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

(b)(6)

U.S. Citizenship and Immigration Services

Date: AUG 13 2014 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 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 admission within ten years of her last departure from the United States. The record indicates that the applicant is married to a U.S. citizen and is the mother of three U.S. citizen children. She is also the daughter of a lawful permanent resident. She is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 U.S. citizen spouse and children and lawful permanent resident mother.

The Director concluded that while the applicant established that extreme hardship would be imposed on a qualifying relative, the applicant failed to establish that the waiver should be granted as a matter of discretion, and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Service Center Director*, dated October 17, 2013.

On appeal, counsel contends that the Director failed to properly balance the favorable and unfavorable factors to determine whether discretion should be favorably exercised, and a proper balance of the equities in the applicant's case would result in the approval of the Form I-601.

The record includes, but is not limited to, the following documentation: briefs by applicant's counsel in support of Form I-601, Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), and Form I-290B, Notice of Appeal or Motion (Form I-290B); statements by the applicant, the applicant's spouse, and other family members; a psychological evaluation of the applicant's spouse; psychological and medical documentation for two of the applicant's children; letters of reference; and the applicant's criminal records related to her conviction for negligent homicide. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (B) Aliens Unlawfully Present.-
>
> > (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.

The record indicates that the applicant entered the United States without inspection on or before 1991 and remained in the United States until her removal on May 12, 2010. Under section 212(a)(9)(B)(iii)(I) of the Act, no period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under section 212(a)(9)(B)(i) of the Act. The applicant turned 18 on May 16, 1997, thus she began accruing unlawful presence on May 16, 1997. The applicant was placed in removal proceedings on May 16, 2002 and on March 18, 2005, an immigration judge denied her application for cancellation of removal and granted voluntary departure in lieu of removal on or before May 17, 2005. The regulations provide at 8 CFR § 239.3 that if an alien is already accruing unlawful presence when removal proceedings are initiated, s/he will continue to accrue unlawful presence unless the alien is protected from such accrual. Accrual of unlawful presence stops on the date the alien is granted voluntary departure and resumes on the day after voluntary departure expires. The applicant therefore accrued unlawful presence from May 16, 1997 until she was granted voluntary departure on March 18, 2005.[1] Thus, the applicant was unlawfully present in the United States for a period of more than one year. The applicant does not contest this inadmissibility.

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

> (v) Waiver.-The Attorney General [now 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 [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 or his child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse and lawful permanent resident mother are the only qualifying relatives in this case.

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[1] The applicant appealed the denial of her application for cancellation of removal to the BIA. On March 28, 2006, the BIA dismissed the appeal and ordered the applicant to depart voluntarily within 60 days. The applicant failed to depart and filed a motion to reopen and reconsider with the BIA, which was denied on June 9, 2006. On July 7, 2006, the applicant filed a petition for review with the U.S. Court of Appeals for the Fifth Circuit. The applicant's motion for a stay of removal was granted on December 12, 2006, and thus the applicant further accrued unlawful presence from May 27, 2006, when her voluntary departure expired, to December 12, 2006 and again from May 31, 2007, when her petition for review was denied, until she was removed on May 12, 2010. *See generally, Memorandum by Donald Neufeld, Acting Associate Director, Domestic Operations Directorate; Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate; Pearl Chang, Acting Chief, Office of Policy and Strategy, dated May 6, 2009.*

Under this provision of the law, children are not deemed to be qualifying relatives. However, although children are not qualifying relatives under this statute, U.S. Citizenship and Immigration Services (USCIS) does consider a child's hardship a factor in determining 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 we then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (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,* the Board of Immigration Appeals (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 v. INS*, 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.

As noted above, the Director determined that the applicant established that her qualifying relative would suffer extreme hardship if the waiver application is not granted. *See Decision of the Service Center Director*, dated October 17, 2013.

Counsel contends that the applicant's spouse is suffering emotional hardship in the absence of the applicant. The record includes a clinical assessment of hardship for the applicant's spouse by a clinical psychologist. The assessment states that the applicant's spouse lives with the applicant's mother and the applicant's two children from a previous marriage, and that he is separated from the applicant and their daughter, and that this separation is a stressful situation for the applicant's spouse, causing difficulty sleeping and constant depression. The assessment indicates that the applicant's spouse meets the criteria for generalized anxiety disorder and depression. The record further includes evidence that the applicant's spouse was prescribed with the anti-depressant medication Celexa by his physician.

In addition, the record includes psychological and medical documentation for the two stepchildren of the applicant's spouse, children of the applicant from a previous marriage. The evidence indicates that the applicant's daughter is experiencing emotional hardship and has attempted suicide. The evidence further indicates that the applicant's son has autism and behavioral problems. As stated above, under section 212(a)(9)(B) of the Act of the Act, children are not deemed to be qualifying relatives, and a child's hardship will only be considered to be a factor if it affects whether a qualifying relative experiences extreme hardship. The clinical assessment of the applicant's spouse indicates that he lives with his stepchildren, and that he cannot take care of the stepchildren by himself. The applicant's spouse states that he is very concerned about the emotional health of the two children, and is constantly worrying about his stepdaughter. The statement from the applicant's mother states that the applicant's spouse helps to support his stepchildren, and that he treats them like his own children.

The record reflects that the cumulative effect of the emotional and psychological hardships that the applicant's spouse is experiencing due to the applicant's inadmissibility, and the concern he has for the applicant's two children, rises to the level of extreme. We thus conclude that were the applicant's spouse to remain in the United States without the applicant due to her inadmissibility, the applicant's spouse would suffer extreme hardship.

Concerning the hardship that the applicant's spouse may experience if he relocates to Guatemala to be with the applicant and their child, the record reflects that the applicant's spouse was born in the United States and has always resided in the United States. The applicant's spouse states that he does not speak Spanish. In the brief in support of Form I-601, counsel states that the applicant's spouse has traveled to Guatemala on several occasions to visit the applicant and his daughter and attempted to find employment and start a new life there, but he was unable to find employment and returned to the United States. The applicant's spouse also indicates in his statement that he is unable to find a job in Guatemala.

Based on the evidence on the record, the applicant has established that her spouse would suffer hardship beyond the common results of removal if he were to relocate to Guatemala to reside with the applicant.

As we have found that the applicant has established that her spouse will experience extreme hardship if the waiver application is not approved, it is not necessary for the applicant to establish that her mother, her other qualifying relative, will experience extreme hardship if the waiver application is not approved.

We find 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 he 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).

The record shows that in October 2001, the applicant was involved in a traffic accident in which her niece was killed. On the applicant was convicted of criminally negligent homicide in the 185th District Court for the State of Texas.[2] The indictment indicates that the applicant unlawfully caused the death of her niece by criminal negligence by driving at a speed that was unreasonable and by failing to properly restrain a child passenger under the age of 17.

The favorable factors in this matter include:

- The applicant's family members residing in the United States, her U.S. citizen spouse, her two U.S. citizen children, and her lawful permanent resident mother.
- The extreme hardships that the applicant's spouse will endure in the applicant's absence.
- The apparent absence of any further criminal records beyond her conviction for negligent homicide.
- The approved immigrant visa petition filed on the applicant's behalf.
- A letter in the record from the mother of the applicant's niece who was killed in the car accident expressing forgiveness to the applicant.
- Letters of reference on the applicant's behalf.
- A court order establishing successful completion of court ordered community supervision, and the completion of a drug rehabilitation program.

The unfavorable factors in this matter include:

- The applicant's conviction for negligent homicide.
- The police report from the car accident indicating that the car the applicant was driving had seven passengers, even though it was designed to carry only five passengers.
- The applicant's failure to properly restrain a child passenger under the age of 17.
- The police report indicating that the applicant was speeding at the time of the accident.
- The police report indicating the presence of cocaine and alcohol in the applicant's system, with a blood-alcohol level of .013.
- The applicant's original unlawful entry into the United States.
- The applicant's failure to comply with voluntary departure.
- The applicant's unauthorized employment in the United States.
- The fact that the applicant's marriage, the birth of her youngest child and the filing of the immigrant visa petition benefiting her occurred after the applicant was placed into immigration proceedings, and, therefore, are "after-acquired equities," to which we accord diminished weight.

[2] As noted by the Service Center Director in his decision, the offense of criminally negligent homicide is not a crime involving moral turpitude subject to a finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. *See Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992).

We note that the applicant has provided a statement regarding remorse for her actions that led to the death of her niece in 2001 and her conviction for negligent homicide in 2003. However, considering the seriousness of the crime for which the applicant was convicted, as well as the lack of evidence of favorable factors such as employment history, ties to the community, and good character, we find the applicant has not established that a favorable exercise of the Secretary's discretion is warranted.

The applicant is also inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien previously removed from the United States who is seeking admission within 10 years of her removal. She requires an approved Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). The record indicates that the applicant's Form I-212 was denied by the Director, Nebraska Service Center on October 17, 2013. The Director issued two separate decisions for the Form I-601 waiver and Form I-212. However, the record contains only one properly executed Form I-290B. While the record includes a copy of a Form I-290B appeal for the denial of the Form I-212, there is no evidence that the Form I-290B was properly executed, or that the required filing fee was received by USCIS. However, as the applicant does not merit a favorable exercise of discretion as required for a waiver under section 212(a)(9)(B)(v) of the Act, she would also not merit a favorable exercise of discretion as required for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.