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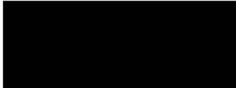


U.S. Citizenship
and Immigration
Services

H2.



FILE:



Office: LIMA, PERU

Date: **MAR 26 2008**

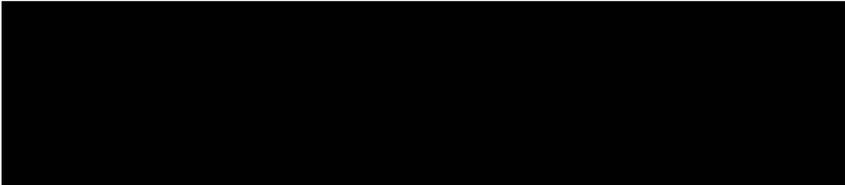
IN RE:



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:



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.¹ The appeal will be dismissed.

The applicant is a native and citizen of Peru 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 attempted to procure admission into the United States by fraud or willful misrepresentation and under 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 readmission within ten years of her last departure from the United States. The applicant is the spouse of a naturalized U.S. citizen² and seeks a waiver of inadmissibility in order to reside in the United States with her spouse and their children.

The Officer-in-Charge concluded that the applicant had failed to establish that extreme hardship would be imposed upon the applicant's naturalized U.S. citizen spouse and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the Officer-in-Charge*, dated March 15, 2006.

On appeal, counsel contends that Citizenship and Immigration Services (CIS) erred as a matter of law in finding that the applicant had failed to meet the burden of establishing extreme hardship to her qualifying relative, as necessary for a waiver under 212(i) and 212(a)(9)(B)(v) of the Act. *Form I-290B; Attorney's brief*. Counsel also asserts that the Officer-in-Charge abused his discretion by failing to take into consideration all of the favorable factors in the applicant's case. *Id.*

In support of the assertions made on appeal, counsel submits a brief. The record also includes, but is not limited to, a letter from [REDACTED], LCSW, dated March 18, 2006; a letter from the employer of the applicant's spouse; statements from the applicant's spouse; a statement from the applicant's daughter; a Peruvian Theater Center certificate for the applicant's daughter; statements from the applicant; and a Peruvian police records certificate for the applicant. The entire record was reviewed and considered in rendering this decision.

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.

Section 212(i) of the Act provides that:

¹ The AAO observes that in addition to the appeal, counsel for the applicant also filed a Motion to Reconsider that was never adjudicated by the Officer-in-Charge.

² The AAO notes that a copy of the naturalization certificate of the applicant's spouse is not included in the record. However, the applicant's spouse lists his naturalization certificate number on the Form I-130, Petition for Alien Relative. The record also includes a copy of the lawful permanent residency card for the applicant's spouse.

- (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 or, in the case of an alien granted classification under clause (iii) or (iv) of section 204(a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B), the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

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.

The record reflects that the applicant was admitted to the United States with a fraudulent B-1/B-2 nonimmigrant visa in 1994, which she had purchased in Peru. *Consular notes*, dated December 13, 2005. She remained in the United States until she voluntarily returned to Peru in 1999. *Id.* The applicant is therefore inadmissible under Section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact and, as she is seeking admission to the United States within ten years of her last departure, 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.

Waivers of inadmissibility resulting from violations of sections 212(a)(6)(C) and 212(a)(9)(B) of the Act are dependent first upon a showing that inadmissibility imposes extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant herself or the applicant's child would experience upon removal is not directly relevant to the determination as to whether the applicant is eligible for a waiver under section 212(i). The only hardship relevant to eligibility in the present case is the hardship that would be suffered by the applicant's naturalized U.S. citizen spouse if the applicant is removed.³ If 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, 565-566 (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 family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that he resides in Peru and if he remains in the United States, as he is not required to reside outside 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.

If the applicant's spouse resides in the United States, the applicant needs to establish that her spouse will suffer extreme hardship. The parents of the applicant's spouse as well as his two children live in Peru. *Form G-325A, Biographic Information sheet, for the applicant's spouse; Statement from the applicant's spouse*, dated September 22, 2005. Although the applicant's spouse brought his daughter to live with him in the United States, she missed her mother and sister so much that the applicant's spouse had to take her back to Peru after four months. *Statement from the applicant's spouse*, dated September 22, 2005. The applicant's spouse loves the applicant and his children very much and is suffering without them. *Id.* In October 2005 the applicant's spouse began to receive professional psychotherapy services. *Statement from [REDACTED]*, LCSW, dated March 18, 2006. He was diagnosed with Major Depressive Disorder, with one of the major stressors being the separation from his wife and two children. *Id.* After several sessions of psychotherapy, the health insurance of the applicant's spouse was terminated and the applicant's spouse had to stop treatment. *Id.* Recently, the applicant's spouse was able to re-initiate his health insurance policy and will again begin to work with his therapist to help him learn ways to better deal with his difficult situation. *Id.* The applicant's spouse has worked in the Food Service Department of the Rye School District since September 1999. *Statement from [REDACTED] Food Service Director, Rye City School District*, dated March 20, 2006. While in the past, his performance has been consistent and productive with attention to

³ The AAO notes counsel's assertion that the applicant's U.S. citizen child is also a qualifying relative for the purposes of this case (*Attorney's brief*). However, counsel's assertion is in error, as discussed above. Further, the record does not establish that the applicant's older daughter was born in the United States.

detail, recently his performance has been erratic, at times he has been short-tempered with the staff, and he seems consistently occupied with other thoughts rather than with his work. *Id.* When looking at the aforementioned factors, particularly the significant mental health condition of the applicant's spouse, his diminishing job performance, and his separation from the applicant and both of their children, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to reside in the United States.

If the applicant's spouse travels with the applicant to Peru, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in Peru and his parents continue to reside there. *Form G-325A, Biographic Information sheet, for the applicant's spouse.* The applicant's spouse worked as a police officer in Peru fighting terrorism and notes that terrorists have taken revenge on police officers by killing their families. *Statement from the applicant's spouse, dated March 27, 2006.* According to counsel, there have been recent killings of police officers and their families in Peru by members of terrorist groups. *Attorney's brief.* The AAO acknowledges the assertions made by counsel, however, it notes that the record fails to include any documentary evidence to support such assertions. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The 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).* Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See 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)).* The applicant's spouse states that he has been in the United States for many years and that it would be impossible for him to start a life somewhere else. *Statement from the applicant's spouse, dated September 22, 2005.* While the AAO acknowledges the statements made by the applicant's spouse, it notes that the applicant's spouse has not specified why it would be impossible for him to reside in Peru. The record does not include any information regarding whether the applicant's spouse would be affected on a financial level if he resided in Peru, nor does the record demonstrate that the applicant's spouse would be unable to contribute to his family's financial well-being from a place other than the United States. When looking at the aforementioned factors, the AAO does not find that the applicant has demonstrated extreme hardship to her spouse if he were to reside in Peru.

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)(6)(C) 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.