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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: FEB 2 6 2014 OFFICE: ATHENS, GREECE [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:

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,

Michael Shumway

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Athens, Greece. The matter came before the Administrative Appeals Office (AAO) on appeal and the appeal was dismissed. The matter is again before the AAO on motion to reopen and reconsider. The motion will be granted and the appeal will be sustained.

The applicant is a native and citizen of Israel who entered the United States on July 5, 2005 and was admitted as a temporary B-2 visitor until July 20, 2005. The applicant remained in the United States beyond his authorized period of stay before departing voluntarily on January 3, 2008. On February 15, 2006, after having already overstayed his visa, the applicant filed a Form I-539, *Application to Change or Extend Status*. The extension of status application was denied by U.S. Citizenship and Immigration Services (USCIS) on September 23, 2006 and the applicant accrued unlawful presence in the United States for a period in excess of one year. He 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 more than one year and seeking readmission within 10 years of his last departure. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). He seeks a waiver of inadmissibility under 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.

The Field Office Director concluded that the applicant 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. *See Decision of the Field Office Director,* dated June 14, 2010.

On appeal, the AAO concluded that although the applicant established that extreme hardship would be imposed on a qualifying relative in the event of relocation, the applicant failed to establish that extreme hardship would be so imposed in the event of separation, and the AAO dismissed the appeal accordingly. *See Decision of the AAO,* dated July 27, 2012. In response, counsel for the applicant filed the present motion to reopen and reconsider. *See Form I-290B*, Notice of Appeal or Motion (Form I-290B), received August 27, 2012.

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 USCIS policy. A motion to reconsider a decision on an application 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).

Counsel contends on motion that the AAO failed to consider the entire range of hardship factors in their totality. Counsel asserts that separation-related hardship to the applicant's spouse has become more severe since the appeal was dismissed, in that she is pregnant with her second child, her depression has worsened, and her close family members are experiencing declining health and financial difficulties. Counsel has supplemented the record on motion with a new hardship affidavit from the applicant's spouse, affidavits from the applicant's spouse's sister and mother,

psychological and medical records, financial and tax records, an offer of likely employment to the applicant, country conditions articles, and family photos. Counsel additionally refers to a number of published extreme hardship-related cases. The AAO finds that the applicant has met the requirements of 8 C.F.R. §§ 103.5(a)(2) and 103.5(a)(3), and the motion will be granted and the application reopened and reconsidered.

In addition to the supplemental evidence described above, the record contains but is not limited to: Forms I-290B; various immigration applications and petitions; hardship letters; letters from the applicant's spouse's mother, sister and brother; other supporting letters; a psychologist's letter and earlier evaluation; physicians' letters concerning the applicant's mother; medical records related to the applicant's spouse's pregnancy; Israel country conditions documents; and records related to the applicant's inadmissibility and unauthorized employment in the United States. The entire record was reviewed and considered in rendering this decision on the motion.

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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> (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.

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 and his child can be considered only insofar as it results in hardship to a qualifying relative. In the present case, the applicant's spouse is the only qualifying relative. 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 AAO's previous discussion on appeal concerning extreme hardship factors and related case law are hereby incorporated by reference.

The AAO found on appeal that the applicant has established that his qualifying relative spouse would experience extreme hardship if she were to relocate to Israel to be with him. The AAO will not disturb this finding on motion. We look only to whether the applicant has established on motion that his spouse would suffer extreme hardship related to separation.

On appeal, the AAO noted that the record lacked sufficient documentary evidence to establish that the applicant's spouse is suffering economic hardship in the applicant's absence or that the applicant would be able to assist his spouse financially if permitted to return to the United States. On motion, income tax documentation has been submitted showing that the applicant's spouse's earnings declined substantially from tax year 2010 to 2011. In a hardship affidavit submitted on appeal, the applicant's spouse indicated that her diagnoses of major depression and anxiety have been exacerbated by a hostile employer. In an affidavit submitted on motion, the applicant's spouse states that she is no longer employed. Her sister confirms that working conditions became so bad for the applicant's spouse that she had to quit her job and now relies financially on the applicant whose modest income in Israel is insufficient to support them both. An earnings statement submitted for the applicant for the month of May 2012 shows that he was paid a net salary of 7,486 shekels, the equivalent of $2,160 U.S. In a letter submitted on motion, states that he is strongly considering hiring the applicant upon his lawful return to the United States.

Court documentation submitted on motion shows that the family home shared by the applicant's spouse, her child, and her mother was foreclosed upon but ultimately saved in 2011 as a result of mortgage negotiation. The applicant's spouse's mother writes that her daughter feels very guilty that she cannot support her financially and worries about her health as she suffers from scoliosis, rheumatoid arthritis and sciatic nerve problems. The AAO noted on appeal that corroborating medical evidence had not been submitted concerning the mother. On motion, the record has been supplemented with medical records demonstrating that the applicant's spouse's 73-year-old mother suffers from sciatic lower back pain as a result of osteoarthritis of the lumbar and thoracic spine, and scoliosis and lumbar nerve root compression which prevents her from conducting normal daily activities. She has also been diagnosed with atherosclerosis of the aorta. The applicant's spouse's mother indicates that she may soon be required to use a walker. The applicant's spouse's sister notes that despite their mother's advanced age and declining physical condition, she cannot retire from her physically taxing job as a preschool teaching assistant because her income is necessary to maintain the family home. Income tax documentation submitted on motion confirms that the applicant's mother earned a little more than $20,000 for tax year 2011.

On motion, the record has been supplemented with a second letter from writes that the applicant's spouse has been struggling with severe depression and anxiety for years due to separation from the applicant. She notes that the applicant's spouse and toddler son must travel frequently to Israel to spend time with the applicant and that these travels are both extremely stressful and a significant financial burden. reports that when visiting Israel, the applicant's spouse experiences severe panic and anxiety around the current political situation and it is very difficult for her and her son to respond to frequent alarms and constantly having to go to a bomb shelter. She adds that the applicant has been called to active

military service which causes the applicant's spouse to live in constant terror about his safety. At the time of letter on motion, the applicant's spouse was pregnant with her second child. writes that the applicant's spouse's obstetrician has concerns for the unborn child given the severe anxiety experienced by his/her mother. confirms that the applicant's spouse is experiencing significant anxiety resulting in sleeplessness, palpitations and episodic panic attacks due to the current immigration challenges facing the applicant. avers that the physical and emotional stress of this separation poses a significant hardship for the applicant's spouse and carries greater risk for preterm labor and premature delivery, as well as growth restriction of the fetus and post-partum depression. Dr. explains that there are extreme concerns about the applicant's spouse's pregnancy and the health of the unborn baby given the levels of anxiety and stress. She states that is extremely critical that the applicant's spouse be provided with the emotional and financial support of the applicant given her current state of depression and severe anxiety, that without this support she is again at risk for post-partum depression compiled to her levels of depression and anxiety, which may become debilitating for her.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant's spouse, including her significant psychological, emotional, and health-related conditions and the economic impact of separation as now documented in the record. Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the separation-related challenges the applicant's spouse has and will continue to face, meet the extreme hardship standard.

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 favorable factors in the present case include extreme hardship to the applicant's U.S. citizen spouse as a result of the applicant's inadmissibility; the applicant's significant family ties to the United States, particularly to his spouse, his young minor child(ren), and his spouse's mother and sister; the emotional and familial support he provides to his spouse and son; his financial support of the applicant's spouse through his current earnings in Israel; his purported offer of employment in the United States through which he will likely provide greater economic support to his U.S. citizen spouse and her mother; and his apparent lack of any criminal record. The unfavorable factors are the applicant's immigration violations, including his periods of unlawful presence and unauthorized employment, and the lack of evidence that he paid income taxes during his periods of unauthorized employment. Although the applicant's violations of immigration law are significant, the positive factors in this case outweigh the negative factors. Therefore, the AAO finds that a favorable exercise of discretion is warranted.

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 been met.

ORDER: The motion is granted and the appeal is sustained.