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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: MIAMI, FL

Date: SEP 27 2005

IN RE: [Redacted]

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

ON BEHALF OF APPLICANT:



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, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Argentina 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 more than one year and seeking readmission within 10 years of her last departure from the United States. The applicant is married to a citizen of the United States and seeks a waiver of inadmissibility (Form I-601) in order to reside in the United States with he husband. The district director found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen spouse. The application was denied accordingly. *Decision of the District Director, September 12, 2000.*

On appeal, counsel asserts that the district director erred in denying the applicant's waiver request, and requests reversal of the decision, or, in the alternative, consideration of additional evidence submitted on appeal which counsel indicates raises new humanitarian considerations. *Letter from Counsel*, dated April 1, 2004.¹ In support of the appeal, counsel has submitted a memorandum of law, and additional evidence relating to the applicant's medical condition diagnosed during the pendency of the appeal. 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 Attorney General [Secretary] that the refusal of admission to such immigrant alien

¹ The record reflects that on October 10, 2000, counsel filed a timely appeal from the district director's decision. Within a month, counsel submitted a brief in support of the appeal. Several years later, counsel submitted a letter providing new evidence of additional humanitarian factors in support of the appeal. *Letter From Counsel*, dated April 1, 2004. Most recently, counsel has submitted a motion to expedite, requesting an adjudication of the appeal. *See Request to Expedite*, dated September 19, 2005.

would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

In the present case, the record indicates that the applicant entered the United States on March 30, 1997, as a nonimmigrant visitor for pleasure, authorized to remain in the United States until September 29, 1997, with a subsequent extension until March 29, 1998. Thereafter, the applicant remained in the United States without authorization. She married her husband on October 20, 1999, in Fort Lauderdale, Florida. On December 3, 1999, the applicant filed an Application to Adjust Status (Form I-485) concurrently with a Petition for Alien Relative (Form I-130) filed by her U.S. citizen spouse. Subsequent to the filing of the I-485, the applicant applied for and was granted advance parole, in order to visit her ailing father in Argentina. The applicant departed the United States in May of 2000, pursuant to the grant of advance parole.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* The applicant accrued unlawful presence from March 30, 1998, until, until December 3, 1999, the date of her proper filing of the Form I-485. In applying to adjust her status to that of Lawful Permanent Resident (LPR), the applicant is seeking admission within 10 years of her May 2000 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year after April 1997.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the alien himself experiences upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296. (BIA 1996).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These 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.

Counsel's principal assertion has been that the applicant's spouse would face extreme hardship if he relocated to Argentina in order to remain with the applicant. The extreme hardship the applicant's spouse would allegedly suffer is attributable to a variety of factors. These factors, as detailed in counsel's brief and supported by affidavits in the record, generally relate to the emotional hardship he would suffer due to the separation from his spouse, and the adverse effect upon his career if he were to accompany his wife to Argentina. In addition to supporting a claim of extreme hardship to the spouse, the evidence is also offered to

support a finding that the applicant will also experience extreme hardship. However, as noted previously, the hardship experienced by the applicant's spouse is not relevant to the applicant's eligibility for a waiver of inadmissibility. The following is a discussion of the evidence considered by the district director.

First, the record contains an affidavit from the applicant's spouse. That affidavit states that he married the applicant in October 1999, plans to start a family with her, and "would suffer extreme emotional hardship were she removed from the United States." *Affidavit of* [REDACTED] dated June 29, 2000. The affidavit further notes that he has been employed by Citibank since 1992, and was, at the time of the affidavit, an Assistant Vice President with the Fort Lauderdale, Florida office. He asserts that his career path is likely to include a "promotion to Vice President and an eventual move to the head office of Citibank in New York." *Id.* As additional support for the hardship claim, the record also contains a letter from the human resources director in Fort Lauderdale, which described the applicant's spouse's position within the company and stated that he was an individual who has been rated as having "high potential" within the company. *Letter from* [REDACTED] *BP Human Resources Director*, dated June 22, 2000. The author goes on to state that it is his impression that if the couple were to be separated from each other, the spouse's career would be negatively impacted, as "he would be emotionally affected and the consequences of this would put his professional development at risk." *Id.*

Other evidence submitted, including documents such as the marriage certificate and financial and insurance records, is intended to demonstrate that the couple entered into a good faith marriage. The record also contains evidence to show that the applicant's presence in the United States is critical to the viability of the business partnership that the applicant has entered into with her sister-in-law in which the applicant is now a 49% owner. The evidence includes articles of incorporation, stock certificates, and a letter from the sister-in-law stating that the applicant is essential to the success of the business. *See Miscellaneous Business Documents, and Undated Letter from* [REDACTED]. Finally, the remaining evidence, in the form of an affidavit from the applicant, and a letter from former counsel, was intended to demonstrate that the applicant made an innocent error in departing the United States. The assertion is that the error was made due to inadequate advice from former counsel, and under exigent circumstances, and that, as a result, it should not operate to bar her adjustment of status. *See Affidavit of* [REDACTED] dated June 29, 2000; *Letter from* [REDACTED] dated June 19, 2000.

The AAO will first address two issues that the applicant has raised in support of her application, but which are not proper considerations in her case. First, the claims of hardship to herself are simply not relevant to the determination of whether the applicant's spouse will experience hardship. While the applicant may, indeed, experience hardship as a result of being denied the waiver, her hardship is not recognized under the law. The statute clearly provides that it is only hardship to the applicant's U.S. citizen or lawful permanent resident spouse or parents that is relevant. Only if the difficulties that the applicant would experience would somehow add to the hardship being experienced by a qualifying relative, does such hardship become relevant. The evidence, however, does not demonstrate such a connection. Moreover, the fact that the applicant's business may suffer does not indicate an adverse effect upon her spouse. While her sister-in-law, a United States citizen, may experience hardship relating to her business if the applicant is removed, it is not a relevant consideration as she is not a qualifying relative. In addition, the applicant's spouse is not financially dependent upon the applicant, and, in fact, appears to be the source of financial support for the family as

evidenced by the financial records. Thus, adverse effects upon the business are unlikely to cause him extreme hardship.²

Second, several items of evidence presented, and a portion of the brief submitted on appeal, were intended to demonstrate the applicant's lack of culpability in the events that led to her departure from the United States, which triggered the unlawful presence bar. As stated by counsel in his brief:

We therefore respectfully submit that Ms. [REDACTED] innocent mistake in traveling is a technicality which cannot be ignored. She was extremely concerned about traveling given her immigration background and took every precaution to protect herself. Were it not for the erroneous advice given to her by her legal counsel, since conceded, she would be a permanent resident today on account of her marriage to Jose Roldan.

Counsel's Brief in Support of Appeal, dated November 2, 2000.

It is unclear from a reading of counsel's brief in support of the appeal, what argument counsel is making regarding the applicant's actions in departing the United States. It does not appear that counsel is contesting the district director's finding relating to the applicant's inadmissibility, as the period of the applicant's unlawful presence and her departure from the United States makes that a relatively clear cut determination. It appears, rather, that counsel considers the unintentional nature of her actions to be a factor that must be considered as significant and that should have been taken into account by the district director, although counsel doesn't clarify in what way the district director erred. In terms of the applicant's inadmissibility, neither the statute nor the regulations require the district director to consider whether the applicant intentionally or unintentionally triggered the unlawful presence bar. The applicant's intent in triggering the bar is simply not an issue. Even if the applicant's intention were relevant, the AAO notes that the applicant clearly intended to remain in the United States beyond her period of authorized stay, and subsequently took actions inconsistent with being in an unlawful status such as getting married, and entering into a business arrangements with her sister-in-law. Therefore, to a large extent, the applicant's bar to admission cannot, therefore, be seen as stemming from innocent conduct. Nevertheless, the applicant's state of mind when triggering the bar is not a relevant factor in assessing her inadmissibility. If the circumstances which triggered the applicant's inadmissibility are to be taken into account at all, it would appear that they would more properly be considered part of an assessment of discretionary factors once the applicant has satisfied the statutory requirement of demonstrating extreme hardship to a qualifying relative.

Turning to the evidence of hardship, the record contains relatively little evidence of hardship to the applicant's spouse. The evidence, in the form of affidavits and letters indicates that the spouse will experience hardship due to the separation from the applicant. According to counsel's brief, the applicant's spouse would experience extreme hardship in accompanying his wife to Argentina. Counsel notes that the applicant's spouse has no relatives in Argentina, but has close family ties in the United States in the form of his brother and sister, who are United States citizens. *Counsel's Brief in Support of Appeal*, at p.6. The assertion is also made that the applicant's spouse would be unable to relocate to Argentina with his wife due

² It is further noted that even if a relevant consideration, or if it were demonstrated that the loss of the business would somehow impose a hardship, the fact that the applicant's business interest arose while she was in unlawful status suggests that the couple assumed the risk of losing her losing the business due to the uncertain nature of her immigration status.

to the severe adverse impact such a move would have upon his career path with his employer, Citibank. According to counsel, the applicant's spouse would "have to start over, have to get used to a new system and new people, and have to get a new job as there would be little chance of securing employment with Citibank in Argentina." *Id.* The applicant's spouse states that he would not be able to join his wife due to his current career path in the United States. *Affidavit of* [REDACTED]. However, the dire predictions for the spouse's career seem to be overstated. The record reflects that the spouse states that he has been to Argentina for business purposes approximately seven times. *Id.* Second, while counsel and the applicants' spouse both assert that he would be unable to work in Argentina, it is predicated on the assumption that the spouse's career path must necessarily follow the expected trajectory of a move to New York. The AAO notes that none of the evidence asserts that the applicant's spouse would be unable to work in Argentina for Citibank. Moreover, even if a position at Citibank were not immediately available, it is possible that a similar entity would welcome someone with the spouse's work experience and language capabilities. In addition, a quick check of the Internet reflects that Citibank has a strong overseas presence, with offices in Argentina. As stated in the company's website for its Argentina branch:

Argentina

Citigroup has had a presence in Argentina since 1914, and we now have a consumer and corporate customer base of more than 2,540 million individual accounts and businesses. Our 4,105 employees proudly serve their local communities every day, providing consumer, corporate and investment banking services, insurance and investment products to our valued customers.

Citibank Argentina <http://www.citibank.com/argentina>

The AAO notes that although counsel's brief asserts that the spouse's career path would be disrupted, the evidence submitted does not reflect that the spouse's career could not be as successful, or would be damaged if he were to work first in Argentina. More importantly, no evidence has been presented which establishes that such an option has been explored and found unworkable. The most that appears in the record is the assertion in counsel's brief that the spouse "would have to get a new job as there would be little chance of securing employment with Citibank in Argentina." *Counsel's Brief*, at p. 6. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Consequently, counsel's statements regarding the spouse's inability to obtain employment with Citibank in Argentina, are merely speculation.

Although relocating to another country might cause the spouse some hardship, with his training, language skills, and previous work in Argentina for Citibank, makes him particularly well situated to make the transition with his spouse should he accompany her to Argentina. However, it is also noted that the spouse, being a United States citizen is not required to leave the United States. Thus, he can avoid the hardship attributable to relocating to Argentina. While he would experience hardship due to the separation from his wife, there was no evidence submitted to the district director which indicated that the hardship he would face would be beyond that which normally would be expected to occur when a family is unable to remain together.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. 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. *Hassan v. INS*, *supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. Moreover, the U.S. Supreme Court has held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981). The AAO recognizes that the applicant's wife will endure hardship as a result of separation from the applicant. However, her situation if she remains in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

Additional Evidence Submitted on Appeal

In addition to the evidence before the district director, counsel submitted additional evidence on appeal that did not exist at the time of the district director's review. The evidence relates to the applicant's recent diagnosis of thyroid cancer. As counsel states in a letter accompanying the submission of additional evidence,

To date, this I-290B and Appeal have yet to be adjudicated and new humanitarian considerations have now come into play regarding this case. Namely, that [REDACTED] has now been diagnosed with papillary thyroid cancer and she is being treated by Dr. [REDACTED] in Atlanta, Georgia. As evidenced by the attached documentation...it is abundantly clear that continued treatment in the United States is warranted in this case.

It must also be noted that [REDACTED] will not become a Public Charge on the United States as a result of this illness as she is covered by her husband's...medical plan.

Letter from Counsel, dated September 19, 2005.

Counsel asserts that the "humanitarian factors make it abundantly clear, Carina Roldan must remain in the United States." *Id.* Accompanying counsel's letter are copies of various medical records evidencing her medical condition. The records verify that the applicant was diagnosed with papillary thyroid cancer, and was scheduled to have surgery on March 22, 2004. *See Medical Records Submitted with Letter of September 19, 2005.* It is noted that counsel submitted the records shortly after her scheduled surgery. However, in the recent letter submitted urging the prompt adjudication of her case, counsel made no mention of the state of the applicant's recovery or any other information related to the applicant's condition following her surgery. As that request was submitted a year-and-a-half after the applicant's surgery, it would be reasonable to expect to receive updated information regarding the status of the applicant's condition. More fundamentally, however, counsel has not, in either submission, addressed the critical issue of how the applicant's health condition, as regrettable as it may be, affects the applicant's statutory eligibility for a waiver of inadmissibility. The fact

remains that the applicant must demonstrate extreme hardship to a qualifying relative. However, no evidence has been submitted to address whether, and how the applicant's illness constitutes an extreme hardship to her U.S. citizen spouse. Without such evidence, there is no reason to revisit the district director's finding that the applicant has failed to demonstrate extreme hardship to a qualifying relative. While the applicant's illness undoubtedly constitutes a great hardship for her, it is not clear from the record how her condition may have altered the degree of hardship that her spouse will experience, and the AAO will not speculate as to such hardship.

The AAO notes that counsel refers to the evidence of the applicant's medical condition as a humanitarian consideration. While the AAO does not disagree with such a characterization, and would give that factor appropriate weight in a determination of whether the applicant merits a favorable exercise of discretion, the fact remains that the applicant must first demonstrate how she meets the statutory requirements for the waiver. Once the applicant demonstrates statutory eligibility, discretionary factors are then appropriately considered.

In proceedings for application for a waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely 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.