



U.S. Citizenship
and Immigration
Services

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FILE:



Office: LIMA, PERU

Date: NOV 19 2004

IN RE:



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 Acting Officer in Charge, Lima, Peru. 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 Peru who was found by a consular officer 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. The applicant is married to a citizen of the United States and seeks a waiver of inadmissibility in order to reside in the United States with his wife and child.

The acting officer in charge (OIC) concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Acting Officer in Charge*, dated August 28, 2003.

On appeal, counsel asserts that the applicant's family members will suffer extreme hardship based on the cumulative effects of the spouse's severe health problems coupled with the family's loss of health insurance. Counsel further contends that Citizenship and Immigration Services abused its discretion in determining the applicant's length of unlawful presence and perceived failure to file for adjustment of status. *Form I-290B*, dated September 26, 2003.

In support of these assertions, counsel submits a brief, dated September 26, 2003; a statement of the applicant's spouse; 12 color copies of photographs of the applicant and his family; a report from a mental health counselor regarding the applicant's spouse; copies of the United States birth certificates of the applicant's spouse and child; medical records for the applicant's spouse and child; a copy and translation of the Peruvian death certificate of the applicant's father; a letter from an attorney who previously represented the applicant and copies of financial and tax documents for the applicant and his spouse. The entire record was reviewed and considered in rendering a decision.

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 during May 1986 on a visitor visa. The applicant claims that he applied for and was granted change of status to F-1 nonimmigrant, but the record fails to demonstrate evidence of change of status. Even if the applicant did successfully obtain change of status, the applicant overstayed his authorized period of stay. The applicant, therefore, accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until he was departed from the United States on August 8, 2002. 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 acknowledges counsel's contention that the decision of the acting OIC incorrectly states that the applicant was unlawfully present in the United States "for well over ten years." The AAO notes that unlawful presence provisions were enacted in April 1997 and under the law, periods of unlawful presence of one year or more are treated uniformly, thus rendering irrelevant delineations of presence over one year. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II). The AAO further finds without merit counsel's allegation that the "over ten years" language employed by the acting OIC implies a determination that punishment must be greater based on the length of unlawful presence beyond one year. *Applicant's Brief in Support of Appeal of Denial of INA § 212(a)(9)(B)(v) Waiver (Unlawful Presence)*, dated September 26, 2003. The decision of the OIC does not reflect a finding of "greater punishment" based on the applicant's length of unlawful presence and, as pointed out by counsel, the statute does not provide for additional repercussions.

The AAO further notes counsel's assertion that the decision of the acting OIC incorrectly states that the applicant did not seek to adjust his status after his marriage. *Id.* at 5. The decision of the acting OIC states that the applicant did not file a Form I-130 petition until he returned to Peru, two years after his marriage occurred. Counsel is correct in asserting that this fact has no bearing on the waiver application. The AAO notes, however, that the decision of the acting OIC does not demonstrate that the timing of the filing of the Form I-130 petition on behalf of the applicant was incorrectly weighed by the acting OIC. The decision of the acting OIC states as fact the timing of the filing of the Form I-130 petition, but does not weigh that fact in determining whether or not extreme hardship is present in the application.

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 asserts that the applicant's wife would face extreme hardship as a result of relocating to Peru in order to remain with the applicant. The applicant's spouse states that she was born and raised in the United States and is not of Peruvian descent. *Statement of Rosa Gutierrez*, dated September 24, 2003. The applicant's spouse indicates that she is aware of ongoing social and political problems in Peru and that she does not "believe ... that [she] could live there, or should raise [her] daughter there." *Id.* The AAO notes that, as a U.S. citizen, the applicant's spouse is not required to reside outside of the United States as a result of denial of the applicant's waiver request. The AAO finds, however, that the record fails to establish extreme hardship if the applicant's spouse relocates to Peru to remain with the applicant. Unsubstantiated assertions by the applicant's spouse and counsel do not, standing alone, form the basis for a finding of extreme hardship. *Applicant's Brief in Support of Appeal of Denial of INA § 212(a)(9)(B)(v) Waiver (Unlawful Presence)* at 4 (stating that the applicant's spouse "cannot and will not easily relocate to South America with young Desiree").

Further, counsel does not establish extreme hardship to the applicant's wife if she remains in the United States in order to maintain her close familial relationships and residency in her country of birth. Counsel submits a letter from a licensed mental health counselor to support the assertion that the applicant's spouse suffers emotionally as a result of separation from the applicant. *Comprehensive Psychological* [REDACTED] dated September 25, 2003. The AAO notes that the record fails to establish an ongoing relationship between the examining mental health professional and the applicant's spouse. The record further fails to demonstrate that the applicant's spouse is prescribed medication to combat her condition. The AAO acknowledges that the applicant's spouse experiences feelings of sadness and loneliness, as indicated by the examining counselor, however, in the absence of additional evidence substantiating her psychological condition, the asserted emotional hardship cannot be deemed to rise to the level of extreme.

Further, the AAO notes that the applicant's child underwent surgery for a bi-lateral hernia that involved mending holes present in her abdominal muscle walls. *Applicant's Brief in Support of Appeal of Denial of INA § 212(a)(9)(B)(v) Waiver (Unlawful Presence)* at 2. While the child's need for surgery is unfortunate, the record does not demonstrate that the applicant's child requires ongoing care as a result of her surgery or suffers from an continuing medical condition for which the qualifying relative, the applicant's spouse, requires the presence of the applicant. The record fails to demonstrate why the applicant's spouse is unable to maintain health insurance in the absence of the applicant in order to care for her asthma and provide general medical care for the couple's daughter.

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*