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U.S. Citizenship
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[REDACTED]

FILE: [REDACTED] Office: Helena, MT Date: APR 11 2006

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:
[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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office



DISCUSSION: The waiver application was denied by the Acting District Director, Helena, MT and 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 Mexico 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 U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States with her husband and children.

The acting district director found that the applicant had failed to establish extreme hardship to her U.S. citizen spouse. The application was denied accordingly. *Decision of the Acting District Director*, dated February 12, 2003.

On appeal, counsel asserts four main points: first, section 212(a)(9)(B)(i)(II) of the Act does not apply to the applicant because the applicant is applying for adjustment of status under section 245(i) of the Act; second, the Service should be estopped from requiring a waiver in this case because the applicant detrimentally relied on the advice of a district adjudications officer when she departed the United States on an advance parole document; third, the Service erred in applying the definition of extreme hardship too strictly and the leading cases interpreting this definition do not address the definition in the context of a waiver for unlawful presence; and fourth, the applicant did establish that her spouse would suffer extreme hardship if she was removed from the United States.

In support of these assertions, counsel submits an appeal’s brief and a brief in support of the application for waiver of inadmissibility. 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 would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

In the present application, the record indicates that the applicant entered the United States without inspection on or about October 25, 1991. On November 29, 1999, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) under section 245(i) of the Act. On December 13, 1999, the applicant was issued Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and reenter the United States.

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 April 1, 1997, the date of enactment of the unlawful presence provisions under the Act, until November 29, 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 July 2002 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.

The AAO notes that it is not persuaded by counsel's assertions regarding a waiver of inadmissibility not being required in this case. Counsel asserts that the applicant is not subject to section 212(a)(9)(B)(i)(II) of the Act because she filed for adjustment of status under section 245(i) of the Act.

Section 245(i) of the Act provides, in pertinent part:

(2) Upon receipt of such an application and the sum hereby required, the Attorney General [Secretary] may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if;

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence;

In this case the applicant is not admissible to the United States for permanent residence. Nowhere in the Act does it state that 212(a)(9)(B)(i)(II) does not apply to applicants for adjustment of status under section 245(i) of the Act.

Counsel also asserts that the Service should be estopped from requiring a waiver in this case because of the circumstances surrounding the applicant's accrual of unlawful presence. Counsel states that the applicant detrimentally relied on the advice of a district adjudications officer when she departed the United States using an advance parole document. The AAO, like the Board of Immigration Appeals (BIA), is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of the Bureau from undertaking a

lawful course of action that it is empowered to pursue by statute or regulation. See *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted through regulations at 8 C.F.R. 103.1(f)(3)(iii). Accordingly, the Service has no authority to address counsel's equitable estoppel claim. Therefore, the applicant must submit a waiver of inadmissibility in her case.

The AAO notes that *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) is the ruling authority in establishing extreme hardship in a case involving a waiver of inadmissibility. In his appeal's brief counsel points to *Matter of L-O-G-, J-O* as the ruling authority in establishing extreme hardship. Interim Dec. 3281 (1996). He asserts that based on the interpretation of extreme hardship in *Matter of L-O-G-, J-O* the Service should have been more liberal in its interpretation of extreme hardship. He then goes on to state that *Matter of L-O-G-, J-O* as well as the other leading BIA cases cited by the Service were all cases involving suspension of deportation and should not be used when determining extreme hardship for a waiver of inadmissibility.

The cross-application of extreme hardship standards between different benefits, such as suspension of deportation as it existed prior to April 1, 1997, and waivers of inadmissibility, is limited by the statutes under which eligibility is determined. See *Cervantes-Gonzalez*, at 565. Such cross-application of administratively and judicially developed factors is intended to foster consistency in interpreting substantially similar statutory requirements, but may not be used to undermine or otherwise alter the terms of the applicable statute. Thus, the AAO used *Matter of Cervantes-Gonzalez* in deciding the applicant's case.

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 herself experiences upon deportation or her children experience because of her 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 provides a list of factors the Bureau 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. 22 I&N Dec. 560 (BIA 1999).

Counsel asserts that the applicant's spouse would face extreme hardship if he relocated to Mexico in order to remain with the applicant. Counsel states that the applicant's spouse would suffer economically if he were to reside in Mexico because of the poor economic conditions in the country. Counsel also asserts that the applicant's spouse would suffer financially if the applicant was removed to Mexico and he resided in the United States. The applicant's spouse would have to provide for childcare for their three children and would not be able to afford the added expense. Counsel asserts that the applicant's spouse would face extreme hardship because he would be separated from his wife and be left to raise their children alone. *Counsel's Brief in Support of Application for Waiver of Inadmissibility*, dated February 28, 2001. Counsel submitted no

documentation to support his assertions. Without documentary evidence to support his claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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. The AAO recognizes that the applicant's husband will endure hardship as a result of separation from the applicant. However, his situation, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for 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.