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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUL 3 1 2015

FILE #:
APPLICATION RECEIPT #:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Newark, New Jersey. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion is granted, our prior decision is withdrawn and the underlying appeal is sustained.

The applicant is a native and citizen of Portugal 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 for one year or more and seeking readmission within 10 years of her last departure. The applicant's spouse and child are U.S. citizens. She seeks a waiver of inadmissibility in order to reside in the United States.

The Field Office Director found that the applicant had not established extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly. *Decision of the Field Office Director*, dated October 7, 2013. We found that the applicant did not establish that her spouse would experience extreme hardship, and we dismissed the appeal accordingly. *Decision of the AAO*, dated September 30, 2014.

On motion, the applicant, through counsel, asserts that new evidence establishes that her spouse would experience extreme hardship if her waiver application is denied. *Brief in Support of Form I-290B, Notice of Appeal or Motion*, dated November 19, 2014.

A motion to reopen must state 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: (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 updated documentation provided, which includes new facts, the requirements of a motion to reopen have been met. The requirements of a motion to reconsider have not been met.

The record includes, but is not limited to, medical records; a psychoemotional and family dynamics assessment of the applicant and her family, prepared by a mental health counselor; affidavits by the applicant, her spouse, their friends, and her spouse's colleagues; photographs; educational and medical records for the applicant's child; financial records; and information about Portugal. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (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.
>
> . . . .
>
> (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 under the visa-waiver program in December 2001, and she departed the United States on August 26, 2006. She then returned to the United States in October 2007. The applicant accrued unlawful presence from March 2002, the date her authorized period of stay ended, until August 26, 2006, the date she departed the United States. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of one year or more and seeking readmission within ten years of her departure from the United States. The applicant does not contest her inadmissibility.

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 her child can be considered only insofar as it results in hardship to a 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 U.S. Citizenship and Immigration Services 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.

We will first address hardship to the applicant's spouse upon relocation to Portugal. The applicant's spouse stated to the mental health counselor that he has two adult children in the United States with whom he maintains contact; he came to the United States 29 years ago; he was raised in Angola and Portugal; and he speaks Portuguese. The record reflects that the applicant's spouse is 62 years old.

The mental health counselor administered two exams to the applicant's spouse and found that the results corroborated the presence of intense anxious-depressive thoughts, feelings and several somatic

symptoms of stress. The listed symptoms include, but are limited to, nervousness, inability to relax, feeling scared, sleep disturbances, loss of appetite, loss of concentration, fatigue and irritability. The applicant's spouse was diagnosed with adjustment disorder with mixed anxiety and depressed mood, unspecified anxiety disorder and psychological factors affecting other medical conditions, in his case hypertension. The mental health counselor states the applicant's spouse's emotional and cognitive conditions could deteriorate further if the external triggers persist or worsen, and this would in turn generate a major depressive disorder. The mental health counselor indicates that this would occur if the applicant's spouse has a traumatic relocation. The record also includes a letter from the applicant's spouse's physician, who states that the applicant's spouse is being treated with daily medication for hypertension.

The record includes evidence of hardship to the applicant as a victim of domestic abuse by her ex-spouse. According to her current spouse, her ex-spouse tried to kill her; they have received Internet death threats from her ex-spouse; and the applicant's ex-spouse stated that if she returns to Portugal he will kill her for having him deported. The applicant corroborates her spouse's statements and includes additional details of her abuse. The record also includes a September 24, 2009 temporary restraining order and a September 24, 2009 removal order for the applicant's ex-spouse.

The applicant's spouse states that he will not be able to secure a job in Portugal in his profession; teachers make about $1,000 per month and not everyone is able to obtain a job; and "the unemployment rate for teachers is outrageous." The applicant's spouse stated to the mental health counselor that he would not be hired as a teacher in Portugal, as he has been in the United States for 30 years and he would be considered too old. The applicant and her spouse stated to the mental health counselor that Portugal has serious and persistent unemployment; corruption and nepotism are deteriorating the economy; and thousands of people are leaving the country. The record includes an advertisement for teacher positions in Portugal; and articles about teachers marching for better working conditions in Portugal and salaries in the teaching profession in Europe.

The record also includes educational and medical documentation showing that the applicant's child is a special-education student in a "learning/language disability impaired severe" classroom; he has attention deficit hyperactivity disorder (ADHD), seizure disorder, reactive airway disease and autism; and he takes medications that may cause side effects in extreme heat. The applicant stated to a mental health counselor that her son had a difficult time in Portugal from 2006 to 2007; he developed more seizures than normal; he banged his head in desperation, which the counselor adds is a sign of severe autism; and he did not understand the language sufficiently. The applicant's spouse stated to the mental health counselor that services for the applicant's son are do not compare to those in the United States and there is no money for special education teachers. The applicant and her spouse expressed concerns to the mental health counselor about the lack of available public medical and pediatric services for the applicant's child.

The record reflects that the applicant's spouse has been in the United States for a lengthy period of time and he has two adult children in the United States, thereby establishing significant ties to the United States. Moreover, based on his age and time outside of the United States, in addition to the evidence concerning conditions in Portugal, it is reasonable to conclude that his claim of being unable to find employment is likely true. Moreover, the applicant's spouse has shown he would

experience psychological hardship upon relocation. In addition, he would experience hardship based on educational and medical hardship to the applicant's son. Based on the totality of the hardship factors presented, we find that the applicant's spouse would experience extreme hardship upon relocating to Portugal.

We will now address hardship to the applicant's spouse upon remaining in the United States. The applicant's spouse states that he would experience emotional hardship, because he is unable to care for himself and his household "in an adequate fashion" and he is too old to learn; the applicant takes care of household duties; and he does not have enough money to travel to Portugal to visit the applicant and her son. The applicant's spouse claims the applicant's absence would affect him greatly and could cause the marriage to break down.

A fellow teacher of the applicant's spouse states that the applicant's spouse forgets his meetings at school, does not answer phone calls, and has become distant and lonely. She states that some pupils feel that he is not the same person. Three other friends make similar observations in their October 2014 affidavits. As mentioned, a mental health counselor administered two exams and found that the results corroborated the presence of intense anxious-depressive thoughts and somatic symptoms of stress. The mental health counselor states the applicant's spouse's emotional and cognitive conditions could deteriorate further if the external triggers persist or worsen, thus generating a major depressive disorder. The mental health counselor indicates that this would occur if the applicant's spouse remained in the United States without the applicant.

The applicant's spouse also states that he has stress related to the applicant's safety issues; his levels of fear and anxiety would increase tremendously if she were removed to Portugal; the applicant's ex-spouse has contacted him and threatened to kill the applicant if she returns to Portugal; he fears that he would lose the applicant and her child to violence at the hands of her ex-husband; he wakes up a few times every night to make sure things are okay; and he has lost 10 pounds since her immigration interview.

In addition, the applicant's spouse states that the applicant's child is like his own son; he is the only father figure who has not caused her son to suffer; he helps her son get to school on time and attends school meetings; he is on call if her son, who has epilepsy and ADHD, has a seizure, and he has responded to calls from his school; he takes her son to medical appointments; and he would suffer seeing her son's condition worsen in Portugal because, in addition to her son not knowing Portuguese and becoming stressed and frustrated, the type of medical care the applicant's son needs is non-existent and schools there cannot handle his special needs.

The applicant's spouse asserts that he also would experience financial hardship if he were to remain in the United States, because the applicant would not able to work in Portugal, as her son needs care; he would have to financially support them from the United States; and he would not able to make ends meet maintaining two homes. The record includes paystubs for the applicant's spouse from and the Board of Education of the City of . The applicant's spouse's employment contract reflects a salary of $73,539 and his 2011 U.S. federal tax return reflects an income of $104,934. The record includes no other evidence addressing his financial hardship if he were to remain in the United States.

The applicant's spouse's claim that the applicant would care for her son in Portugal and he would have to maintain two separate households, if corroborated, would cause him some financial hardship. The record does not include sufficient evidence, however, to establish the extent of financial hardship the applicant's spouse may experience, such as evidence of potential expenses in maintaining two households. In addition, without evidence of a current threat to the applicant, the applicant's spouse's claim that he fears for her and her son's safety is not corroborated. However, the record reflects that the applicant's spouse would experience significant emotional and psychological hardship without the applicant and her son. The record reflects that the applicant's spouse depends on the applicant and that he has a close relationship with the applicant's child, actively assisting with his educational and medical issues. Based on the totality of the emotional and psychological hardship factors presented, we find that the applicant's spouse would experience extreme hardship upon remaining in the United States.

Considered in the aggregate, the applicant has established that her spouse would face extreme hardship if the applicant's 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.

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*, 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 (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 U.S. citizen spouse, extreme hardship to her spouse and her lack of a criminal record. The unfavorable factors include the applicant's unauthorized periods of stay.

We find that the favorable factors in the present case outweigh the adverse factors, such 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, our prior decision is withdrawn and the underlying appeal is sustained.