employment, documentation regarding the applicant's spouse's health, letters of support from the applicant's family and members of the community, documentation regarding the country conditions in Mexico, and documentation of the applicant's immigration history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

The applicant was found to be inadmissible under section 212(a)(6)(E) of the Act, which states, in relevant part:

> (E) Smugglers
> (i) In general. Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.
> (ii) Special rule in the case of family reunification. Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.
> (iii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (d)(11) of this section.

The record reflects that the applicant stated in her consular interview that she unlawfully entered the United States on December 28, 1999 with her 10-year-old son. As a result of the applicant's role in bringing her minor son into the United States unlawfully, she is inadmissible under section 212(a)(6)(E) of the Act. The applicant does not contest her inadmissibility on appeal.

Section 212(d)(11) of the Act states, in relevant part:

> (11) The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) of this section in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 1153(a) of this title (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

A waiver under this section may be granted for humanitarian purposes, to assure family unity, or if it is otherwise in the public interest. *Id.* In this case, the AAO takes note of the applicant's spouse's long-term residence, family ties, and employment in the United States. The AAO also notes that the applicant's spouse's first wife and the mother of his adult daughter passed away. The applicant's spouse has submitted evidence of his employment, as well as evidence that he suffers from hypertension, high cholesterol, reflux disease, depression and anxiety. Based on

these observations, the AAO finds sufficient humanitarian and family unity grounds on which to approve the applicant's waiver under section 212(d)(11) of the Act.

The applicant, however, is also inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for one year or more.

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

> (B) ALIENS UNLAWFULLY PRESENT.-
> (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-
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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.
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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 reports that she initially entered the United States without inspection on December 28, 1999, when she was 28 years old, and remained in the United States unlawfully through December 26, 2008, accruing unlawful presence during that entire period. As the period of unlawful presence accrued is one year or more, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for a period of 10 years from her departure from the United States. The applicant does not contest this finding of inadmissibility on appeal.

The applicant is eligible to apply for a waiver of this ground of inadmissibility under section 212(a)(9)(B)(v) of the Act, as the spouse of a U.S. citizen. In order to qualify for this waiver, however, she must prove that the refusal of her admission to the United States would result in extreme hardship to her spouse, a much higher standard than required under section 212(d)(11) of the Act. Hardship to the applicant will not be separately considered, except as it may affect the applicant's 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 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. 627, 632-33 (BIA 1996)*; *Matter of Ige, 20 I&N Dec. 880, 885 (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 1292, 1293 (9th Cir. 1998)* (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.

On motion, the applicant's spouse submits additional evidence to demonstrate that he is suffering from emotional, physical, and financial hardship that cumulatively amounts to extreme hardship. The applicant's spouse states that he has been in poor health and he used to rely on the applicant for emotional and physical support. The record indicates that the applicant and her U.S. citizen spouse have been married since November 28, 2003. The applicant and her husband both have children from previous relationships. The applicant's son is also applying for an immigrant visa and waiver of inadmissibility at this time, and resides with the applicant in Mexico. The family has been separated since December 2008, when the applicant and her son voluntarily departed the United States to pursue their visas. The applicant's spouse states that the emotional, physical, and financial stress from separation from his spouse has caused him extreme hardship. In support of that statement, the record contains a letter dated May 23, 2012, from Physician Assistant California. states that the applicant's spouse has been a patient at the clinic since September 2010 and that he has a history of "hypertension, benign prostatic hypertrophy and high cholesterol…" She states that he takes prescribed medications for those ailments. She also states that the applicant's husband "has developed reflux disease and anxiety/depression." The applicant's spouse states that when his first wife died, he also experienced depression and anxiety, but that his symptoms were relieved when he met the applicant and began his relationship with her. He states that he is now re-experiencing depression as a result of separation from the applicant. stated that the applicant's spouse was prescribed Zoloft and was referred to a psychologist for further evaluation due to worsening symptoms. A letter dated June 6, 2012 from Mental Health Therapist Mental Health Services states that the applicant's spouse visited the clinic to obtain mental health services. The record also indicates that the applicant's spouse filled prescriptions for medication to assist him with his depression and anxiety.

The applicant's spouse states that being separated from the applicant has also caused him financial hardship. The record indicates that the applicant's spouse has worked as a farmworker for over 15 years, where he earns approximately $21,907 per year. Although this amount is over the poverty line for a family of two, the applicant's spouse states that the applicant has not been able to find employment in Mexico, so she relies on him for support, as a result, the applicant's spouse is supporting two households. The record indicates that the applicant contributes $500 to $900 per month in support of the applicant and his stepson in Mexico, which leaves him with little to live on in the United States. Letters in the record from the applicant's spouse's family, employer, colleagues and friends attest that the applicant's spouse is hardworking and doing his best to care for both households, but that he has been suffering emotionally, physically, and financially, as a result. The evidence does not establish extreme hardship when considered individually, nonetheless, having reviewed the preceding evidence in the aggregate, the AAO finds it to establish that the applicant's spouse is experiencing extreme hardship resulting from his separation from the applicant. In reaching this conclusion, we note the applicant's spouse's long-term medical problems, previous loss of a spouse due to illness, as well as his limited financial means. Documentary evidence and statements from medical professionals, family, friends, and

community members corroborate the applicant's spouse's claims of emotional hardship, physical, and financial concerns. The applicant's spouse is also concerned about his family's safety in Mexico. The AAO concludes that, considering the evidence in the aggregate, the applicant's spouse is experiencing extreme hardship resulting from his separation from the applicant.

As to whether the applicant's spouse would suffer extreme hardship if he were to relocate to Mexico to reside with the applicant, on motion, the applicant's spouse submitted additional evidence of his extensive family ties in California, and also documents the difficulty he would have in obtaining employment in Mexico as a result of his age and established employment in the United States. The applicant's spouse also submitted evidence to document his long-term reliance on medical care in California to treat his chronic conditions. The record demonstrates that the applicant's spouse has important employment and family ties in the United States, including his daughter from his first marriage. The record indicates that the applicant's spouse's daughter and his four siblings all reside in the same city in California. Letters from those individuals in the record establish the applicant's spouse's close relationship to his family members in the United States. Also, as noted above, the applicant's spouse has maintained employment with the same employer in the United States for over 15 years, as well as relied on the local health system for regular medical care to treat his hypertension, high cholesterol, and monitor his prostate condition. Although none of these factors in and of themselves amount to extreme hardship, the AAO concludes that, considering the evidence in the aggregate, the applicant's spouse would experience extreme hardship should he relocate to Mexico to reside with the applicant.

When the specific hardship factors noted above and the hardships routinely created by the separation of families are considered in the aggregate, the AAO finds that the applicant has established that her spouse would face extreme hardship if the applicant's waiver request is denied. The applicant has established statutory eligibility for a waiver of her inadmissibility under section 212(a)(9)(v) of the Act.

In that the applicant has established that the bar to her admission would result in extreme hardship to her qualifying relative, and has established that she merits a waiver under section 212(d)(11) of the Act, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

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.

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 AAO must then, "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's initial entry without inspection, her involvement in bringing her minor son unlawfully to the United States, and her unlawful presence in the United States, for which she now seeks a waivers. The mitigating factors include the hardship to the applicant's spouse, the letters in the record documenting the applicant's good moral character, work and involvement in the community in the United States, and the lack of a criminal record for the applicant.

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

In proceedings for an application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(d)(11)) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. After a careful review of the record, the AAO finds that in the present motion, the applicant has met her burden.

ORDER: The motion to reopen is granted and the underlying application is approved.