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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: APR 15 2014 Office: SAN FRANCISCO, CA [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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, San Francisco, California, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the appeal 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)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen spouse.

In a decision, dated March 21, 2013, the field office director found that the applicant failed to show that her spouse would suffer extreme hardship as a result of her inadmissibility. In support of her waiver application the applicant submitted: an affidavit, an affidavit from her spouse, an affidavit from friends, and medical documentation. Specifically, the field office director found that the documentation in the record failed to fully address how the applicant's spouse's medical conditions and the applicant's ability to financially support her spouse would cause him extreme hardship upon relocation to the Philippines. The field office director noted that no documentation regarding country conditions was submitted in support of the application. In regards to separation, the field office director found that the record failed to show that the applicant's spouse would not be able to obtain the care and support the applicant provides for him from another source. The waiver application was denied accordingly.

On appeal, counsel stated that the applicant's spouse cannot relocate to the Philippines because his medical conditions would not allow him to travel by plane, he would not have access to proper health care, he is 80 years old, and he was born and raised in the United States. Counsel also stated that the applicant would have no support or ability to find employment in the Philippines. Finally, counsel asserted that the applicant emotionally, physically, and financially supports her spouse while in the United States. Counsel submitted a brief, photographs, and financial documentation to additionally support the record of hardship.

In our decision, dated November 6, 2013, we found that the record established that the applicant's spouse would suffer extreme hardship as a result of relocation, but did not show that the applicant would suffer extreme hardship as a result of separation. Specifically, we found that due to the applicant's spouse's advanced age, familial and cultural ties to the United States, and his various medical conditions, including conditions which require him to be on oxygen, it would be an extreme hardship for him to relocate to the Philippines. We also found that the record did not give a full picture of the applicant's spouse's financial situation failing to show that the applicant's spouse would not be able to support himself on his income and/or retirement benefits and that he would not be able to afford the care he would need in the applicant's absence. The record failed to indicate that if they were separated her husband would then suffer extreme emotional hardship. We noted that the applicant's spouse and his sister live in the same apartment complex and the record did not show that she would be unable or unwilling to help her brother in the event he was separated from the applicant. Thus, we found that the current record did not show that the applicant's spouse would suffer extreme hardship as a result of the applicant's inadmissibility.

On motion counsel submits additional evidence of hardship, including a statement from the applicant's spouse, a psychological evaluation from the applicant's spouse, and documentation regarding the applicant's spouse's sister's age.

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 to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

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

> (B) 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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> (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), and again seeks admission within 3 years of the date of such alien's departure or removal, or
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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 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.

As stated in our previous decision, the applicant entered the United States on June 23, 2008, as a B2 visitor, with an authorized period of stay until December 21, 2008. The applicant departed the United States on October 28, 2009. On March 11, 2010, she then reentered the United States using her visitor's visa and was granted an authorized period of stay until September 10, 2010. On April

23, 2012, the applicant filed an application for adjustment of status. The applicant has not departed the United States. Inadmissibility under section 212(a)(9)(B)(i)(I) of the Act, which is triggered upon departure, remains in force until the applicant has been absent from the United States for three years. The applicant remained outside of the country for less than three years. Thus, the applicant is inadmissible under section 212(a)(9)(B)(i)(I) of the Act. On motion, counsel does not contest the applicant's inadmissibility. The applicant's qualifying relative is her 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. *Salcido-Salcido v. I.N.S.*, 138 F.3d 1292 (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 appeal, the record of hardship included: counsel's brief, an affidavit from the applicant, an affidavit from the applicant's spouse, an affidavit from friends of the applicant, medical documentation, photographs, and financial documentation.

On motion, the record of hardship includes: a statement from the applicant's spouse, a psychological evaluation for the applicant's spouse, and documentation regarding the applicant's spouse's sister's age.

The record now establishes that the applicant's spouse would suffer extreme hardship as a result of separation from the applicant. The record again fails to provide a complete picture of the applicant's spouse's financial situation, but does indicate that the emotional hardship involved in separation would rise to the level of extreme hardship. The record indicates that the applicant's spouse has no other family to help care for him if the applicant is removed. His sister, who is his only other living family member, is 83 years old and also requires care. The psychological evaluation in the record indicates that the applicant and her spouse have a secure and healthy emotional attachment; that her spouse is suffering from anxiety and stress as a result of the possibility of separation; and that the applicant cares for her spouse on a daily basis, helping him with cooking, cleaning, his medications, and his mobility. Thus, we find that because of the applicant's spouse's age, daily needs, and lack of other means of support, he would suffer extreme emotional hardship as a result of separation. Considered in the aggregate, the applicant has established that her spouse would face extreme hardship if her 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 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 favorable factors in the applicant's case include the extreme hardship her spouse would face if she were denied a waiver of inadmissibility, the lack of any criminal record, and, as attested to by

her spouse, her role as a loving and caring wife. The unfavorable factors in the applicant's case include her unlawful presence in the United States.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case 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 her burden. The motion is granted and the appeal will be sustained.

ORDER: The motion is granted and the appeal sustained.