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

U.S. Citizenship and Immigration Services

[redacted]

#7

DATE: DEC 14 2012

OFFICE: MONTERREY, MEXICO [redacted]

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Form I-601 waiver application and the Form I-212 application for permission to reapply for admission were concurrently denied by the Field Office Director, Monterrey, Mexico and are now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the applications will be approved.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under 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 10 years of her last departure from the United States; section 212(a)(6)(E) of the Act, 8 U.S.C. § 1182(a)(6)(E) for alien smuggling; and section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien ordered removed under section 240 or any other provision of law. The applicant seeks a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(d)(11) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) and 1182(d)(11) and permission to reapply for admission under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States with her lawful permanent resident spouse.

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 accordingly. *See Decision of the Field Office Director,* dated September 30, 2011. The field office director further concluded that the negative factors outweigh the positive factors and thus the waiver application should be denied as a matter of discretion. *Id.*

The field office director additionally concluded that the applicant is "inadmissible under a provision of law for which there is no waiver." *Id.* While the field office director does not specify the provision to which he refers, it appears, as noted by counsel on appeal, that section 212(a)(9)(C) of the Act has been incorrectly conflated with section 212(a)(9)(A) of the Act. As the applicant never entered the United States without inspection after her April 2007 removal she is not inadmissible under section 212(a)(9)(C) of the Act. Moreover, the field office director incorrectly indicates that the applicant may not even file a Form I-212 application for permission to reapply for admission until she has remained outside the United States for 10 years. The AAO finds that the applicant is not inadmissible under section 212(a)(9)(C) of the Act, that she is indeed eligible and has properly filed her Form I-212 application without waiting 10 years outside the United States, and that she is not inadmissible under any provision of law for which there is no waiver. Accordingly, the field office director's findings to the contrary will be withdrawn.

On appeal counsel contends that if a waiver is not granted, the applicant's qualifying relative spouse will suffer extreme hardship and that the applicant merits a favorable exercise of discretion. *See Form I-290B, Notice of Appeal or Motion,* received October 31, 2011.

The record contains, but is not limited to: Form I-290B and counsel's statement thereon; counsel's appeal brief and previous memorandum in support of the waiver application; various immigration applications and petitions; hardship letters; letters from the applicant; letters from the applicant's children; counsel's memorandum concerning depression among men after separation and corroborating articles; medical and psychological records for the applicant's spouse; numerous letters of character reference and support; employment, earnings, and income tax records; records

of wire transfers to Mexico; country conditions reports and documents concerning Mexico; birth and marriage certificates and family photos; and documents related to the applicant's inadmissibility, criminal record, removal proceedings and removal. The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(6)(E) of the Act provides:

> (i) 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. . . .
>
> (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (d)(11).

Section 212(d)(11) of the Act, 8 U.S.C. § 1182(d)(11), provides:

> The Attorney General 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 any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) and 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 admitted to having smuggled her two minor children into the United States in December 2006. As the only individuals the applicant assisted in entering the United States in violation of law were her own children, the AAO hereby exercises its discretion for humanitarian purposes to assure family unity in the application of section 212(a)(6)(E) of the Act, and grants a waiver to the applicant under section 212(d)(11) of the Act.

The record reflects that the applicant was convicted on March 5, 2007 in the Southern District of Iowa, for one count each of false identification documents in violation of 18 U.S.C. 1546(b)(1), fraudulently obtained documents in violation of 18 U.S.C. 1546(a), and misuse of a social security number in violation of 42 U.S.C. 408(a)(7)(B). The field office director failed to make any finding with regard to whether the applicant has been convicted of a crime involving moral turpitude or whether she is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. As the AAO has determined that the applicant meets the requirements for a waiver under section 212(a)(9)(B)(v) of the Act, she has also established eligibility for a waiver under section 212(h) of the Act and we need not engage in complete analysis of her criminal convictions to settle whether she is inadmissible under section 212(a)(2)(A) of the Act for having been convicted of a crime involving moral turpitude.

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- ...
> >
> > > (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 shows that the applicant entered the United States without inspection in or about June 2001 and remained unlawfully until she was removed to Mexico in April 2007. The applicant accrued unlawful presence during her entire time in the United States, a period in excess of one year. As the applicant is seeking admission within 10 years of her departure, she 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 and her children can be considered only insofar as it results in hardship to a qualifying relative. In the present case, the applicant's lawful permanent resident 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 record shows that the applicant's spouse is a 36-year-old native of Mexico and lawful permanent resident of the United States who has been married to the applicant since October 2003. They have two minor children together both residing with the applicant in Mexico since shortly after her removal. The applicant's spouse states that he misses the applicant and their children desperately but would be unable to provide for them economically were it not for his job in the United States. He explains that he is his family's sole provider and describes the difficulties he has faced being the only source of income for both households. Documentary evidence shows that in order to support his family financially, the applicant's spouse works full time at a salary of $13.35 per hour and numerous wire transfer receipts demonstrate his ongoing transfers to the applicant in Mexico approximately every other week.

The applicant's spouse expresses tremendous sadness over being able to see his family for only a few weeks once a year, explaining that prior to the applicant's apprehension they had never before been separated. The applicant's spouse writes that he is experiencing overwhelming stress and anxiety, has much trouble sleeping, often gets sick, and feels increasingly nervous and depressed all the time. M.D. confirms that he has diagnosed the applicant's spouse with depression and anxiety for which Prozac was prescribed. Corroborating medical records show that Dr. has treated the applicant's spouse on an ongoing basis for symptoms related to these conditions numerous times since the applicant's removal in April 2007. Multiple published articles about depression and the effects of separation on men have been submitted for the record.

The applicant's spouse expresses great fear for his family's safety in Durango, Mexico where he learned from the applicant that a recent confrontation between organized Zeta criminal groups and local military resulted in multiple deaths and kidnappings. He explains that the applicant, his 17-year-old son, and his 12-year-old daughter have no one to protect them in Mexico and this feeling of helplessness and failure as their husband and father deepens and exacerbates his depression. In addition to the corroborating country conditions evidence submitted for the record, the AAO has additionally reviewed the U.S. State Department's current *Mexico Travel Warning*, dated November 20, 2012. Therein, U.S. citizens are warned that crime and violence are serious problems throughout the country and can occur anywhere, U.S. citizens have fallen victim to drug-related and gang-related violence such as homicide, gun battles, kidnapping, carjacking and highway robbery, there is a rising number of kidnappings and disappearances throughout Mexico, and local police have been implicated in some of these incidents. The report specifically discusses Durango, warning that all non-essential travel to the state should be deferred. The U.S. State Department notes that homicides increased in Durango by 122% between 2010 and 2011 alone, and that several areas of the state continue to experience high rates of violence and remain volatile and unpredictable.

The AAO has considered cumulatively all assertions of separation-related hardship to the applicant's spouse including his significant emotional/mental/health-related conditions and that they are exacerbated by his fears for his family's safety as they reside far away from him in one of the most dangerous Mexican states; his significant economic difficulties being the sole source of support for himself in the United States and the applicant and their children in Mexico; and the inability to visit his close-knit family more than once each year on account of economic and time off work limitations. Considered in the aggregate, the AAO finds that the evidence is sufficient to demonstrate that the applicant's lawful permanent resident spouse is suffering and will continue to suffer extreme hardship due to separation from the applicant.

Addressing relocation, the applicant's spouse states that his family would be extremely poor in Mexico where it would be impossible for him to find a job sufficient to support his family in light of the country's devastating economy, extremely high unemployment, and nominal salaries for those fortunate enough to find work. Corroborating country conditions reports have been submitted for the record. He adds that despite the applicant's greatest efforts, she has had no success finding any work in Mexico since 2007. The applicant explains that she and her children are residing with her parents in a small Durango town where they have no telephone communication, the nearest medical clinic is an hour away, her son must ride his bike nine

kilometers to school, and they are always terrified as they live under constant threat, abuses, violence, and robberies by the Zetas. She expresses great fear that her children will be kidnapped and concern that if her spouse relocates to Mexico he will lose his status as a lawful permanent resident in the United States. The applicant's spouse echoes the applicant's concerns in all regards and adds that violence, gangs and drugs are a terrible and growing problem in Mexico, innocent people are regularly killed, and many more are seriously affected by the country's lawlessness. The applicant's spouse's concerns are corroborated by documentary evidence submitted for the record as well as by the U.S. State Department's November 2012 travel warning.

The AAO has considered cumulatively all assertions of relocation-related hardship to the applicant's spouse including his adjustment to a country in which he has not resided for many years; his longtime residence in the United States and close community ties therein as demonstrated by numerous letters of support and concern; his steady employment in the United States and payment of taxes and the likely difficulty he would face in attempting to secure employment in Mexico sufficient to support his family; the possibility that he would lose his U.S. lawful permanent resident status as a result of residing abroad; and his stated economic, employment, health-related, educational, and safety concerns regarding Mexico. Considered in the aggregate, the AAO finds the evidence sufficient to demonstrate that the applicant's lawful permanent resident spouse would suffer extreme hardship were he to relocate to Mexico.

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 lawful permanent resident spouse as a result of the applicant's inadmissibility; the applicant's significant community ties to the United States as demonstrated by numerous attestations by others to her good moral character and essential presence in the community; the necessary emotional, physical and familial support she provided to her lawful permanent resident spouse when residing in the United States; and that she has remained outside the United States following her removal, making no attempts to unlawfully enter the country despite being separated for years from her spouse. The unfavorable factors are the applicant's immigration violations which include her entry without inspection and periods of unlawful presence and unauthorized employment in the United States, as well as her criminal record which includes convictions for using false identification documents, fraudulently obtained documents and misusing a social security number. Although the applicant's violations of immigration law and criminal law are significant and cannot be condoned, the positive factors in this case outweigh the negative factors. Therefore, pursuant to section 212(a)(9)(B)(v) of the Act, the AAO finds that a favorable exercise of discretion is warranted

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be approved as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8

U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

ORDER: The appeal is sustained. The applications are approved.