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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 09 2007

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of South Africa. The applicant 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. He 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 adjust to permanent resident status and reside in the United States with his U.S. citizen spouse.

The applicant was admitted into the United States as a B-2 visitor for pleasure on March 12, 2001. His period of authorized stay expired on September 11, 2001. On November 15, 2003, the applicant and his U.S. citizen spouse, [redacted], were married in the United States. The applicant's spouse filed a Petition for Alien Relative (Form I-130) on the applicant's behalf and the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on June 7, 2004. The applicant subsequently departed and returned to the United States on February 28, 2005 pursuant to advance parole. The I-130 petition was approved on June 25, 2006. The applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) on July 29, 2005.

The Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative and denied the waiver application accordingly. *Decision of Director* [redacted] dated June 15, 2006.

On appeal, counsel asserts that but for the ineffective assistance of the applicant's former counsel, the applicant never would have departed the United States pursuant to advance parole. Counsel contends that had the applicant not departed, he would not have been found inadmissible and no waiver of inadmissibility would be necessary. As evidence of ineffective assistance of counsel, counsel submits a copy of an e-mail exchange between the applicant and his former counsel containing the attorney's legal advice concerning the applicant's travel outside of the United States.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

Counsel notes that courts have held that all of the above factors need not be present where the claim of ineffective assistance is supported by the plain facts on the record, and states that the applicant's claim is valid even though he has not met all the requirements set forth in *Matter of Lozada*. The AAO notes, however, that in both cases counsel cites in support of his argument, the ineffective assistance in question occurred during immigration court

proceedings and was recorded in the official court record. *See Monhajaz-Munos v. INS*, 320 F.3d 1061, 1071-1072 (9th Cir. 2003); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000). Such is not the case here. Consequently, there is insufficient legal basis to excuse the applicant from meeting the procedural requirements established by the court in *Matter of Lozada*. Absent a showing that the applicant has met these requirements, the applicant's claim of ineffective assistance of counsel cannot be considered.

Counsel also contends on appeal that denial of the waiver of inadmissibility would result in extreme hardship to the applicant's U.S. citizen spouse "given her age and family ties in the United States, her mental health history and current psychological condition, the extraordinary high crime rate in South Africa, and her and her husband's current financial situation and inability to afford a move to South Africa."

In support of these assertions, counsel has submitted an affidavit from [redacted] a psychological evaluation report from [redacted], copies of [redacted]'s financial records; a statement from a former real estate agent in South Africa detailing the costs of real estate and average monthly rents in that country; reports concerning crime and employment for accountants in South Africa; a statement from [redacted]'s mother and family photographs.

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

> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who –
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> (II) Has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
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> . . . .
>
> (v) Waiver. – The Attorney General [now Secretary, 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 Attorney General [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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.,* the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or to his children is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's U.S. citizen spouse is the only qualifying relative. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(a)(9)(B)(v) of the Act; s*ee also Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

In addition, the Ninth Circuit Court of Appeals in reversing the denial of suspension of deportation to the petitioner in *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United States", and that, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted), *see also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that [redacted] faces extreme hardship if her husband is not granted a waiver of inadmissibility. The AAO recognizes that [redacted] a native of the United States, would suffer extreme hardship if she relocated to South Africa with the applicant. The applicant is a native of the United States who has lived in the United States her entire life and has no family in or other ties to South Africa. She is a certified public accountant who provides for herself and her husband, and relocating to South Africa would require her to abandon her career and face the prospect of being unemployed or underemployed in an

unlicensed accounting position. However, the applicant has failed to establish that [redacted] would suffer extreme hardship if she decided not to accompany her husband.

The AAO recognizes that she would suffer emotionally as a result of separation from the applicant if she chooses to remain in the United States. Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted letter of [redacted] is based on a single interview between the applicant's spouse and the psychologist. The record fails to reflect an ongoing relationship between a mental health professional and the applicant's spouse or any history of treatment for the current or past disorders suffered by the applicant's spouse. Moreover, the conclusions reached in the submitted evaluation, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering the psychologist's findings speculative and diminishing the evaluation's value to a determination of extreme hardship. [redacted] states that [redacted] experienced "Major Depressive Disorder" when her only other serious relationship ended and he believes that separation from the applicant would "precipitate another such episode." [redacted] does not state that he treated the applicant for her prior disorder, or for any current conditions, and the applicant has submitted no other medical records detailing [redacted] past or current mental health conditions. Although the statements by [redacted] and [redacted] are relevant and have been taken into consideration, little weight can be afforded it in the absence of supporting evidence. *Matter of Kwan,* 14 I & N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The anxiety described by [redacted] and [redacted] is typical of individuals separated as a result of removal or inadmissibility and does not rise to the level of extreme hardship based on the record. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. Furthermore, [redacted] is employed and does not depend on the applicant for financial support.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.