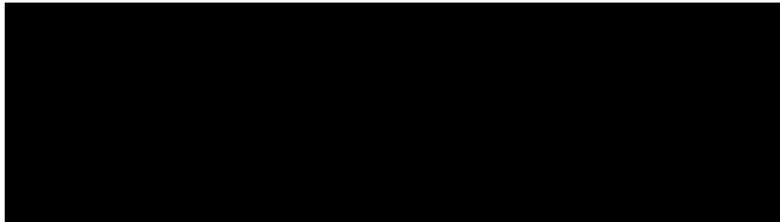


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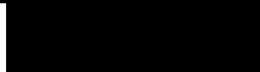
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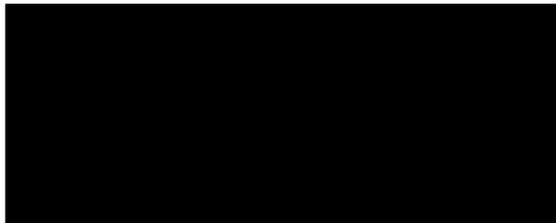
APR 11 2007

IN RE:



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

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Officer-in-Charge (Acting OIC), Panama, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed.

The applicant [REDACTED] is a native and citizen of Columbia who was found inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude; section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B), for having multiple criminal convictions; section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A), for having been present without admission or parole; and section 212(a)(9)(B)(i)(II) of 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 the wife of a naturalized citizen [REDACTED] of the United States, and the mother of a U.S. citizen daughter [REDACTED] aged 29), a U.S. citizen son [REDACTED] and a U.S. citizen daughter [REDACTED] aged 11). She seeks a waiver of inadmissibility under sections 212(h) and 212(i) of the Act so as to live with her family in the United States.

The acting OIC concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative, and accordingly denied the Application for Waiver of Excludability (Form I-601). *Decision of the Acting OIC*, dated June 15, 2005.

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 Secretary, 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.
- ...

Section 212(a)(6)(A)(i) of the Act states that, in general, "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."

Section 212(a)(2) of the Act states that:

(A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(a)(2)(B) of the Act states that:

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

Section 212(h) of the Act allows waivers for crimes of moral turpitude (except murder and torture), and commission of more than one crime. It states that "[t]he Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B) . . . of subsection (a)(2) . . . if -

- (1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

On appeal, counsel makes the following statements. The submitted evidence of extreme hardship relates to emotional hardship endured by the applicant's spouse, as a result of separation from the applicant; to the applicant's inability to find stable employment in Columbia and the non-economic and personal hardships to her U.S. citizen daughter as a result of this; and to the personal hardship that the applicant's daughter suffers while in Columbia or will suffer if living in the United States without the applicant. *Contreras-Buenfil v. INS*, 712 F.2d 401, 402 (9th Cir. 1983) and *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981) indicate that separation from family living in the United States may be held to be "the most important single factor relative to the issue of extreme hardship." Here, the applicant is in Columbia while her husband is in Omaha, Nebraska. They were living together in the United States for two years in preparation of their marriage and acted as a family during that time. The applicant provides necessary emotional support to her husband. Although economic disadvantage alone does not constitute extreme hardship, it is an important factor that impacts the applicant's minor daughter as a result of the applicant's inability to find stable employment in Columbia. The applicant for the past two years has cleaned houses for one hour a week to a few hours a week. The applicant is unable to pay for her daughter to attend school and is unable to obtain health insurance for her. Her daughter, who needs to attend a bilingual school, has not been to school for two years, while in Columbia. Her daughter does not read or write Spanish and speaks the language minimally and would need to attend at the kindergarten level in Columbia. Because of this, she receives no formal education in Columbia and stays at home, becoming isolated and depressed. These are the non-economic and personal hardship factors that the applicant's daughter is suffering. The applicant's daughter suffers from emotional and psychological hardship as a result of severance from her siblings and stepfather who live in the United States. The siblings of [REDACTED] will not be able to care for her in the United States. [REDACTED] is in jail and awaiting release under bond; he is not currently living with [REDACTED] is currently on a special assignment with the U.S. Army. The political and economic conditions in Columbia are unstable. The evidence indicates extreme hardship is present because "significant actual or potential injury" has been demonstrated, as in *Tukhowinich vs. INS*, 64 F. 3d 460, 463 (9th Cir. 1995).

The entire record has been reviewed in rendering this decision.

The AAO will first address the acting OIC's finding that the applicant is inadmissible pursuant to section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A), for having been present without admission or parole; and section 212(a)(9)(B)(i)(II) of 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.

A person present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible. Section 212(a)(6)(A)(i) of the Act. This ground of inadmissibility only applies when the person is in the United States and therefore does not apply to visa applicants outside the United States. *Memo, Virtue, Acting Exec. Assoc. Comm., HQ IRT 5015.12, 96 Act 026 (Mar. 31, 1997)*. Thus, the acting OIC erred in finding the applicant, who was not in the United States when the Form I-601 was filed in 2005, inadmissible pursuant to section 212(a)(6)(A)(i) of the Act. The applicant had voluntarily departed from the United States on May 26, 2003. *Letter from [REDACTED] senior certified law student, dated October 19, 2004.*

The director found the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(II) of 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. Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). Exceptions and tolling for good cause are set forth in sections 212(a)(9)(B)(iii) and (iv) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii) and (iv), respectively. The periods of unlawful presence under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II), are not counted in the aggregate. Each period of unlawful presence in the United States is counted separately for purposes of section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II).¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.² The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. DOS Cable, *supra*. See also *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists). With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. *Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997)*.

¹ *Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).*

² DOS Cable, *supra*.; and *IIRIRA Wire #26, HQIRT 50/5.12.*

The district director correctly found that the applicant was unlawfully present in the United States for more than one year. She entered the United States without inspection in 1985 and illegally resided in the country until May 2003. *Letter from American Embassy, Bogota, Columbia, dated March 31, 2005; Record of Deportable/Inadmissible Alien*. The record does not reflect that the applicant filed an Application to Register Permanent Residence or Adjust Status, Form I-485. The applicant had been in unlawful status from April 1, 1997 to May 26, 2003, her date of voluntary departure from the United States. It is clear that the applicant accrued more than one year of unlawful presence in the United States from April 1, 1997 to May 26, 2003, and when she departed from the country on that date she triggered the ten-year bar. Thus, the acting OIC correctly found her to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of 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. *Decision of the Acting OIC*, dated June 15, 2005.

The AAO will now address the director's finding of failure to establish eligibility for a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The applicant seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant and her children is not a permissible consideration under the statute and will be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse, [REDACTED] is the only qualifying relative here. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(i) of the Act; *see also Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

Section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission resulting from inadmissibility under sections 212(a)(9)(B)(i)(II) and 212(a)(2)(B) the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member.

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 U.S. 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.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the

case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I & N Dec. 880, 882 (BIA 1994).

U. S. courts have stated, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and also, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted). Separation of the applicant from her husband will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO will now apply the *Cervantes-Gonzalez* factors to the present case to the extent they are relevant in determining extreme hardship to the applicant's qualifying relative, in this case to her husband. It is noted that extreme hardship must be established in the event that he joins the applicant; and in the alternative, that he remains in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In support of the hardship claim, the record contains the applicant's affidavits and those of her husband, daughters, and son; the marriage license of the applicant and [REDACTED] birth certificates; a restraining order from the Comissaria Novena de Famila located in Bogota, Columbia, and a translation of the document; the Form I-601; in additional to other documents.

The record reflects that [REDACTED] states that she is unable to find employment providing a living wage, and as a consequence of this, [REDACTED] who does not read or write Spanish, has not been able to attend a bilingual school in Columbia and have health insurance. The [REDACTED] states that [REDACTED] would have to enroll in kindergarten in Columbia due to her language skill level. The applicant states that her former husband, who lives in Columbia and is [REDACTED] father, has a mental illness and has threatened her and [REDACTED] *Affidavit of [REDACTED] dated August 3, 2005.*

[REDACTED] states that he married [REDACTED] on May 1, 2003 in Nebraska. He states that he has a loving relationship with her and misses her very much. He indicates that he has five children³ from a previous marriage and [REDACTED] has four children. [REDACTED] states that the applicant takes care of all of the children and runs the household. *Affidavit of [REDACTED] sworn and subscribed on October 18, 2004.* [REDACTED] states that he has known [REDACTED] he started datin [REDACTED] Hernandez four years ago, when [REDACTED] about six years old. [REDACTED] states that [REDACTED] special to him, he loves her, and he thinks of her as his own daughter. He is in touch with [REDACTED] who he loves and cares for like his own children, through weekly telephone calls. [REDACTED] states that before [REDACTED] ft to Columbia, she contributed to the household as a caretaker of the home and in the parenting responsibilities for his children as well as her own. The children, he states, need her parental

[REDACTED] s children are 11, 17, 19, 23, and 24 years of age. *Decree of Dissolution* at 2. It is noted that former wife was awarded the care, custody, and control of the children. *Id.* at 6.

guidance and he needs her emotional support. *Affidavit* [REDACTED] *sworn and subscribed on July 29, 2005.*

[REDACTED] indicates that she would like to attend school, and misses her friends and family in the United States. *Letter from* [REDACTED] *dated August 3, 2005; Letter from* [REDACTED] *dated June 30, 2004.*

In an October 20, 2004 letter, [REDACTED] states that she is a sergeant in the U.S. Army and a respiratory therapist at the Institute of Surgical Research at Brook Army Medical Center in San Antonio, Texas. She works in civilian hospitals around San Antonio as a part-time job because she now provides for seventeen-year-old [REDACTED]. She has no children of her own and no parenting experience, and works 60 hours each week. She states that she misses her mother, fears being deployed to the Middle East, and is concerned about [REDACTED] being kidnapped. *Letter from* [REDACTED] *dated October 20, 2004.*

In an October 20, 2004 letter, [REDACTED] states that he has had depression, loneliness, anger, and excruciating hardship. He is concerned about the well-being of his youngest sister due to the danger of living in Columbia, and prays to be united with his mother. He states that his eldest sister should not be forced to parent a seventeen-year-old boy. *Letter from* [REDACTED] *dated October 20, 2004.*

[REDACTED] attests to the extreme hardship he will suffer as a result of separation from the applicant. He indicates that the applicant provided emotional support to him, was the caretaker of the home, and had parenting responsibilities. The AAO is not unsympathetic to the emotional hardship that the applicant's husband will endure if separated from her. However, his situation, if he remains in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship, based on the record. In *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Court of Appeals upheld the BIA's finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission." (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir. 1980) (severance of ties does not constitute extreme hardship). The Ninth Circuit in *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. The record before the AAO is insufficient to show that the emotional hardship endured by the applicant's husband is unusual or beyond that which is normally to be expected upon deportation.

There is no evidence to establish that the applicant's husband would endure extreme economic hardship if the waiver of inadmissibility is not granted. It is noted that the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

No evidence in the record establishes that the applicant's husband would endure extreme hardship if he joined the applicant in Columbia. The record contains no documentation relating to the social, economic, and political conditions in Columbia. It has no information suggesting that [REDACTED] would be unable to find employment in Columbia. There is no evidence of [REDACTED] having a significant health condition that requires treatment that is not available in Columbia.

With regard to the birth of a child who is a United States citizen, the general proposition is that the mere birth of a deportee's child who is a U.S. citizen is not sufficient to prove extreme hardship. The BIA has held that birth of a U.S. citizen child is not per se extreme hardship. *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984). In *Banks v. INS*, 594 F.2d 760, 762 (9th Cir. 1979), the circuit court has stated that an illegal alien cannot gain a favored status on the coattails of his (or her) child who happens to have been born in this country. Thus, the fact that the applicant has U.S. citizen children is not persuasive, in itself, to establish extreme hardship to her husband.

In the final analysis, the record does not establish that the applicant's husband would endure extreme hardship if he remained in the United States; and in the alternative, if he joined the applicant in Columbia.

Consequently, the requirement of significant hardships over and above the normal economic and social disruptions involved in deportation has not been met so as to warrant a finding of extreme hardship. Having carefully considered each of the hardship factors, both individually and in the aggregate, it is concluded that the factors in this case do not constitute extreme hardship to a qualifying family member for purposes of relief under 212(h) of the Act.

The AAO need not address the acting OIC's finding that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, for having committed a crime involving moral turpitude; and section 212(a)(2)(B) of the Act, for having multiple criminal convictions, because it has found that the applicant failed to establish extreme hardship to her husband as required by section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.