

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

7/2

[REDACTED]

FILE:

[REDACTED]

Office: LIMA, PERU

Date:

OCT 25 2007

IN RE:

[REDACTED]

APPLICATION:

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

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Lima, Peru, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Brazil who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission into the United States by fraud or willful misrepresentation on December 17, 1988. The applicant was also found 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 and seeking readmission within 10 years of her last departure from the United States. The applicant is married to a U.S. citizen, has a U.S. citizen son and a lawful permanent resident daughter. She seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The officer in charge found that the applicant failed to show that a qualifying relative would suffer hardship over and above the normal economic and social disruptions involved in the removal of a family member. The application was denied accordingly. *Decision of the Officer in Charge*, dated December 7, 2005.

On appeal, counsel asserts that the applicant's spouse would suffer extreme hardship as a result of the applicant's inadmissibility to the United States. She also states that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act because she made a timely retraction of her misrepresentation and did not gain an immigration benefit. *Counsel's Brief*, dated February 4, 2006.

The record indicates that on December 17, 1988, the applicant presented a B-2 visitor's visa to gain entry into the United States as an immigrant coming to the United States for vacation. Upon secondary inspection, the applicant stated that she was married, but that her husband was in Brazil. *Applicant's Sworn Statement*, dated December 17, 1988. She also states that her husband could not come on vacation with her because he could not take leave from work. It was not until the inspecting officer asked the applicant if she had made her statement voluntarily and would swear that it was truthful and accurate, that the applicant told the truth about her husband's whereabouts. She then stated that her husband was in the United States working as a construction worker. *Id.* The applicant was placed in exclusion proceedings. She failed to appear for her hearing before an immigration judge and was ordered excluded and deported in absentia.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The Department of State Foreign Affairs Manual (FAM) offers interpretations regarding the statutory reference to misrepresentations under section 212(a)(6)(C) of the Act. Stated in part; (1) a misrepresentation can be made orally or in writing, (2) silence or the failure to volunteer information does not in itself constitute a misrepresentation, (3) the misrepresentation must have been practiced on an official of the U.S. government, generally a consular or immigration officer, and (4) a timely retraction will avoid the penalty of the statute. Whether a retraction is timely depends on the circumstances of the particular case.

A timely retraction has been found in cases in where applicants used fraudulent documents only *en route* and did not present them to U.S. officials for admission, but, rather, immediately requested asylum. *See, e.g., Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991); *cf. Matter of Shirdel*, 18 I&N 33 (BIA 1984). In the applicant's case, she revealed her husband's presence in the United States at secondary inspection, after having unsuccessfully attempted to procure admission by fraud.

The AAO also notes that although the applicant did not gain an immigration benefit from her misrepresentation, she did seek to gain an immigration benefit through her misrepresentation making her subject to section 212(a)(6)(C)(i) of the Act.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The AAO also finds that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for one year or more.

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 on a visitor's visa on December 17, 1988. She was ordered removed on March 21, 1989. On June 18, 2005 the applicant departed the United States. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of the unlawful presence provisions under the Act, until June 18, 2005, the date she departed the United States. In applying for an immigrant visa the applicant is seeking admission within 10 years of her June 2005 departure from the United States. 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.

Sections 212(i) and 212(a)(9)(B)(v) of the Act provide the waivers for the bars to admission under sections 212(a)(6)(C) and 212(a)(9)(B)(i)(II) of the Act. These waivers are dependent first upon a showing that the bars impose an extreme hardship on the applicant's U.S. citizen or lawful permanent resident spouse and/or parent. Hardship the alien herself experiences or her children experience due to separation is not considered in section 212(i) and/or section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's spouse and/or parent. 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 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.

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).

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that he resides in Brazil or in the event that he resides in the United States, as he is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

The first part of the analysis requires the applicant to establish extreme hardship in the event that her spouse remains in the United States. Counsel asserts that the applicant's spouse is suffering extreme emotional hardship from being separated from the applicant. *Counsel's Brief*, dated February 4, 2006. The AAO notes that the record establishes that the applicant and her spouse have been married for over 30 years and have rarely been separated until now. The applicant states that she fears for the mental well-being of her spouse. *Applicant's Affidavit*, dated January 2, 2006. She states that she has learned that her spouse is experiencing sleepless nights and anxiety and that he has missed days of work. She also states that he has seen a doctor about his condition and is on medication. *Id.* The applicant's daughter states that her father has been especially quiet and sad, and that it is hard for him to give her and her brother support because he is very depressed. *Daughter's Affidavit*, dated January 2, 2006. The applicant's son states that his father seems overwhelmed by having to play the roles of provider and caretaker in the family. *Son's Affidavit*, dated January 3, 2006. He states that his whole life his father has been a calm man who never showed any signs of being worried. He states that everyday that passes he seems more distant from him and his sister and constantly seems to have something on his mind. The applicant's son explains that he has seen his father go through countless nights without sleep and that his mother has been his father's life-long partner and separating them now will continue to be devastating. *Id.*

The applicant's spouse states:

Without my wife's presence I have been feeling very anxious. Each day that passes it has intensified. Often I feel shortness of breath, light-headedness and sweating. I fear that my wife won't be able to return and I won't be able to provide our children with the same motherly love. ...I also feel very depressed without her by my side. We have been married for 30 years and it is hard to live each day knowing that she is still alive yet not being able to be by her side. ...I feel a deep pain that is very immobilizing to my everyday tasks. I feel very sad which has interfered with my emotional, psychological and social functioning. I feel very lonely without my loving wife by my side. ... She has always been there for me by giving me advice, love and comfort. I no longer have anyone to turn to.

Spouse's Statement, dated January 3, 2006.

Counsel submits various documents to support the spouse's emotional condition. The record includes a letter from [REDACTED] which states that the applicant's spouse has been experiencing increasing symptoms of anxiety since his wife's departure to Brazil. [REDACTED] dated December 28, 2005. The record also contains receipts for prescriptions of Ambien and Mitrex dated December 15, 2005. In addition to this documentation, counsel submitted detailed letters from the spouse's minister, employer and friends.

The letter from [REDACTED] states that the applicant's spouse is in a deep state of depression from being separated from the applicant. *Letter from* [REDACTED] dated December 19, 2005. [REDACTED] states that the applicant's spouse has not been able to sleep through the night because of his constant worry about his family and that he spends hours everyday crying as a result of his distress at being so far

away from the women he loves and has been married to for 30 years. *Id.* The spouse's employer, [REDACTED] at the Housing Authority of the City of Bridgeport states that the applicant's spouse has been working with the Housing Authority for 12 years. [REDACTED] states that ever since the departure of his wife, the applicant's spouse appears to be depressed and is having trouble focusing on work. *Letter from Employer*, dated December 16, 2005.

The record contains 13 letters and statements from friends reporting the emotional hardship being felt by the applicant's family. One letter is from an [REDACTED], who states that he has known the applicant and her family for 12 years and that they attend the same church. *Affidavit of [REDACTED]* dated December 30, 2005. He states that since the applicant's departure from the United States, the applicant's spouse has not been himself. He states that the applicant's spouse has been out of work on occasion due to anxiety and that while at church, he is not longer as active as he was when the applicant was with him. He describes the applicant's spouse as now being distant and shy. He states that instead of being involved in church activities, he stays behind in the corner of the church and that he seems anxious and worried at times. [REDACTED] states that he somehow thinks that the applicant's spouse is ashamed of the whole situation. He notes that the applicant's spouse has told him that he suffers from sleepless nights. *Id.* Another letter is from [REDACTED] and [REDACTED] who state that they have known the applicant's family for years, attend the same church and are close friends. *Letter from [REDACTED]*, dated December 29, 2005. They state that away from his family, the applicant's spouse seems disoriented and lacks a shoulder to lean on. They state that the applicant's spouse is often described as a calm person, but lately he has been very stressed and seems distant and sad. They explain that he has distanced himself from friends, church activities and even his family. They state that he often seeks the help of friends but that has not been enough to help him. *Id.* A third example of the letters in the record, is the letter from [REDACTED] who describes herself as a close family friend who has known the applicant's family for 11 years. *Letter from [REDACTED]* dated January 2, 2006. [REDACTED] states that when the applicant's spouse was with the applicant he was a happy vibrant person. She states that he demonstrated calmness and he was always outgoing. She describes how he liked to sit in the kitchen and ask his family how their day went. She states that lately he has been very lonely and even when the children are home from college, he is detached from them. She states that he tries to talk with his children to comfort them, but often returns to his room with tears in his eyes. She also states that it is hard for him to give emotional support to his family when inside he is depressed and anxious. *Id.* The AAO finds that through documentation, letters and affidavits the applicant has shown that her spouse's emotional reaction to their separation is beyond that normally encountered in cases where a family is separated as a result of removal. Accordingly, the applicant has established that her spouse would experience extreme hardship were he to remain in the United States without her.

The second part of the analysis requires the applicant to establish extreme hardship to her spouse in the event that he resides in Brazil. The record indicates that the applicant is fifty-six years old with no record of working outside the home. The applicant's spouse is fifty-seven years old and has been working for the Housing Authority of Bridgeport Connecticut for the past 12 years. He obtains his medical insurance through this employer and supports his children, who are attending the University of Connecticut. Counsel states that because of the applicant's spouse's age it would be impossible for him to find a job of the same stature that he has now in Brazil. Counsel states that relocating to Brazil would subject the applicant's spouse to an inferior livelihood. *Counsel's Brief*, dated February 4, 2006. The applicant states that at her spouse's age he would not be able to find a job in Brazil and that with his current job he is able to pay for the children's education and

maintain a household in the United States. *Applicant's Statement*, dated January 2, 2006. She also states that in Brazil they will be subject to an inferior medical system, where in the United States they have health insurance. *Id.* The AAO notes that medical letters were submitted concerning the applicant and her spouse showing a number of ailments that require follow-ups with doctors. [REDACTED] states that the applicant's spouse is being followed-up for mitral valve disorder, aortic insufficiency, chest pain and pre-diabetes. *Letter from* [REDACTED] dated December 28, 2005. A [REDACTED] states that the applicant is under care for cardio vascular disease and a prolapsed valve. *Letter from* [REDACTED] dated February 4, 2006.

The AAO notes that no documentation was submitted supporting the claims concerning conditions in Brazil. The record does not contain any supporting evidence regarding the applicant's spouse's ability to obtain employment and/or medical insurance in Brazil. In addition, while the AAO recognizes that the applicant's spouse has been employed with the same employer for a substantial period of time, no documentation was provided showing the effect that leaving his current employer would have on the applicant's spouse's financial situation.

Counsel also expresses concern regarding the effect the applicant's spouse's relocation will have on his children and how the children's hardship will affect the applicant's spouse. The AAO notes that the record includes letters from the University of Connecticut describing the difficulties the applicant's children are having in the applicant's absence. A letter from [REDACTED] the [REDACTED] of the University of Connecticut's Allied School of Health, which the applicant's daughter attends, states that the applicant's daughter has been seeking counseling since the departure of her mother. *Letter from* [REDACTED] dated December 22, 2005. [REDACTED] also states that the loss of the applicant has affected her daughter's focus and her daughter was placed on academic probation due to the stress of her mother leaving the United States. *Id.* A letter from Teaching Assistant, [REDACTED] at the University of Connecticut states that the emotional impact of being separated from the applicant can be seen in the academic performance of the applicant's son. *Letter from* [REDACTED] dated January 3, 2006. [REDACTED] states that often times he has noticed that the applicant's son seems distracted and unable to concentrate on his work and that these emotional difficulties have affected his overall grade in the class. *Id.* In the applicant's spouse's statement he expresses the importance of his children's ability to attend college. He states that his children can speak Portuguese but cannot read or write in Portuguese and would not be able to attend college in Brazil. *Spouse's Statement*, dated January 3, 2006. He also states that if he relocated to Brazil he would not be able to support his children's education. *Id.* Counsel states that the academic decline of the applicant's children is causing the applicant's spouse hardship because he is unable to fill the role of caretaker. *Counsel's Brief*, dated February 4, 2006. The AAO notes that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As stated above, hardships the applicant's children experience are not considered in section 212(i) and/or section 212(a)(9)(B)(v) waiver proceedings unless it causes hardship to the applicant's spouse. The current record offers no documentary evidence, e.g. the evaluation of a licensed health care professional, that makes the connection between the children's hardships and the applicant's spouse's suffering. Thus, the AAO finds that the current record does not establish that the applicant's spouse would suffer extreme hardship upon relocation to Brazil.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS*, *supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

The AAO notes that, on appeal, counsel asserts that Citizenship and Immigration Services' (CIS) approval of the Application for Permission to Reapply for Admission (Form I-212) filed by the applicant was based on a finding that the applicant's spouse and children would suffer extreme hardship in her absence. *Counsel's Brief*, dated February 4, 2006. While the AAO acknowledges that CIS has approved the Form I-212 filed by the applicant, it notes that the approval of a Form I-212 application does not require the applicant to establish extreme hardship to a qualifying relative. Instead, a determination as to whether a favorable exercise of the Secretary's discretion is warranted rests on the weighing of the positive and negative aspects of the applicant's case. In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

Accordingly, in approving the Form I-212 filed by the applicant, the director determined simply that the favorable factors in the applicant's case outweighed the adverse, not that the applicant's spouse would suffer extreme hardship if permission to reapply for admission were not granted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) and/or 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.