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

U.S. Citizenship and Immigration Services

[redacted]

Date: MAY 2 1 2013 Office: SEATTLE FILE: [redacted]

IN RE: Applicant: [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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The record reflects that the applicant, a native and citizen of Mexico, entered the United States without inspection in 1993. The applicant was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of more than one year. The applicant seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), to reside in the United States with his U.S. citizen spouse.

The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director,* dated June 20, 2012.

On appeal, counsel contends that the applicant's spouse will suffer extreme hardship if the applicant's waiver application is not approved and submits additional evidence in support of this contention. Counsel further advises that the applicant's spouse gave birth to their first child on April 18, 2010, subsequent to the date that the applicant filed his Form I-601.

The record contains the following documentation: a brief in support of the appeal; statements by the applicant, the applicant's spouse, and other family members; medical documentation for the applicant's spouse; psychological reports for the applicant's spouse; financial documentation; country-conditions reports on Mexico; and letters of reference. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> 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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> . . . .
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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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> . . . .
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> (v) Waiver. – The [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 [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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse is the only qualifying relative in this case. Under this provision of the law, children are not deemed to be qualifying relatives. However, though children are not qualifying relatives under this statute, U.S. Citizenship and Immigration Services (USCIS) does consider that a child's hardship can be a factor in the determination whether a qualifying relative experiences extreme hardship. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

The record reflects that the applicant entered the United States without inspection in 1993 and remained in the United States until January 2008. The applicant began accruing unlawful presence on April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, (IIRIRA).[1] The applicant was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States from April 1, 1997 until February 2008, a period of more than one year. The applicant does not contest this finding of inadmissibility. The applicant subsequently returned to the United States on July 15, 2009, pursuant to a grant of significant public interest parole, in order to testify for the prosecution in an immigration violation case, and the applicant continues to reside in the United States.

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.

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[1] No period of unlawful presence prior to the effective date of the IIRIRA is counted when determining inadmissibility under section 212(a)(9)(B) of the Act.

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.

Counsel contends that the applicant's spouse will suffer psychological hardship if she is separated from the applicant. The record includes evidence documenting that the applicant's spouse has a history of psychological problems dating back to November 6, 2001, when the applicant's spouse was diagnosed with depression and anxiety. A statement from a doctor indicates that after the applicant returned to Mexico in 2008, the applicant's spouse sought treatment for depression and anxiety and that her symptoms were severe enough to warrant prescription medication. The doctor's statement indicates that the applicant's spouse's condition improved after the applicant's return from

Mexico in 2009, but that in July 2012, the applicant's spouse's previous symptoms of anxiety and depression resurfaced because the applicant may have to return to Mexico. The doctor concluded that the applicant's spouse would suffer extreme hardship if separated from the applicant and that her situation would be worsened by the fact that she would need to care for her young daughter as a single parent.

In addition, the record includes a psychological evaluation of the applicant's spouse dated July 26, 2012, which states that the applicant's spouse presented anxious symptoms of clinical significance triggered by the applicant's immigration situation, with mild suicidal thoughts. The evaluation included a diagnosis of generalized anxiety disorder and major depressive disorder, recurrent.

Medical documentation in the record indicates that the applicant's spouse has had abnormal Pap smears in the past and has a history of anxiety and depression, pulmonic stenosis, and mild hyperlipidemia.

Counsel further contends that the applicant's spouse will suffer economic hardship if the applicant's waiver is not approved. The record indicates that the applicant's spouse is employed and is currently earning $2,100 per month. Counsel presented evidence indicating that the family's monthly expenses average $3,500. In addition, the applicant's spouse gave birth to their first child in April 2010. Absent the income of the applicant, the record indicates that the qualifying spouse would unable to meet her financial obligations if separated from the applicant.

The record establishes that if the waiver application were denied, the applicant's spouse would experience psychological, medical, and financial hardship. Her psychological and emotional health has worsened as a result of the uncertainty concerning the applicant's immigration status, causing her to have suicidal thoughts. Additionally, should she separate from the applicant, she would be responsible for providing child care alone while continuing to work. Moreover, the record corroborates claims that she will be unable to manage her living expenses on her salary without the applicant's assistance. These hardships, when considered in the aggregate, are beyond the common results of removal and would rise to the level of extreme hardship if she remained in the United States without the applicant.

The record further indicates that the applicant's spouse would experience hardship were she were to relocate to Mexico to be with him. Although the applicant's spouse was born in Mexico, she came to the United States when she was only nine years old and has resided in the United States for over 20 years. All of her family members, including her parents, siblings and grandparents, reside in the United States, and she has no immediate family living in Mexico. In addition to severing ties with her family, counsel states that the applicant's spouse would have to sacrifice her job, her health insurance, and the quality of life and economic opportunity for both herself and their daughter if she moved to Mexico. The applicant also submits information on country conditions in Mexico, including a February 2012 travel warning for Mexico issued by the U.S. Department of State. The AAO notes that the most recent travel warning specifically references the Mexican state of Guerrero, where the applicant formerly resided, suggesting that visitors "exercise caution and stay within

tourist areas.... The state of Guerrero has seen an increase in violence among rival criminal organizations. Acapulco's murder rates increased dramatically since 2009."[2]

Based on the evidence on the record and considering it in the aggregate, the applicant has established that his spouse would suffer hardship beyond the common results of removal if she were to relocate to Mexico to reside with the applicant. As indicated above, she has lived for most of her life in the United States and has no close family ties to Mexico. Additionally, she has no clear means of financial support there and would be abandoning her own employment and the related benefits she currently enjoys. Finally, country conditions in Mexico would affect the applicant's spouse emotionally and physically, given the violence and instability described in objective evidence the applicant submits to corroborate these claims.

The AAO thus finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. In discretionary matters, the alien 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).

> In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). 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).

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[2] *See* U.S. Department of State, *Travel Warning*, "Mexico," at http://travel.state.gov/travel/cis_pa_tw/tw/tw_5815.html.

The favorable factors in this matter are the extreme hardships the applicant's U.S. citizen spouse and U.S. citizen daughter would face if the applicant were to reside in Mexico, whether they accompanied him or remained in the United States; the applicant's apparent lack of a criminal record;[3] the applicant's willingness to assist the U.S. government in the prosecution of an immigration violation case; and his good character as indicated in letters of reference written on his behalf. The unfavorable factors in this matter are the applicant's unlawful entry in 1993 and unlawful presence while in the United States.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The waiver application is approved.

[3] On November 19, 2005, the applicant was charged with driving under the influence; however, the charge was subsequently dismissed on February 9, 2011, upon the applicant's successful completion of all requirements of a five-year deferred prosecution in the State of Washington.