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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: OCT 0 3 2013 Office: PANAMA CITY File:

IN RE: Applicant:

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. § 1182(a)(9)(B)(v)

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Panama City, Panama, denied the waiver application, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion. The motion will be granted and the prior AAO decision affirmed.

The applicant is a native of Venezuela and citizen of Colombia who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of 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. While contesting the unlawful presence finding, she is seeking a waiver of inadmissibility in order to immigrate to the United States as the beneficiary of the approved Petition for Alien Relative (Form I-130) filed by her lawful permanent resident father.

The field office director concluded the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and, accordingly, denied the Application for Waiver of Ground of Inadmissibility (Form I-601). *Decision of the Field Office Director,* June 4, 2012. The AAO similarly concluded that the record evidence did not establish that a qualifying relative would suffer extreme hardship as a result of the applicant's inadmissibility, and dismissed the appeal. *Decision of the AAO*, February 27, 2013.

On motion, filed in March 2013 and received by the AAO in August 2013, the applicant contends that the AAO's dismissal of the appeal constitutes an erroneous application of the facts to the extreme hardship standard and is not supported by the record. Counsel provides a brief and evidence not previously submitted, including updated statements, copies of remittances, copies of passport pages, a medical evaluation, and related documents. The record contains counsel's previous brief, as well as supporting statements of the applicant and her father, an Infopass appointment notice and documents provided to counsel by USCIS at the applicant's appointment. The entire record was reviewed and considered in rendering this decision.

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

> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .
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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 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....

We previously noted the applicant was inspected and admitted on October 17, 2004 in K-2 status until January 5, 2005 and filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on December 29, 2004. Her application for adjustment of status was denied on January 10, 2006, and she departed the country on January 25, 2008. Meanwhile, the applicant's father adjusted his K-1 status to that of lawful permanent resident on March 15, 2006 after marrying his fiancée-petitioner on September 2, 2004. On October 21, 2008, he filed a Form I-130 on the basis of which the applicant sought an immigrant visa. At the visa interview, a Consular Officer found her inadmissible for having accrued unlawful U.S. presence from her 18th birthday on April 8, 2006 until she left the United States, and the field office director denied the waiver application. On appeal, counsel contended the field office director erred in finding the applicant to have been unlawfully present and in failing to find extreme hardship on humanitarian grounds. On motion, counsel contends the AAO similarly erred in dismissing the appeal.

While counsel reasserts the applicant's period of unlawful presence would have been tolled by the pendency of the Form I-485, the tolling provision at section 212(a)(9)(B)(iv) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iv), does not apply, because it refers to requests for an extension of stay or change of nonimmigrant status, and the applicant has not filed an Application to Extend/Change Nonimmigrant Status (Form I-539).[1] Counsel also asserts that USCIS erred in not reopening the Form I-485 denial based on nonreceipt of an appointment notice. However, an alien is responsible for maintaining a current address with USCIS, pursuant to section 265 of the Act, 8 U.S.C. § 1305, and an applicant bears the burden of proving admissibility under the Act, *see* section 291 of the Act, 8 U.S.C. § 1361.

The applicant began to accrue unlawful presence on April 8, 2006, her 18th birthday, as she had no pending Form I-485.[2] Although she claims she was unaware the application had been denied, the AAO notes that USCIS sent the interview notice and the denial decision to the address she provided on the Form I-485. This application was never reopened, the applicant's departure in 2008 triggered the 10-year unlawful presence bar, and the AAO does not have jurisdiction to review the denial of the Form I-485. She thus requires an inadmissibility waiver in order to receive an immigrant visa.

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.

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[1] The record reflects that the applicant's Form I-485 was denied for abandonment due to nonappearance at her scheduled November 8, 2005 USCIS interview and not reopened, despite the applicant's claim that she received no notice of this appointment. While counsel submits a copy of an envelope sent to the applicant's record address bearing a DHS/USCIS return address and marked "undeliverable," there is no indication of the contents or date of the mailing. There is evidence that, at the time of the applicant's interview, she and her father had not resided with her stepmother since August 28, 2005, and were obliged by law to have reported this change within 10 days, which would have been two months before the interview and four months before the denial. *See* Section 265(a) of the Act.

[2] A pending Form I-485 would have prevented her from accruing unlawful presence. However, since she was under 18 when it was denied in January 2006, she did not begin to accrue unlawful presence immediately upon its denial, but rather when she turned 18 in April 2006.

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. The applicant's father is the only qualifying relative in this case. 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 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 v. INS.*, 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.

Regarding relocation, the augmented record fails to establish that moving back to Colombia would impose extreme hardship on the qualifying relative. The record reflects that the applicant's father emigrated to the United States from his native Colombia in 2004 at nearly 50 years of age. There is no evidence of specific threats toward him or his daughter, and general safety concerns are not substantiated by official U.S. government reporting. Updated U.S. Department of State (DOS) travel information advises U.S. citizens to exercise caution when traveling to Colombia, but notes that the threat of kidnapping has diminished significantly since 2000. *See Colombia—Travel Warning,* DOS, April 11, 2013.

The applicant submits new evidence that her father has been monitored yearly since 2011 for heart disease and COPD (chronic obstructive pulmonary disease) due to job-related asbestos exposure and indicates he had a minor heart attack at some time in the past. *See Medical Evaluation*, March 5, 2013. This documentation does not establish that returning to Colombia would adversely affect his health. There is no indication that current medications, other treatments, or medical monitoring are unavailable in Colombia or that a Colombian citizen would encounter difficulties accessing health benefits. The record does not show that the qualifying relative has health insurance or public benefits here that he would forfeit by moving overseas.

The evidence shows that, while the qualifying relative has lived here for nearly nine years, he has no family ties and been without a job since 2011, and has been living rent-free at the home of his counsel since losing his rental apartment, as well as received medical evaluations at no charge. There is no indication he has assets or financial obligations in the United States, nor of his living expenses or how he is meeting them. The applicant is currently living with her mother in the Colombian town where her parents were born, and there is no evidence that her father would have difficulty reintegrating to his native land. Due to his lack of U.S. ties, the record shows that beyond the inconvenience of traveling, the applicant's father would experience little disruption to his life. The AAO thus concludes that, were the applicant unable to reside in the United States due to her inadmissibility, the record does not establish that a qualifying relative would suffer extreme hardship by relocating abroad.

Regarding hardship from separation, there is no documentary evidence that the applicant's father has incurred emotional hardship from his daughter's absence beyond the common result of separation from a loved one. The qualifying relative claims his daughter's inability to immigrate is causing him extreme hardship, and the medical report noted above states he has experienced anxiety attacks. While the record reflects the qualifying relative and the applicant miss each other, there is no

documentation showing that the applicant's absence has had an impact beyond the psychological pain commonly caused by separation from a family member or that he has received any treatment for anxiety. Likewise, there is no evidence that the applicant's presence is required to render any specific medical treatment. Despite claiming that her inability to pursue higher education in the United States has caused her father sadness, the applicant made no showing that she had begun post-secondary education while in the United States.

Regarding the claim of financial hardship, the updated record indicates that, as he lost his job in 2011 and has not found new employment, evidence of the qualifying relative's income is no longer current. His only documented expenditure consists of periodic remittances to Colombia. The record of the applicant's living situation reflects that she currently resides with her mother in Colombia, where she claims to attend university, aided by funds received from her father. There is nothing establishing the amount of her expenses or the other financial resources available to her, and we are unable to assess the economic burden she represents to her father. The claim that traveling overseas to visit his daughter has imposed or will impose a further burden is unsupported, as there is no evidence of the cost to the qualifying relative of twice visiting his daughter or of his available assets. There is no indication that the applicant's return to the U.S. will help her father economically.

The documentation on record, when considered in its totality, reflects that the applicant has not established her father will suffer extreme hardship if she is unable to live in the United States as a permanent resident. The AAO recognizes that the applicant's father will endure hardship as a result of separation from the applicant. However, his situation is typical of individuals separated as a result of removal or inadmissibility, and the AAO therefore finds that the applicant has failed to establish extreme hardship to her father as required under the Act.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden and, accordingly, the prior decision of the AAO will be affirmed.

ORDER: The motion is granted. The waiver application remains denied.