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: JAN 22 2015 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v), 212(d)(11) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(d)(11) and 1182(i)

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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Nebraska Service Center. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). We affirmed our appeal decision in response to a motion. The matter is now before us on a second motion. The motion is granted, our prior decisions are withdrawn and the underlying appeal is sustained.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 one year or more and seeking readmission within 10 years of her departure from the United States. She was also found inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission into the United States through fraud or material misrepresentation; and under section 212(a)(6)(E) of the Act, 8 U.S.C. § 1182(a)(6)(E), for knowingly assisting her minor child to enter the United States in violation of the law. The applicant has a lawful permanent resident spouse, two U.S. citizen children, and one child who is neither a lawful permanent resident nor a U.S. citizen. 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); section 212(i) of the Act, 8 U.S.C. § 1182(i); and section 212(d)(11) of the Act, 8 U.S.C. § 1182(d)(11).

The Director found that the applicant did not establish extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Director*, dated January 24, 2013. We found that the applicant's spouse would not experience extreme hardship whether he was separated from the applicant or he remained in the United States, and we dismissed the applicant's appeal. *AAO Appeal Decision*, dated October 2, 2013. We then found that the applicant's spouse would not experience extreme hardship, specifically if he relocated to Mexico, and we affirmed our prior decision. *AAO Motion Decision*, dated March 25, 2014.

On motion, counsel asserts that the applicant's spouse would experience extreme hardship upon relocation to Mexico due to safety, emotional, financial and medical reasons; the applicant warrants a favorable exercise of discretion; and the applicant should be granted a waiver under section 212(d)(11) of the Act as a matter of discretion to assure family unity. *Brief in Support of Motion,* dated April 24, 2014.

The record includes, but is not limited to, counsel's briefs, statements from the applicant and her spouse, statements of support from friends of the applicant and her spouse, financial records, their children's educational records, a psychological evaluation of the applicant's spouse and country-conditions information about Mexico. The entire record was reviewed and considered in rendering a decision on the motion.

The applicant has filed a motion to reconsider. A motion to reconsider must: (1) 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 U.S. Citizenship and Immigration Services (USCIS) policy; and (2) 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).

Based on the reasons stated and reference to pertinent precedent decisions, including *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560 (BIA 1999) and *Matter of O-J-O,* 21 I&N Dec. 381 (BIA 1996), the requirements of a motion to reconsider have been met.

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

> (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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> . . . .
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> (v) Waiver.-The Attorney General [now the 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.

The record reflects that the applicant entered the United States without inspection in December 2002 and remained in the United States until May 2011, accruing unlawful presence during that entire period. As the period of unlawful presence accrued is one year or more, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for a period of 10 years from her departure from the United States. The applicant does not contest this ground of inadmissibility.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

> (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The record reflects that the applicant sought to procure a visa to the United States in 2011 by misrepresenting the length of time that she had resided in the United States, initially stating that she had been unlawfully present in the United States for only one month. The applicant disclosed that she had been unlawfully present in the United States for a period of one year or more only after a U.S. consular officer confronted her with derogatory evidence. We find that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for having attempted to procure a visa to the United States through fraud or willful misrepresentation of a material fact. The applicant does not contest this inadmissibility finding.

Section 212(a)(6)(E) of the Act provides, in pertinent part, that:

> (i) In general-Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.
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> . . .
>
> (iii) Waiver authorized-For provision authorizing waiver of clause (i), see subsection (d)(11).

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

> (11) The [Secretary] may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of . . . an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

The record reflects that the applicant paid $1,000 to smuggle her son into the United States in July 2009. As a result of the applicant's role in bringing her minor son into the United States unlawfully, she is inadmissible under section 212(a)(6)(E) of the Act. The applicant does not contest this ground

of inadmissibility. As noted above, under section 212(d)(11) of the Act, a waiver of this inadmissibility may be granted for humanitarian purposes, to assure family unity, or if it is otherwise in the public interest. We, however, will first consider whether the applicant has met the criteria for a waiver under sections 212(a)(9)(B)(v) and 212(i) of the Act.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a U.S. citizen or lawful permanent resident spouse or parent, the same standard as required under section 212(a)(9)(B)(v) of the Act. In this case, the applicant's qualifying relative is her spouse. Hardship to the applicant or her children is only relevant insofar as it is shown to affect the hardship to the qualifying relative, in this case the applicant's spouse. 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 deportation, 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, 885 (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 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 we have already found that the applicant's spouse would experience extreme hardship if he remained in the United States without the applicant and nothing in the record, including the instant motion, warrants revisiting our finding, we will address hardship to her spouse only upon relocating to Mexico in this decision.

The applicant's spouse states that he has lived in the United States since 1990; his elderly parents in Mexico would be unable to help him; and he has no other close family members in Mexico. The applicant's spouse believes that he would suffer financially if he sold his two businesses and residential property and moved to Mexico. The applicant's spouse states that he built his businesses from the ground up, and it would be difficult to leave his businesses. The record contains documentation showing the applicant owns a home and two businesses: a produce stand and a restaurant. The applicant's spouse explains that he would have to take a loss on their home if he sold it, as real estate prices have declined; there are fewer qualified buyers and loans are difficult to obtain; selling his businesses would be difficult as their revenues have fallen, thus reducing their values; he would live in poverty and be dependent on the government for support in Mexico; and the job market is not strong there. The applicant states that she has been unable to find employment in Mexico and they are unskilled laborers who would not be able to earn enough to support their family.

The applicant's spouse states that the applicant lives in , with their children and her parents; the town, which is close to the border, has no hospitals, banks or grocery stores; the closest city with services, is seven miles away; he would have to live at his property in or with the applicant and her family in several criminal gangs operate in both his family cannot go out at night for safety reasons; gangs wait for people withdrawing money from banks and kidnap or kill them; he only visits his family once a year, because otherwise the gangs may get to know him and kidnap him

for ransom; he cannot drive a nice car or wear nice clothes when he visits, as these would attract attention from gangs and other criminals; if he had a business in the aforementioned areas then he would have to pay a monthly fine to the gangs to leave him alone; he knows business owners who pay this fine; gang members kill or kidnap business owners who do not pay the fine; and he would not be able to earn the same amount of money that he does in the United States.

The applicant's spouse states that he has diabetes; he follows a specific diet to maintain his health; his doctors help him with his diet; and he does not want to give up his relationship with his doctors. He states that he has health insurance in the United States but he is worried that he cannot afford health insurance in Mexico.

The applicant submits country-conditions information about Mexico, including information on health care, crime, safety, education and economic issues. Articles about gang-violence in accompany the instant motion. They describe gun battles in between the police and suspected gang members and battles between rival gangs. Another article mentions the prominent position in that one criminal gang, the maintains. Although the December 24, 2014, U.S. Department of State travel warning for Mexico does not include an advisory for it includes an advisory for and addresses serious safety issues generally in Mexico.

The applicant and her spouse also state that their children would not be able to attend school at their current grade levels in Mexico, because their Spanish is limited and English-language private schools are very expensive. The applicant's spouse states that their children are having a hard time adjusting to life in Mexico and the quality of available schools is poor. The applicant's spouse states that it would be hard for him to see their children receive poor medical treatment. The record includes letters from the applicant's children to their father, in which they state they miss him and miss living in the United States.

The record reflects that the applicant's spouse would experience emotional hardship in Mexico due to leaving his lengthy residence in the United States of nearly 25 years. In addition, he would experience emotional hardship based on the hardship that their children would experience, which includes the loss of educational opportunities. The record also includes evidence of serious safety issues in the applicant's area of residence and the area where the applicant's spouse owns property. Specifically, the evidence establishes that drug-related gang violence is a serious problem in those areas. In addition, the applicant's spouse would have to leave his businesses in the United States and the lack of services in also would contribute to his hardship. The record includes no supporting documentary evidence of the applicant's spouse's claimed medical condition. However, considering the totality of the hardship factors presented, and the normal results of relocation, we find that the applicant's spouse would experience extreme hardship if he relocated to Mexico.

We will now address whether the applicant is eligible for a section 212(a)(9)(B)(v) waiver and a section 212(i) waiver as a matter of discretion. 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. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 299 (BIA 1996). The adverse factors

evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on her 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.

We note 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*, 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 (citation omitted).

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 for section 212(h)(1)(B) relief 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 include the applicant's lawful permanent resident spouse, two U.S. citizen children, extreme hardship to her spouse, hardship to their children, and the lack of a criminal record. The unfavorable factors include the applicant's unlawful presence, misrepresentation and smuggling of her son into the United States. We find that the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

We will now address the applicant's waiver application under section 212(d)(11) of the Act. The applicant meets the first part of the waiver as she is seeking admission as an immigrant under section 203(a) of the Act as the spouse of a lawful permanent resident. Moreover, the record also establishes that she is the mother of the individual she assisted in entering the United States in violation of law.

With regard to the discretionary part of the waiver, the record reflects that the applicant's spouse is a lawful permanent resident, the applicant and her spouse have been married for 18 years and they have three children, including two U.S. citizen children. The record includes numerous statements detailing the closeness of the applicant's family. The record also includes other favorable discretionary factors, including extreme hardship to the applicant's spouse, hardship to their children, and the lack of a criminal record. The adverse discretionary factors include the applicant's unlawful presence, misrepresentation and smuggling of her son into the United States. We find that the applicant qualifies for a waiver of section 212(a)(6)(E)(i) as a matter of discretion in order to assure family unity.

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, our prior decisions are withdrawn and the underlying appeal is sustained.