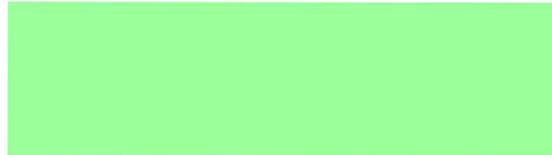


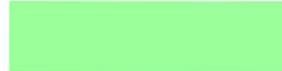


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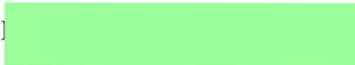


Date: **JUN 20 2013**

Office: GUATEMALA CITY

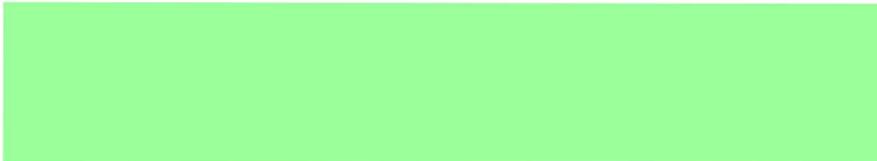


IN RE: Applicant:]



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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Guatemala who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year, section 212(a)(9)(A)(ii) of the Act as an alien previously removed, and section 212(a)(9)(C)(i)(II) of the Act as an alien unlawfully present in the United States after previous immigration violations. The applicant is married to a U.S. citizen and is the son of a lawful permanent resident. The applicant seeks a waiver of inadmissibility in order to reside with his wife and his mother in the United States.

The field office director found that the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act and is ineligible for a waiver because ten years have not passed since the applicant's last departure. The field office director denied the application accordingly.

On appeal, counsel contends, among other things, that the applicant is eligible for a waiver because both of his reentries into the United States occurred before April 1, 1997, the date section 212(a)(9)(C) of the Act became effective. Counsel contends the applicant filed extensive documentation showing that he established extreme hardship.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and his wife, I indicating they were married on June 14, 2001; an affidavit from the applicant; a letter from two letters from the applicant's mother, a letter from physician; copies of tax returns and other financial documents; documents addressing business; letters from the applicant's sister and other family members; letters of support; a copy of the U.S. Department of State's Human Rights Report for Guatemala and other background materials; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

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

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

....

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

....

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] 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 [Secretary] 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.

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

(A) *Certain aliens previously removed.*

(i) *Arriving aliens.* Any alien who has been ordered removed under section [235(b)(1) of the Act] or at the end of proceedings under section [240 of the Act] initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) *Other aliens.* Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) *Exception.* – Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

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

(C) Aliens unlawfully present after previous immigration violations. -

(i) In general. - Any alien who -

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

In this case, the record shows, and counsel concedes, that the applicant attempted to enter the United States in September 1985 without inspection, was ordered deported by an immigration judge, and was deported from the United States on September 28, 1985. In addition, the record shows the applicant entered the United States in August 1992 using a Canadian visitor's visa, was placed in deportation proceedings for working without authorization and violating the terms of his visa, and was subsequently granted voluntary departure by an immigration judge. The record shows that the applicant did not timely depart the United States as ordered and was subsequently deported from the United States on October 26, 1994. The record further shows the applicant re-entered the United States in January 1997 without inspection. The applicant's previous order of deportation was reinstated and the applicant was again removed from the United States on April 9, 2008. The applicant accrued unlawful presence beginning on April 1, 1997, the date of enactment of the unlawful presence provisions under the Act, until his removal in April 2008. The applicant accrued eleven years of unlawful presence. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more and seeking admission to the United States within ten years of his last departure. Furthermore, the applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act as an alien who was ordered removed and was removed from the United States.

Regarding inadmissibility under section 212(a)(9)(C) of the Act, the AAO finds counsel's contention that the applicant is not inadmissible under this section of the Act to be persuasive. The record shows that the applicant reentered the United States using a visitor's visa in August 1992. His reentry into the United States without inspection was in January 1997, pre-dating the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Because "the unlawful reentry or attempted unlawful reentry must have occurred on or after April 1, 1997," the applicant is not inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act. See *U.S. Department of Justice, Office of Programs (HQPGM), Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)*, dated June 17, 1997, at 6. Therefore, the applicant is eligible to apply for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act for his unlawful presence and for permission to reapply for admission to the United States under section 212(a)(9)(A)(iii) of the Act for his previous removals.

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.

In this case, the applicant's mother, [REDACTED], states that she is eighty-eight years old, is very sick, and needs her son to take care of her. She contends she gets more depressed and sad with each day that passes because her son is not by her side. She states that her son is her youngest child and that he is her pride, love, and what holds her together. According to [REDACTED] her son has been attacked and robbed in Guatemala and she does not sleep many nights, worrying about his safety. In addition, [REDACTED] states she uses a wheelchair and cannot walk more than a few feet. She states she cannot travel to Guatemala to see her son due to her weak health, particularly considering that after flying into Guatemala, she would need to take a bus for four hours.

After a careful review of the entire record, the AAO finds that if the applicant's mother remains in the United States without her son, she would suffer extreme hardship. The record shows that [REDACTED] is currently ninety years old and documentation in the record corroborates her contentions about her medical issues. A letter from her physician states that [REDACTED] has been under his care since 2009 and has been diagnosed with anxiety disorder, asthma, dementia, osteoarthritis, vertigo, and cirrhosis of the liver. A letter from the applicant's sister describes the unique bond the applicant has with their mother and the depression [REDACTED] is suffering because of the absence of her son. The AAO recognizes the anxiety and sleeplessness [REDACTED] has been experiencing because she worries about her son's safety in Guatemala, and takes administrative notice that the U.S. Department of State describes the threat of violent crime in Guatemala as "critical." According to the State Department, Guatemala remains "one of the more dangerous countries in the world," and armed robberies are common in all areas of the country. *U.S. Department of State, Country Specific Information*, dated March 22, 2013. Considering these unique circumstances cumulatively, the AAO finds that the hardship the applicant's mother would experience if she remains in the United States is extreme, going beyond those hardships ordinarily associated with inadmissibility.

The AAO also finds that if the applicant's mother returned to Guatemala to be with her son, she would experience extreme hardship. As stated above, the record shows the applicant's elderly mother has numerous, serious medical problems. The AAO recognizes that returning to Guatemala would disrupt the continuity of her health care. Moreover, the AAO acknowledges that [REDACTED] has been a lawful permanent resident of the United States for more than twenty years, since April 1991, and that readjusting to living in Guatemala would be difficult, particularly considering her advanced age and medical problems. Furthermore, the AAO also acknowledges the potential for violent crime in Guatemala as described above and notes that the State Department states that "dual nationals are more likely to become victims of serious crimes, as they tend to be integrated into local society and may not reside in the safest areas." *Id.* Considering all of these factors cumulatively, the AAO finds that the hardship [REDACTED] would experience if she returned to Guatemala to be with her son is extreme, going well beyond those hardships ordinarily associated with inadmissibility or exclusion.¹

¹ Because the AAO finds that the applicant has established extreme hardship to a qualifying relative, we need not address whether the applicant's wife, a second qualifying relative, would also suffer extreme hardship.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case include: the applicant's three deportations and removals from the United States; the applicant's failure to depart the United States as ordered by the immigration judge; the applicant's entry without inspection into the United States; the applicant's unauthorized presence and periods of unauthorized employment in the United States; the applicant's failure to abide by the terms of his visitor's visa; and the applicant's conviction for driving while intoxicated in March 2008. The favorable and mitigating factors in the present case include: the applicant's family ties to the United States, including his U.S. citizen wife and lawful permanent resident mother; the extreme hardship to the applicant's entire family if he were refused admission; evidence the applicant has regularly paid taxes while living in the United States; and numerous letters of support describing the applicant as a hard worker and an honest and kind man who "has been known to give his shirt off his back to help a man in need."

The AAO finds that, although the applicant's immigration violations and conviction are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.