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H3

FILE: [REDACTED] Office: HARLINGEN

Date:

IN RE: [REDACTED]

JUL 20 2009

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

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting Field Office Director, Harlingen, Texas. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED], is a native and citizen of Mexico. She 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 admission within 10 years of her last departure from the United States. The applicant 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 return to the United States to join her U.S. lawful permanent resident spouse, [REDACTED].

The record reflects that on July 2, 2006, the applicant filed a Form I-485, Application to Adjust Status, based upon an underlying Form I-130, Petition for Alien Relative. On December 14, 2006, the Harlingen Field Office Director determined the applicant to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act and denied the adjustment application. On December 28, 2006, counsel filed a Form I-601, Application for Waiver of Grounds of Inadmissibility, and a motion to reopen/reconsider the denial of the Form I-485 adjustment application based upon a claim of ineffective assistance of counsel. On July 7, 2008, the director denied the applicant's waiver application and dismissed the motion to reopen/reconsider. On August 6, 2008, counsel filed a notice to appeal the denial of the waiver application and the dismissal of the motion to reopen. On April 14, 2009, the director *sua sponte* moved to reopen the waiver application because of an adjudication error. The director noted that the waiver denial applied an incorrect ground of inadmissibility and failed to consider hardship to the applicant's U.S. lawful permanent resident spouse. The applicant was afforded 30 days to submit additional evidence of extreme hardship to a qualifying relative. On June 4, 2009, the Acting Field Office Director denied the waiver application, concluding that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, her U.S. lawful permanent resident spouse.

The denial of the waiver application is now on appeal before the AAO. The AAO notes that counsel has also appealed the director's dismissal of the applicant's motion to reopen/reconsider her Form I-485 adjustment application. Counsel asserts, on appeal, that the matter should be reopened for ineffective assistance of counsel pursuant to *Matter of Lozada* and a waiver should not be required. However, there are no appeal rights attached to the denial of an application for adjustment of status under section 245 of the Act. *See* 8 C.F.R. § 245.2(a)(5)(ii). Since the AAO does not have jurisdiction over this matter, the dismissal of the applicant's motion to reopen/reconsider will not be addressed in these proceedings.

Counsel asserts on appeal from the director's initial July 7, 2008 denial that the director erred in failing to give the applicant the opportunity to file a waiver application prior to the denial of the Form I-485 adjustment application. Counsel states that the applicant's advance parole document should not have been granted because the applicant had accrued unlawful presence and, thus, was subject to inadmissibility. Counsel states that the denial of an approvable adjustment application is a waste of judicial resources. Counsel states that the director made errors of law in denying the

applicant's waiver application. Counsel states that the director failed to consider that the applicant's spouse would suffer extreme hardship in attempting to raise a high school aged daughter, twin daughters nearing puberty and a three year old son without the assistance of his wife. Counsel states that the director's decision was not postmarked until July 11, 2008, interfering with the applicant's statutory right to have 30 days to file an appeal.

Counsel asserts on appeal from the director's June 4, 2009 denial that the second denial is even more egregious than the first, and that the decision fails to consider the evidence submitted. Counsel states that the decision makes an attack on the applicant's morality because only one of her children is the biological child of her spouse. Counsel states that the applicant and her spouse love and care for those in their blended family and the children love and care for them. Counsel states that the applicant could not give the love, support and care that she gives her spouse and children if she were sent to Mexico. Counsel states that the applicant's spouse could not find work in Mexico because of economy. Counsel states that the applicant's spouse would not be able to raise his children without the assistance of his wife. Counsel states that the director also did not consider the medical issues presented. As corroborating evidence, counsel furnished the applicant's children's school, vaccination and birth records, family photographs, and letters from the applicant's spouse and children. 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:

(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 [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 reflects that the applicant entered the United States from Mexico with a Mexican Border Crossing Identification Card and B1/B2 Nonimmigrant Visa in 1996. Mexican Border Crossing Cards are issued to citizens of Mexico who seek to travel temporarily to

the United States for business or pleasure. *See* 8 C.F.R. § 212.6(a). However, the applicant permanently remained in the United States, and on July 2, 2006, she filed a Form I-485, Application to Adjust Status. Time in unlawful presence begins to accrue on April 1, 1997, the date of enactment of unlawful presence provisions under the Act. Consequently, the applicant accrued unlawful presence from April 1, 1997 until the date she filed her adjustment of status application, July 2, 2006. The applicant resided in the United States until on or about October 2006 when she departed for Mexico with an advance parole travel document. On December 2, 2006, the applicant was paroled into the United States as an arriving alien. The applicant's departure from the United States triggered the ground of inadmissibility arising under section 212(a)(9)(B)(i)(II) of the Act. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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 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).

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 (BIA) 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 United States 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).

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 reflects that the applicant wed [REDACTED] a U.S. lawful permanent resident, on January 26, 2001. The applicant's spouse is a qualifying family member for section 212(a)(9)(B)(v) of the Act extreme hardship purposes. The applicant and her spouse have a 26 year old child, Adriana Aguirre, a 25 year old U.S. citizen child, [REDACTED], a 24 year old child, [REDACTED] a 20 year old child, [REDACTED], 13 year old U.S. citizen twin children, [REDACTED] and [REDACTED] and a four year old U.S. citizen child, [REDACTED]. Hardship to the applicant's adult and minor children will be considered insofar as it results in hardship to the applicant's spouse.

The AAO will first address counsel's assertions regarding procedural errors in this case. Counsel asserts that the director erred in failing to give the applicant the opportunity to file a waiver application prior to the denial of the Form I-485 adjustment application. The AAO finds the director's actions to be harmless error as the director would have granted the applicant's motion to reopen/reconsider the adjustment application had she established eligibility for a waiver of inadmissibility.

Counsel asserts that the applicant's advance parole document should not have been granted because the applicant had accrued unlawful presence and, thus, was subject to inadmissibility. The AAO finds counsel's argument to be unpersuasive as the applicant's advance parole travel document (Form I-512L, Authorization for Parole of an Alien Into the United States) provides a one paragraph travel warning regarding unlawful presence. The travel document explains the ground of inadmissibility arising under section 212(a)(9)(B)(i)(II) of the Act. Further, U.S. courts have held that there is no constitutional requirement for the U.S. government to notify aliens of the consequences of re-entry with advance parole. In *Balogun v. U.S. Attorney General*, the Eleventh Circuit Court of Appeals held that the INS had no duty, constitutional or otherwise, to provide legal advice to aliens who petition the agency for a grant of advance parole. 304 F.3d 1303, 1312 (11<sup>th</sup> Cir. 2002).

Counsel asserts further that the director's decision was not postmarked until July 11, 2008, interfering with the applicant's statutory right to have 30 days to file an appeal. The AAO notes that this action also amounts to harmless error because on April 14, 2009, the director *sua sponte* moved to reopen the waiver application. The applicant was afforded 30 days to submit additional evidence of extreme hardship to a qualifying relative. On June 4, 2009, the Acting Field Office Director denied the waiver application and notified the applicant that she could submit additional evidence or a brief in support of her appeal to the AAO. Therefore, the applicant was afforded the opportunity to submit additional evidence in support of the waiver application on at least two occasions prior to the issuance of the AAO's decision.

Finally, counsel indicates that had the matter been reopened for ineffective assistance of counsel pursuant to *Matter of Lozada*, a waiver would not be required. 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). The AAO notes first that the holding in *Matter of Lozada* involves a claim of ineffective assistance of counsel by an aggrieved party against former counsel. In the present case, counsel, on behalf of the applicant, has presented an ineffective assistance of counsel claim against herself. The AAO observes that this approach creates a bias that inevitably hinders the applicant's ability to satisfy the third requirement of *Matter of Lozada* - to demonstrate 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. In addressing the relevance of the third requirement, the BIA noted in *Matter of Rivera* that the process serves to protect against collusion between alien and counsel in which "ineffective" assistance is tolerated, and goes unchallenged by an alien before disciplinary authorities because it results in a benefit to the alien in that delay can be a desired end, in itself, in immigration proceedings. 21 I&N Dec. 599, 604 (BIA 1996). Moreover, the AAO notes that had the director granted the motion to reopen the applicant's adjustment of status application, she would nevertheless remain inadmissible. Counsel has provided no authority for the argument that ineffective assistance of counsel can cure the applicant's inadmissibility, and the AAO notes that the remedy for ineffective assistance of counsel is typically the reopening of a proceeding so that an alien can submit evidence or a claim that would have affected the outcome of the proceeding if submitted previously. *See e.g., Matter of Lozada*, 19 I&N Dec. 637 (Where respondent filed a motion to reopen for ineffective assistance of counsel because former counsel failed to submit a written brief or statement explaining the basis for appeal.); *In re B-B*, 22 I&N Dec. 309 (BIA 1998)(Where respondents filed a motion to reopen for ineffective assistance of counsel because former counsel dissuaded them from applying for asylum.); *Matter of Rivera*, 21 I&N Dec. 599 (BIA 1996)(Where respondent filed a motion to reopen in absentia proceedings based on her unsuccessful communications with her attorney.).

Having addressed the procedural issues in this case, the AAO will now evaluate the applicant's claim of extreme hardship to her spouse. Counsel states that the applicant and her spouse love and care for those in their blended family and the children love and care for them. Counsel notes that the applicant has four children from a prior relationship, her spouse has two children from a prior relationship, and they have one child in common. Counsel states that the children were of tender years when their parents married and they rely on their stepparents for love and support. Counsel states that the applicant could not give the love, support and care that she gives her spouse and children if she were sent to Mexico. Counsel contends that family unity is the main policy reason for allowing waivers of inadmissibility. Counsel notes that the applicant has twin U.S. citizen daughters who are 13 years old, a U.S. citizen son who is five years old, a 20 year old daughter who just finished high school because of difficulties learning, and a 24 U.S. citizen son serving in the military. Counsel states that the applicant has raised the children, taken care of their home, and provided emotional support and love to her husband. Counsel states that the applicant's spouse would not be able to raise his children without the assistance of his wife. Counsel maintains that dismantling the life of the applicant's family and the effect it would have on all concerned would create extreme hardship for the applicant's spouse.

As corroborating evidence, counsel furnishes the following documentation:

- A letter from the applicant's spouse, dated June 29, 2009, which in part states, "For my beloved wife. My love I write these lines to tell you that I love you. . . . God bless you for giving me my son which is the most beautiful thing that could have happened to me because he, you, and your daughters and my kids are the most marvelous thing that God could have given me."
- A letter from the applicant, dated July 1, 2009, which in part states, "My life here changed completely for me and my daughters everything is much better, their studies and the way of living and to go forwards in life and progress with them. . . . What more than to live here is different from my home land. Here they facilitate for us to live better, better education, and jobs, and because I LOVE my family."
- A letter from the applicant's daughter, [REDACTED] dated June 29, 2009, which in part states, "I have a sickness of miigrane head-age [sic] and she only know how to take care of me when I get migranes [sic]. I need my mom here cuz who would take me to school, who will give me [sic] to eat. . . . Who will be their [sic] for us when we have bad days. If you take her away from us I will get lost in this huge city."
- A letter from [REDACTED] dated June 30, 2009, which in part states, "My mother [sic] entire family is located here in U.S.A. She provides for my brother, sisters and needs to remain here to provide a brighter future for them. I would like for her to share with me my son's childhood and help me with [sic] times."
- A letter from [REDACTED] dated June 30, 2009, which in part states, "When we were living in Mexico several years ago we would always suffer and we were miserable, we never had a stable home or school to attend. . . . In total we are a family of eight, though [REDACTED] and myself are now married and doing well. My twin sisters and youngest brother are still residing with my mother and her husband. . . . My mother has made her life here in the United States, she has learned how to speak English and has attended classes for baking. . . . My mother is very well respected by her family, friends and neighbors. She is the families foundation and without her our lives will not be the same."
- An undated letter from [REDACTED] which in part states, "I just can't imagine my life without my mom. She needs to stay in the U.S. because she need to support me on my school sports games. She take care of all my sisters and brother when we're sick. I love when we go shopping and have fun in the park."
- An undated letter from [REDACTED], which in part states, "I love my mom and I can't do anything or be anyone without her. My mom is everything for me she is a very good person she sometimes when she has money she buys us stuffs like clothes, shoes, and other stuff that we need. We are a good family because of her she the best mom I could ever had and when we get mad we solve the problems."

The AAO recognizes that the applicant's spouse and children would suffer emotionally as a result of the applicant's inadmissibility. Their situation, however, 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. Rather, the record demonstrates that they will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse or parent is removed from the United States. The AAO notes that the record does not demonstrate that the applicant's spouse would be unable to care for his children. There is no discussion of the applicant's spouse's work schedule, whether he has friends and family members that can assist with child care, or whether there are affordable child care options available to him.

The letters from the applicant's family members show that the applicant has very loving and devoted family members who are extremely concerned about the prospect of the applicant's departure from the United States. Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard of section 212(a)(9)(B)(v) of the Act, be above and beyond the normal, expected hardship involved in such cases. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984).

Counsel states that the director also did not consider the medical issues presented. Counsel notes that she submitted a HIPAA release for medical records for [REDACTED] who had reconstructive surgery to fix a hole in her heart when she was younger. The record contains a HIPAA authorization for release of information, dated April 23, 2009. The form requests Dr. [REDACTED] heart specialist, and/or Driscoll Children's Hospital to release to counsel the evaluations and summaries related to [REDACTED]. The AAO notes that the aforementioned letter from [REDACTED] indicates that she currently suffers from migraine headaches.

The AAO will consider medical hardship as a factor in establishing extreme hardship. However, in the present case, the applicant's child's medical condition is not demonstrated by the record. The record does not contain any medical documentation related to [REDACTED] diagnoses, treatment plans and prognosis. It is unclear whether the applicant's child has ongoing medical

conditions for which she is currently seeking medical treatment. The record does not demonstrate how [REDACTED]'s medical conditions affects her activities of daily life, and as a result create hardship for the applicant's spouse. 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)). For these reasons, the AAO cannot conclude that the applicant's child has a medical condition that would contribute to a finding of extreme hardship for the applicant's spouse.

Counsel asserts that the applicant's spouse is a middle aged male born in 1952 and as a laborer he could not find work in Mexico because of economy. Counsel notes that the applicant's spouse would lose his U.S. lawful permanent resident status if he went to Mexico. The record contains a copy of the applicant's spouse's Form I-864, Affidavit of Support, and supporting financial documentation. The supporting financial documentation consists of a letter from the Human Resources Administrator of the applicant's employer, Keppel Amfels, Inc., dated August 2, 2006. The letter states that the applicant's spouse has been a full-time employee of the company since May 14, 2001 as a Pipe Fitter II. The financial documentation also includes the applicant spouse's Form W-2, Wage and Tax Statement, which reflects that he earned \$32,691.64 in 2005.

The AAO will consider financial hardship a factor in establishing extreme hardship if the applicant's spouse accompanied her to Mexico. However, in the present case, sufficient documentation has not been provided to demonstrate that the applicant's spouse would be unable to find employment in Mexico. The record does not demonstrate the type of employment opportunities available in Mexico to someone with the applicant's spouse's background and skills. The record does not contain any country condition reports related to the economy and job opportunities available in Mexico. As previously stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.

In *Matter of Cervantes-Gonzalez*, the BIA noted that the respondent's wife spoke Spanish and the majority of her family was originally from the respondent's country of citizenship, Mexico. The BIA stated that based on these factors the respondent's wife "should have less difficulty adjusting to live in a foreign country." 22 I&N Dec. 560, 567 (BIA 1999). The record in the present case reflects that the applicant's spouse is a national and citizen of Mexico. He became a U.S. lawful permanent resident on January 30, 1990, at the age of 37 years. Thus, he should have less difficulty readjusting to culture and residence in Mexico. Finally, the AAO notes that the possibility of the loss of lawful permanent resident status is a hardship that inevitably befalls all qualifying lawful permanent resident relatives. As such, counsel's claim that the applicant's spouse would lose his permanent resident status if he resided in Mexico does not, alone, rise to the level of extreme hardship. Therefore, AAO does not find that the hardship factors as demonstrated in the record, in totality, amount to extreme hardship should the applicant's spouse accompany the applicant to Mexico.

Therefore, the record, reviewed in its entirety and in light of the *Matter of Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse faces extreme hardship if the applicant is refused admission 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)(v) 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.