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 27 2014 OFFICE: ANAHEIM, CALIFORNIA [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:

SELF-REPRESENTED

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the International Adjudications Support Branch on behalf of the Field Office Director, Ciudad Juarez, Mexico and a subsequent appeal was rejected by the Administrative Appeals Office (AAO) as untimely filed. The AAO will reopen the matter on service motion to address the appeal on the merits. The appeal will be sustained.

The applicant is a native and citizen of Mexico 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 readmission within ten years of his last departure from the United States. The record indicates that the applicant is the spouse of a lawful permanent resident and 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.

The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly. *See Decision of the Field Office Director,* dated April 17, 2013.

On appeal, the AAO concluded that the appeal was untimely filed, and rejected it accordingly. *See Decision of the AAO,* dated September 19, 2013. Based on subsequent information received by the AAO, we find that the Field Officer Director's decision was issued on April 17, 2013, but incorrectly dated April 17, 2012, and the applicant's appeal was therefore timely filed. The AAO now reopens the matter on service motion to address the appeal on the merits.

The record contains, but is not limited to: Form I-290B; various immigration applications and petitions; hardship letters; letters from the applicant; letters of character reference, support and concern from family and friends; prior employment and salary verification for the applicant; and medical records for the applicant's spouse's brother and sister. The entire record was reviewed and considered in rendering this decision on the appeal.

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

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

The record reflects that the applicant entered the United States without inspection in 2005 and remained until departing voluntarily to Mexico in September 2012, a period in excess of one year. As the applicant is seeking admission within 10 years of his departure, he was found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). The record supports this finding, the applicant does not contest inadmissibility, and the AAO concurs that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

A waiver of inadmissibility under section 212(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. 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).

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.

The applicant's spouse is a 24-year-old native of Mexico and lawful permanent resident of the United States who asserts economic, emotional, and physical hardship. She indicates that she has struggled desperately since the applicant's departure, having had to move from Arkansas to Texas where she and her two young children now reside with her parents in a small apartment. The applicant's spouse maintains that her parents and siblings are themselves struggling financially and physically and are unable to assist her. She explains that her sister has heart problems and is in the middle of a divorce, her brother who used to support her, was seriously injured in a job-related accident and is no longer able to support her, and her mother fell and broke her arm due to inclement weather. Her father confirms that since s accident, has unable to assist the applicant's spouse financially and she has instead become his caregiver. He adds that since his daughter was hospitalized due to heart problems and seizures resulting from a drug overdose, the applicant's spouse has become the caregiver for her children. The applicant's spouse indicates that she has become the near full-time caregiver for her brother, her sister's two children, and her own two children. The applicant's spouse's father explains that he has high blood pressure and had "stroke issues" in 2010, and thus must avoid stress. He explains that the stress brought on by the applicant's immigration problems and watching his daughter struggle has greatly exacerbated his own condition such that he cannot breathe or sleep well. The record contains no medical documentation concerning the applicant's spouse's father or mother. Documentation concerning her brother, , however has been submitted and demonstrates that he was injured at his place of employment on April 23, 2013. Medical records show that was hospitalized after sustaining both a facial fracture and an injury to his left arm and shoulder requiring the use of a sling and was likewise prescribed multiple medications. Medical records

also confirm that the applicant's sister, was hospitalized in April 2013 at a cost of nearly $18,000.

The applicant states that he has been unable to secure full-time work in Mexico and while he works part-time as a day laborer he does not earn enough to support himself and his wife and children in the United States. A sworn statement from the State Government declares that the local average monthly household income is $2,200 pesos, the equivalent of approximately $165 USD. The applicant and his spouse, as well as numerous family members and friends, ask that the applicant be permitted to return to the United States where he has always provided financially for his spouse and children. writes in a letter dated August 27, 2012, that the applicant had been employed by her company since October 17, 2005 as a states that the applicant earned $14.00 per hour, worked at least 40 hours a week, and always had some overtime. The applicant's spouse indicates that she can no longer handle the hardships of separation from the applicant and desperately needs the emotional and economic support he provides. Numerous family members and friends attest to the desperate nature of the applicant's spouse's situation.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant's spouse, including the economic, emotional and physical impacts of separation, and the likelihood that the applicant's presence in the United States would alleviate much of the hardships described. Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's U.S. lawful permanent resident spouse has and would continue to suffer extreme hardship due to separation from the applicant.

Addressing relocation, the applicant's spouse indicates that she is a lawful permanent resident of the United States, a hard-earned status she would lose were she to return to Mexico and join the applicant during the remainder of his 10-year period of inadmissibility. The applicant's spouse states that she has very close family ties to the United States, particularly to her two U.S. citizen children, her mother, father, and siblings, and her siblings' children – all of whom are in lawful immigration status. She has established that she is the primary caregiver for her own children, her seriously injured brother, and the two children of her sister who is herself of compromised health.

The applicant's spouse explains that she has no family in Mexico and fears that being separated from her entire family in the United States will cause her a great deal of depression and instability. She avers that her children will suffer from sub-par education and her employment prospects would be bleak in Mexico and diminished upon her return to the United States, if she is permitted to return at all after losing her lawful permanent resident status. The applicant notes that his parents' small home in is not large enough to accommodate his spouse and children, and lacks running water. The applicant's spouse expresses great fear of rampant crime and violence in Mexico, and references information published by the U.S. State Department. We note that the U.S. Department of State's current *Mexico Travel Warning*, dated January 9, 2014 provides some general support for the applicant's fears. The report also specifies that the kidnapping rate for , where the applicant's spouse and children likely would join him in the event of relocation, is the highest for all states in Mexico, more than doubled in 2012 over

2011, and the number of U.S. citizens reported to the consulate as kidnapped in 2013 increased by 75% over 2012. The State Department warns U.S. citizens to defer all non-essential travel thereto.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse, including her adjustment to a country in which she has not resided for many years; her close family ties to the United States including to her two U.S. citizen children, her mother, father, siblings, nieces, and nephews; her role of primary caregiver for several of her family members; the probable loss of her status as a U.S. lawful permanent resident; her economic and employment concerns; concern for the education of her children; and her dire concerns for the safety of herself and her children in Mexico. Considered in the aggregate, the AAO finds the evidence sufficient to demonstrate that the applicant's U.S. lawful permanent resident spouse would suffer extreme hardship were she to relocate to Mexico to be with the applicant.

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. lawful permanent resident spouse as a result of the applicant's inadmissibility; the evident economic and emotional support the applicant provided to his spouse and children while in the United States; his good moral character and essential presence in the community and the lives of his spouse and children as demonstrated by numerous attestations by others; and his apparent lack of any criminal record. The unfavorable factors are the applicant's immigration violations, which include his periods of unlawful presence and unauthorized employment in the United States. 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 appeal is sustained.