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FILE:

Office: MEXICO CITY, MEXICO

Date: JUN 26 2008

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Mexico City, Mexico (Guatemala City, Guatemala). 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 Guatemala 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 ten years of her last departure from the United States. The applicant is married to a U.S. citizen and she seeks a waiver of inadmissibility in order to reside in the United States.

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 and the application was denied accordingly. *Decision of the District Director*, dated November 29, 2007.

On appeal, the applicant asserts that the district director's decision is arbitrary and capricious, the district ignored the approval of the applicant's Form I-212, Application for Permission to Reapply for Admission After Deportation or Removal, approval (i.e. the applicant has already met the requisite standard of extreme hardship), the doctrine of stare decisis compels a reversal of the decision, the district director did not mention the applicant's two U.S. children and the extreme hardship they would encounter without their mother, the dismissal represents a clear misapplication of the law, the district director failed to consider the absence of the applicant's negative factors, the applicant believed her deportation order had been appealed by prior counsel, the Guatemala City consular post encouraged the applicant to leave the United States and Citizenship and Immigration Services (CIS) should be equitably estopped from denying this application. *Form I-290B*, received January 3, 2008.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statement, a letter from the applicant's spouse's counselor, the applicant's pastor's letters, a letter from the applicant's daughter's teacher, and articles on deportation policy and the impacts of family separation. The entire record was reviewed and considered in rendering a decision on the appeal.

The record indicates that the applicant entered the United States without inspection in December 1992, was ordered deported from the United States in 1994 and departed the United States on April 21, 2007. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of the unlawful presence provisions under the Act, until April 21, 2007, the date of her departure from the United States. Therefore, the applicant is 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 and seeking readmission within ten years of her April 21, 2007 departure.

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.

Counsel asserts that the doctrine of *res judicata* compels one USCIS district office to give decisive weight to the decision of another office on the same facts. *Brief in Support of Appeal*, at 3. The AAO notes that a Form I-212 adjudication involves a discretionary analysis of favorable and adverse factors. There is no requirement that a Form I-212 applicant establish extreme hardship to a qualifying relative and there is no evidence that this finding was made in the adjudication of the applicant's Form I-212. As such, counsel's *res judicata* and *stare decisis* claims lack merit.

Counsel also contends that CIS should be equitably estopped from denying the applicant's waiver request. *Id.* at 4. However, the AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS 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 to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable estoppel claim.

The applicant's claim will be adjudicated based on the relevant statutory and case law. 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 to an applicant's child is not a permissible consideration in a 212(a)(9)(B)(v) waiver proceeding except to the extent that such hardship may affect the qualifying relative. 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 are relevant in section 212(a)(9)(B)(v) waiver proceedings and include the presence of 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.

Therefore, an analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The AAO notes that extreme hardship to the applicant's spouse must be established in the event that he relocates to Guatemala or in the event that he remains in the United States, as he is not required to reside outside of the United States based on denial of the applicant's waiver request. The record reflects that the applicant is currently residing in Guatemala.

The first part of the analysis requires the applicant to show extreme hardship to her spouse in the event of relocation to Guatemala. The applicant's spouse's counselor states that the applicant's spouse has resided in the United States for over twenty years, he has had the same employer for over 13 years, he would not be able to obtain the same employment in Guatemala, he would be leaving behind his extended family to whom he is very attached and his children would have a difficult time as they have spent their entire lives in the United States. *Counselor's Evaluation*, at 4, dated January 2, 2008. The AAO notes that the record does not indicate the type of work the applicant's spouse performs or offer evidence that he could not obtain such employment if he relocated to Guatemala. The AAO also notes that the applicant's spouse is originally from Guatemala and is therefore, familiar with the language and culture. Although the AAO acknowledges the hardships that would be faced by the applicant's children in adjusting to a new culture, the record fails to offer sufficient evidence of how the applicant's children's hardships would affect the applicant's spouse. The record does not include sufficient evidence of financial or any other relevant type of hardship. The applicant's spouse states that the economic and political situation in Guatemala would put his family in danger. *Applicant's Spouse's Statement*, at 3, dated March 2001. However, the record does not include evidence, i.e., country conditions information, to support the applicant's spouse's claims. Going on record without supporting documentation will not meet the applicant's burden of proof in this proceeding. See *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)). After a thorough review of the record, the AAO finds that extreme hardship has not been established in the event that the applicant's spouse relocates to Guatemala.

The second part of the analysis requires the applicant to prove extreme hardship in the event that her spouse remains in the United States. Counsel states that the applicant is a "stay-at-home" mother, her presence has benefited the children's development, severing the maternal bonds would cause tragic and needless trauma, and the applicant's spouse could not replace the attention and guidance of an absent mother. *Brief in Support of Appeal*, at 2. The applicant's spouse's counselor details the significant emotional problems that the applicant's children are having as a result of separation from the applicant. *Counselor's Evaluation*, at 3. The applicant's spouse's counselor states that the applicant's spouse suffers from major depressive disorder (moderate without psychotic features), and he experiences depressed mood most of the day, he has

diminished interest or pleasure in almost all daily activities, and he has insomnia and psychomotor agitation. *Id.* at 2. The counselor states that the applicant's spouse would regain his psychological well-being and his children's emotional difficulties would be halted and reversed if the applicant's waiver was approved. *Id.* at 4.

The applicant's pastor states that the applicant's spouse and son have been visibly suffering and the applicant's children are experiencing emotional hardship. *Letter from Applicant's Pastor*, dated January 8, 2008. The applicant's spouse states that his family would be torn apart and destroyed, he cannot care for his son alone, he cannot support the applicant while she is outside of the United States, he cannot afford frequent travel abroad, he and the applicant share family values and religious beliefs, and they spend a lot of time together and enjoy their life together. *Applicant's Spouse's Statement*, at 2-3. The record includes information on family separation and its' effect on children. Considering the totality of the aforementioned factors, the AAO finds that extreme hardship has been established in the event that the applicant's spouse remains in the United States without the applicant.

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 who are removed.

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.