

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
LOS ANGELES, CALIFORNIA**

File No.:       **A 75 710 964**                    )  
                  **A 75 710 965**                    )  
  )  
In the Matter of                                )       **IN REMOVAL PROCEEDINGS**  
  )  
**CABRERA, Benjamin**                            )  
**CABRERA, Londy**                                )  
  )  
Respondents.                                    )

**Charge:**                    Section 237(a)(1)(A) of the Immigration and Nationality Act ("Act") -  
*Inadmissible at time of entry or adjustment of status under section  
212(a)(7)(A)(i)(I)-Immigrant-no valid immigrant visa or entry document  
(A75 710 964)*

Section 212 (a)(6)(A)(i) of the Immigration and Nationality Act ("Act") -  
*Present in the United States Without Being Admitted or Paroled. (A75  
710 965)*

**Application:** Cancellation of Removal

**On Behalf of Respondent:**

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Loa Angeles, CA 90017

**On Behalf of the Government:**

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**PROCEDURAL HISTORY**

The Respondents are a married couple. The male Respondent is a native and citizen of Mexico, and the female Respondent is a native and citizen of Guatemala. The Respondents have admitted to the allegations of fact and conceded to the charges set forth against them in their notices to appear. Both Respondents requested cancellation of removal under Section 240A(b)(1) of the Immigration and Nationality Act, as amended, and voluntary departure under Section 240B of the same statute in the alternative.

On March 29, 2002, the Immigration Judge granted Respondent's application for cancellation of removal. On October 9, 2002, the Department of Homeland Security appealed the Judge's decision to the Board of Immigration Appeals.

On September 22, 2003, the Board of Immigration Appeals sustained the appeal of the Department of Homeland Security and reversed a grant of relief under § 240A(b) of the Act. The Board granted the Respondents voluntary departure with an alternate order of removal. The Respondents filed a Motion to Reconsider with the Board, which was denied by the Board on November 14, 2005. On May 3, 2005, the United States Court of Appeals for the Ninth Circuit remanded the case to the Board in light of Molina-Camacho v. Ashcroft, 393 F.3d 937 (9<sup>th</sup> Cir. 2004). On November 14, 2005, the Board remanded the case to the Immigration Judge pursuant to Molina-Camacho for further consideration consistent with the court's order.

## **II. Summary of Facts**

Respondents are married and have two daughters, Diana Cabrera, and Jocelyn Cabrera. Both Diana and Jocelyn Cabrera are United States citizens: Diana was born on January 7, 1992, in Los Angeles, California, and Jocelyn was born February 15, 1994, in Los Angeles, California. Both daughters are academically gifted, and Diana has consistently been enrolled in special academic programs for gifted students since 1999.

In addition, the female Respondent has two U.S. citizen brothers and her mother is a lawful permanent resident. The female Respondent's mother, Martha Mazariegos, is sixty-four years old and resides with the Respondents. Due to high blood pressure and multiple surgeries for a hiatal hernia, Ms. Mazariegos cannot drive or lift anything weighing more than five pounds. She relies on the Respondents for her medical care, all transportation, and financial needs. Ms. Mazariegos has never worked in the United States and does not have a steady income or pension. She relies exclusively on her children for her financial well-being with the Respondents' carrying most of the responsibility.

Ms Mazariegos is even more dependent on the Respondents for her care now than when this Court previously granted Cancellation of Removal to the Respondents. On October 5, 2006, Ms. Mazariegos testified that her eldest son recently had brain surgery, and will be unable to work. If Respondents are removed, Ms. Mazariegos will be solely reliant on her youngest son for support. However, the Court heard testimony that her youngest son Mario already struggles to provide for his wife and two children on his income as a building manager.

Both the male Respondent's parents are lawful permanent residents, and he has eight siblings residing in the United States. A sister in Mexico is the male Respondent's sole family member remaining in that country. However, only two of the male Respondent's siblings have legal status. The male respondent's legal permanent resident brother currently resides with the Respondents; although he is employed at a factory, the brother relies on the Respondents financial assistance to pay for his expenses. Additionally, the male Respondent continues to provide support for his mother who has severe diabetes and for his father who is a part-time gardener.

Additionally, the Respondent's eldest daughter, Diana Cabrera (hereinafter "Diana") was identified as gifted in 1999. Under the requirements of the Los Angeles School District at the time, Diana qualified for the Gifted and Talented Education Program through her scores on standardized tests, teacher-referral and parent interviews. As a second-grader, she was clustered with third-grade students for Language Arts. In April 2000, Diana scored in the 95<sup>th</sup> percentile for reading on

the nationally-normed Stanford 9, and in April 2001, she scored in the 99<sup>th</sup> percentile for mathematics and spelling on the Stanford 9. (Exhibit 3 90-91).

As a result of her high achievement, Diana became eligible to participate in the Talent Search sponsored by Johns Hopkins University Center for Talented Youth (hereinafter "CTY"). *Id.* at 89. Students must score in the 95<sup>th</sup> percentile or above on a nationally-normed test in order to qualify for the CTY Talent Search. Students who qualify for the Talent Search must then perform at a certain level on the SCAT test, an above grade-level examination, to participate in the program's renowned summer program. (Reply Motion to Order to Supplement 13; Exhibit 3 at 88). Diana was invited to participate in the 2002 CTY Summer Program and has participated in CTY for each of the last four years. (Reply Motion to Order to Supplement 12). Diana will be eligible to participate in CTY throughout the remainder of high school, and she may apply to study at European campuses as well as participating universities within the United States. After the completion of high school, Diana will be entitled to enroll at Johns Hopkins University if she so chooses.

In addition, Diana has been invited to enroll in the Eisenhower People to People Student Ambassador European Discovery Program for the summer of 2007. (Reply Motion to Order to Supplement 4).

Diana has also been accepted into the Pre-International Baccalaureate (pre-IB) Program at Earl Wooster High School in Reno, Nevada. Earl Wooster High School is one of three high schools in Nevada offering the International Baccalaureate diploma, and successful completion of the pre-IB curriculum is required in order to obtain an International Baccalaureate diploma. In order to qualify for the pre-IB program, a student must submit 2 letters of recommendation from current teachers or counselors, a copy of the student's last report card, and a copy of the student's most recent Iowa Test scores. (Motion to Submit New Evidence March 30, 2006, at 12-14). The pre-IB and IB programs are designed to provide students with a rigorous academic experience to enable them to succeed in elite universities throughout the world. For example, grades on the IB exams are equivalent to passage of the "A level" exams in the United Kingdom required for acceptance into Cambridge and Oxford. Diana currently has a 4.0 in her pre-IB coursework. *Id.*

Diana has also received national recognition for her academic performance. In 2006, she was earned the President's Award for Academic Excellence and Senate Majority Leader Harry Reid awarded her a 2006 Best Kids Award. (Reply Motion to Order to Supplement 6,8). She has also been offered an internship in the Los Angeles or Washington D.C. offices of Senator Dianne Feinstein. (Ex. 6 at 4).

### **III. Statement of Law and Analysis**

#### **A. Jurisdiction to Consider New Evidence**

When a case is remanded, the Immigration Judge reacquires jurisdiction over the proceedings and has the authority to consider new evidence. See generally 8 C.F.R. § 1003.23(b)(3). Additionally, unless jurisdiction is retained by the Board, the remand is "effective for the stated purpose and for consideration of any and all matters which the Service officer deems

appropriate in the exercise of his administrative discretion or which are brought to his attention in compliance with the appropriate regulations.” Matter of Patel, 16 I. & N. Dec 600, 601 (BIA 1978). The Board order of November 14, 2005, was not limited or qualified. Additionally, failure to consider new material evidence relevant to the determination of hardship may violate due process. See, Ramirez-Alejandro v. Ashcroft, 320 F.3d 858, 864 (9<sup>th</sup> Cir. 2003) .

### **B. Cancellation of Removal**

Section 240A(b)(1) of the Act provides that the cancellation of removal or adjustment of status of an alien who is inadmissible or deportable from the United States is permissible if the alien:

- (A) has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application;
- (B) has been a person of good moral character during such period;
- (C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3); and
- (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

In the present case, the main issue is whether the Respondents have demonstrated that their removal from the United States would cause exceptional and extremely unusual hardship to their United States citizen children and legal permanent resident parents. Section 240A(b)(1)(D) of the Act.

To establish such hardship, an applicant for cancellation of removal under section 240A(b)(1) of the Act must demonstrate that his or her United States citizen or lawful permanent resident spouse, parent, or child would suffer hardship that is “substantially beyond that which ordinarily would be expected to result from the alien’s [removal],” but need not show that such hardship would be “unconscionable.” Matter of Monreal, 23 I. & N. Dec. 56, 59-60 (BIA 2001). In determining what factors would constitute exceptional and extremely unusual hardship, the Court will look at the “age, health, and circumstances of the qualifying family members, including how a lower standard of living or adverse country conditions in the country of return might affect those relatives.” Matter of Recinas, 23 I. & N. Dec. 467, 468 (BIA 2002). Additionally, the Board has also considered the following factors in determining what constitutes exceptional and extremely unusual hardship: the respondent’s age; family ties inside and outside the United States; home country conditions; financial impact of removal; significant health conditions; other means of adjusting the respondent’s status; immigration history; respondent’s position in the community; and whether the respondent is of special assistance to the United States. See Matter of Anderson, 16 I. & N. Dec. 596, 597 (BIA 1978).

For the following reasons, the Court finds that the removal of the Respondents would result in exceptional and extremely unusual hardship to their United States citizen children.

### I. Diana Cabrera Has "Compelling Needs in School"

Although applications for cancellation of removal under Section 240A(b) are common, the BIA has issued only three precedent decisions since the effective date of IIRIRA in 1997 which specifically address the issue of "exceptional and extremely unusual hardship" in the context of cancellation of removal. See Matter of Monreal, 23 I. & N. Dec 56 (BIA 2001); Matter of Andazola, 23 I. & N. Dec. 319 (BIA 2002); and Matter of Recinas, 23 I. & N. Dec. 467 (BIA 2002).

Dicta in Matter of Monreal included circumstances that would warrant a finding of "exceptional and extremely unusual hardship." Matter of Monreal, 23 I. & N. Dec. at 63-64. Among the examples of those with a strong application were respondents who had a child with "compelling special needs in school." Id at 64. To date, the Board has not defined what constitutes "compelling special needs in school."

However, it is reasonable to conclude that "compelling needs in school" applies to both ends of the academic spectrum. The states of California and Nevada, where the Respondents' children have resided, determined under their laws that students with uniquely "outstanding academic skills or aptitudes" require special attention and nurturing. 5 Cal. Code Regs., tit. 5 § 3820(a),(b) (2006); Nev. Rev. Stat. § 388.440(1).

In fact, under Nevada law, a "gifted" student is defined as "a person under the age of 18 years who demonstrates such outstanding academic skills or aptitudes that he cannot progress effectively in a regular school program and therefore needs special instruction or special services." Nevada Revised Statutes § 388.440(1).

The California Education Code requires all school districts to establish procedures for identifying gifted and talented students, and then mandates that they provide these students with services containing:

- (1) Differentiated opportunities for learning commensurate with the gifted and talented pupil's particular abilities and talents.
- (2) Alternative learning environments in which gifted and talented pupils can acquire skills and understanding at advanced ideological and creative levels commensurate with their potentials.
- (3) Elements that help gifted and talented pupils develop sensitivity and responsibility to others.
- (4) Elements that help to develop a commitment in gifted and talented pupils to constructive ethical standards.
- (5) Elements that assist gifted and talented pupils to develop self-generating problem-solving abilities to expand each pupil's awareness of choices for satisfying contributions in his or her environment.
- (6) Elements that help gifted and talented pupils develop realistic, healthy self-concepts. Cal Educ. Code § 52200(c) (2006).

From these guidelines, it is clear that California recognizes that specialized services for

gifted students are more than an enhanced educational opportunity but are essential to the cognitive, emotional and social development of the gifted student. Just as it would be developmental harmful to require a disabled child to forgo the special educational services available in the United States, it is equally as damaging and tragic to require a highly gifted student to forfeit a developmentally appropriate education because of the immigration status of her parents.

Diana is currently enrolled in the pre-International Baccalaureate Program at Earl Wooster High School in Reno, Nevada. Although some of the courses are available to all students, enrollment in the diploma program is limited to students who have displayed superior academic ability through multiple measurements. Additionally, the International Baccalaureate program is recognized as a suitable program for gifted and talented students according to the California Department of Education. See "California Department of Education Specialized Programs Gifted and Talented Education Program Information" available at <http://www.cde.ca.gov/sp/gt/gt/>.

In addition to receiving specialized education in her school, Diana has also qualified for two of the most highly regarded private programs for gifted and talented students: the Johns Hopkins Center for Talented Youth Summer Program and the Eisenhower People to People Student Ambassador Program. Both programs have provided her with scholarships to ensure her participation. Consequently, multiple agencies government and non-government have identified Diana as having "compelling special needs in school."

In a footnote to Matter of Andazola, the Board rationally recognized that "a finding that diminished educational opportunities result in an 'exceptional and extremely unusual hardship' would mean that cancellation of removal would be granted in virtually all cases involving respondents from developing countries who have young United States citizen or lawful permanent children." Matter of Andazola, 23 I. & N. Dec. at 323 n.1.

However, a finding that "compelling special needs in school" applies both to academically gifted students as well as their disabled counterparts would not result in a significant increase in the number of grants of cancellation of removal. By its very nature, gifted and talented education is limited to students "who possess a capacity for excellence *far beyond* that of their chronological peers." 5 Cal. Code Regs, tit. 5, § 3822. Most programs require that the student score above a certain percentile on a nationally-normed test or a comparable measure of aptitude and talent. For example the Washoe County School District in Reno, Nevada, where Diana currently attends school, requires that a student score in the "98<sup>th</sup> percentile or above on an individually administered intelligence test" in order to qualify for its gifted and talented education programs. See <http://www.washoe.k12.nv.us/district/departments/giftedandtalentedprogram/>.

Diana has been identified under the laws of both California and Nevada as having special skills and aptitudes which require specialized services in order for her to meet her full potential. She has displayed an aptitude for learning that meets or exceeds 99% of her chronological peers in multiple subject areas. The Court finds that Removal of the Respondents would cause Diana to lose the unique educational opportunities currently available to address her special needs as an academically gifted student, and that this forfeiture comprises an exceptional and extremely unusual hardship.

## 2. Removal of the Respondent's Would Result in the Separation of Diana and Jocelyn from one or both of their parents

The Court also finds that removal of the Respondents would inevitably result in the separation of Diana and Jocelyn from one or both of their parents. Under Salcido-Salcido v. INS, it was well established that a court should factor the effect separation would have on a qualifying relative when determining extreme hardship under the old suspension of deportation standards. 138 F.3d 1292 (9th Cir. 1998) (holding that separation from parents may be the most important factor in assessing extreme hardship). The effect of children's separation from their parents is still applicable under cancellation of removal. See Cabrera v. Ashcroft, 423 F.3d 1006, 1012 (9th Cir. 2005) (citing Salcido-Salcido for the effect of separation on children from their parents in listing all the factors the Board takes into account in assessing hardship to qualifying children in cancellation of removal cases).

Diana and Jocelyn are very close to both of their parents. There is little doubt that their academic success and achievements are directly attributable to the constant guidance and support provided by the Respondents. Both Respondents have testified that if they are ordered removed, they will leave their daughters in the United States with the female Respondent's brother Mario. However, it is far from clear to this court whether Mario has the financial ability or the room to provide for his nieces. It does not appear that there are any other relatives with whom the daughters could stay in the United States. Consequently, despite their parents' wishes, Diana and Jocelyn may be forced to depart the United States with their parents.

However, the male and female Respondent are not from the same nation. The male Respondent would be removed to Mexico and the female Respondent would be removed to Guatemala. Although there is migration between Guatemala and Mexico, the vast majority is comprised of illegal migrant agricultural workers. Legal immigration to Mexico is an onerous process for Guatemalan nationals, and it is by no means certain that the female Respondent will be permitted to join her husband in Mexico. See Reply Motion to Order to Supplement p.44. A high rate of unemployment and escalating gang violence would preclude the male Respondent from joining his wife in Guatemala, especially if he were accompanied by his daughters who would face discrimination and possible violence as a result of their gender. Id at 79-81, 88-98. Therefore, it is very likely that no matter whether Diana and Jocelyn remain in the United States or depart to Guatemala or Mexico that they would be separated for a significant period of time from at least one parent.

## 3. Hardship to Martha Mazariegos

In addition to the hardship to the Respondents' United States citizen daughters, removal of the Respondents would cause hardship to the female Respondent's legal permanent resident mother, Martha Mazariegos. Ms. Mazariegos has never worked in the United States and she is not entitled to a pension. She is completely dependent on her children for financial assistance. Due to a prior surgery, Ms. Mazariegos cannot drive or lift moderately-heavy objects.

Prior to the remand, Ms. Mazariegos resided in Los Angeles with her eldest son. However, two years ago, the eldest son had brain surgery. He has received ongoing medical care

and has been advised that he should not work. As noted above, Ms. Mazariegos' other son, Mario, resides in a three bedroom home with his wife and two daughters. Ms. Mazariegos does not live with Mario because they do not have space for her in their small home. Consequently, she currently resides with the Respondents and is completely reliant upon them for transportation, housing and all of her basic needs.

Ms. Mazariegos would suffer a devastating reduction in her quality of life if the Respondents were ordered removed. Currently, the Respondents provide care for their children and Ms. Mazariegos. In addition, they also help the female Respondent's older brother financially. If the Respondents were ordered removed, the care and maintenance of three households including at least nine U.S. citizens and legal permanent residents would depend on the salary of one person—Mario, who is a building administrator.

#### 4. Hardship to Other Qualifying Relatives

Furthermore, the Respondents provide a home to the male Respondent's legal permanent resident brother, and give significant financial support to the male Respondent's disabled mother and legal permanent resident father. Additionally, the male Respondent's father has testified that he will return to Mexico with his son if the Respondents are ordered removed.

The Respondents are part of a close knit family that depends on each member for sustenance and support. To the extent that their families are thriving, the Respondents are an integral part of that success. The Court notes that removal of the Respondents would pose a hardship to at least a dozen U.S. citizens and legal permanent residents. Of these, two U.S. citizen children and three elderly legal resident parents are qualifying relatives whose hardship must be considered in determining Respondent's eligibility for cancellation of removal.

#### 5. Conclusion

After considering all the relevant hardship factors in the aggregate, this Court finds that removal of the Respondents would pose an "exceptional and extremely unusual hardship" to the Respondents' five qualifying relatives.

In Matter of Monreal, the Board noted that "an applicant who has elderly parents in this country who are solely dependent upon him for support might very well have a strong case." " Matter of Monreal, 23 I. & N. Dec. at 63-64. Martha Mazariegos, the female Respondent's mother, is almost solely dependent on her daughter and son-in-law for support. Although Ms. Mazariegos has other children with lawful status in the United States, they would be unable to provide for her on their own. Additionally, the parents of the male respondent rely in significant part on him for their financial support as well.

Additionally, the Respondents' daughter, Diana has "compelling special needs in school." Her intelligence and aptitude for learning are rated at the top 1-5% of her chronological peers nationally. As mandated by law in California and Nevada, Diana's educational needs as a gifted student require specialized nurturing and attention so that she can reach her full potential academically, socially and emotionally. This Court finds that removal of the Respondents would



create an extreme and highly unusual hardship for Diana because it would cause her to forfeit the developmentally appropriate education she is currently receiving in Nevada.

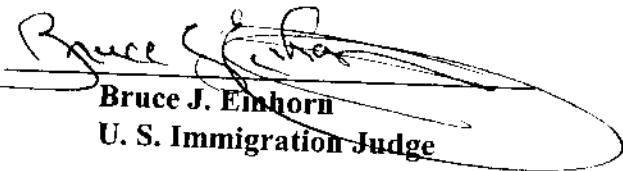
Finally the Court notes that removal of the Respondents would result in the separation of both daughters from one or both of their parents for a significant period of time. This factor alone is not sufficient to rise to the level of extreme and highly unusual hardship. However, when considered in conjunction with the financial and physical hardship to the Respondents' legal permanent resident parents and Diana's special educational needs, the Respondent's have clearly demonstrated that their removal would pose an "extreme and highly unusual hardship" to their qualifying relatives.


Accordingly, the following order will be entered:

**ORDER**

**IT IS ORDERED** that Respondents' Application for Cancellation of Removal and Adjustment of Status pursuant to Section 240A(b) of the Act be **GRANTED**.

January 18, 2007  
Date

  
Bruce J. Einhorn  
U. S. Immigration Judge

<b>CERTIFICATE OF SERVICE</b>	
<b>THIS DOCUMENT WAS SERVED BY:</b>	
<input checked="" type="checkbox"/> MAIL (S)	<input type="checkbox"/> PERSONAL SERVICE (P)
TO: <input type="checkbox"/> ALIEN	<input type="checkbox"/> ALIEN c/o Custodial Officer
<input checked="" type="checkbox"/> ALIEN'S ATT/REP	<input checked="" type="checkbox"/> DHS
DATE: <u>1/18/07</u>	BY: COURT STAFF 
Attachments: <input type="checkbox"/> EOIR-33	<input type="checkbox"/> EOIR-28
<input type="checkbox"/> Legal Services List	<input type="checkbox"/> Other