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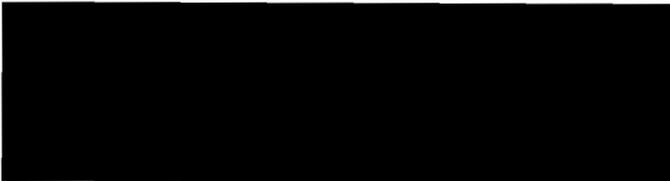


FILE: [REDACTED] Office: BALTIMORE, MARYLAND Date: SEP 11 2008

IN RE: [REDACTED]

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

ON BEHALF OF PETITIONER:



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 "R. P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Baltimore, Maryland, and 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 to be inadmissible to the United States under 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime relating to a controlled substance. The applicant is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. He is also the father of a U.S. Citizen and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his wife and son.

The district director 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 Inadmissibility (Form I-601) accordingly. *See Decision of the District Director*, dated December 23, 2004. The applicant filed a motion to reopen and reconsider, which was denied on December 8, 2005.

On appeal, counsel states that U.S. Citizenship and Immigration Services (CIS) erred in failing to apply the correct legal standard to adjudicate the waiver. Specifically, counsel asserts that in deciding whether to grant a waiver under section 212(h)(1)(B) of the Act, the standard set forth in *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), should be applied to balance the favorable and unfavorable factors. *See Brief in Support of Appeal* at 4-5. Counsel state that CIS erred when it determined that that the standard set forth in *Matter of Marin* concerning the exercise of discretion did not apply in the present case, and in reaching a determination of lack of extreme hardship without assessing these factors. *Id.* at 5. Counsel further asserts that CIS applied an “irrational, arbitrary and capricious assessment of the factual evidence,” and erred in finding there was no extreme hardship to a qualifying relative. *Id.* at 7. Counsel asserts that the applicant’s wife would suffer extreme hardship if the applicant were removed from the United States because she would experience economic hardship and separation from the applicant. *Id.* at 8. Counsel further asserts that the applicant’s son from a previous relationship would suffer extreme hardship without the applicant’s financial support because his mother’s income is insufficient to support him and the applicant would be unable to earn the same amount of money in Peru as he does in the United States. *Id.* He further states that these financial circumstances would prevent the applicant’s son from visiting him in Peru and would cause them to be separated permanently. *Id.* at 9. Lastly, counsel states that CIS erred in finding that it was not demonstrated that the applicant’s spouse or child could not accompany him to Peru, because the applicant demonstrated that he does not have custody of the child. *Id.* at 10.

Section 212(a)(2)(A) of the Act states in pertinent part:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
  - (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

Section 212(h) states in pertinent part:

The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if -

...

(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.

Section 212(h)(1)(B) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. 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). Although counsel correctly notes that the factors outlined in *Matter of Marin*, *supra*, are relevant in determining whether an applicant for a waiver under section 212(h) of the Act merits a favorable exercise of discretion, it must first be determined whether the applicant meets the statutory requirement of establishing extreme hardship to a qualifying relative.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included 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.

U.S. court decisions have additionally held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA 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, in *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996), the court 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. Moreover, the U.S. Supreme Court additionally 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.

In the present case, the record reflects that the applicant is a forty-one year-old native and citizen of Peru who has resided in the United States since August 31, 1991, when he entered as a B-1 visitor for business. The applicant's wife is a forty-eight year-old native and citizen of the United States whom he married on March

15, 2002. The applicant's son from a previous relationship was born on April 11, 2002 and resides in Baltimore, Maryland with his mother. The applicant and his wife also reside in Baltimore.

The applicant was arrested for possession of marijuana on December 6, 1995 in Broward County, Florida and was convicted on April 11, 1996 of possession of marijuana, under 20 grams, and was ordered to pay a fine and court costs. The applicant was also convicted of driving under the influence in Miami-Dade County, Florida on January 12, 1996 and sentenced to a fine and six months probation.

Counsel asserts that the applicant's wife and son would suffer extreme emotional and economic hardship if the applicant were removed to Peru. In support of these assertions counsel submitted evidence including copies of a consent paternity judgment ordering the applicant to pay child support and granting custody to the mother of the applicant's son, copies of canceled checks from the applicant for child support and day care payments, copies of pay stubs for the mother of the applicant's son, copies of a birth certificate and DNA test report indicating that the applicant is the biological father of his son, and copies of income tax returns for the applicant's wife. The entire record was reviewed and considered in arriving at a decision on the appeal.

Counsel asserts that the applicant's son would suffer extreme hardship because he would lose the financial support of the applicant and his mother's income is insufficient to support the child. Counsel states that the applicant "provided evidence that the mother of the child earned less than \$9000.00 per year, and without the financial support of [REDACTED], the child would likely end up as a public welfare dependent." *Brief in Support of Appeal* at 8. In denying the applicant's motion to reopen/ reconsider, the district director noted that although the applicant submitted pay stubs indicating that his son's mother earned approximately \$8500 from one employer in 2004, he failed to submit evidence, such as an income tax return, establishing that this was her only source of income. The AAO further notes that the pay stubs submitted indicate that she worked a total of 904 hours in 2004 as of December 24, 2004, which averages to part-time employment of about 75 hours per month. *See pay check and pay stub from [REDACTED] issued to [REDACTED] dated December 24, 2004.* Further, as the district director noted, no evidence was submitted to establish that the mother of the applicant's son would be unable to find full-time or higher paying employment. The evidence on the record is insufficient to establish that the mother of the applicant's son is unable to support him on her own such that the loss of the applicant's income would result in extreme economic hardship to his son. Even if the loss of the applicant's income would have a negative impact on his son's financial situation, 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.

Counsel additionally asserts that the applicant would be unable to earn the same amount of money in Peru as he earns in the United States because of poor economic conditions and high unemployment in Peru. Counsel failed to submit any documentary evidence, however, to establish that the applicant is employed in the United States. Counsel further states that the applicant's son would be permanently separated from the applicant if he relocates to Peru because financial constraints would prevent him from traveling there to visit the applicant. Counsel asserts that the applicant is "extensively involved in the child's life, providing care for the child on a regular basis and engaging in an appropriate parental relationship." *Brief in Support of Appeal* at 2. The record indicates that the applicant does not have custody of his son, and no evidence was submitted establishing how much time he spends with his son and how close their relationship is, such as affidavits from the applicant or his son's mother describing their relationship or family photographs documenting that the applicant spends time with his son. Without documentary evidence to support the claim, the assertions of

counsel will not satisfy the applicant'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). The record is therefore insufficient to establish that the applicant's son would suffer extreme emotional hardship as a result of separation from the applicant.

Counsel further asserts that the applicant's wife would suffer extreme hardship due to the loss of the applicant's income and permanent separation from the applicant. No evidence was submitted to document the applicant's income or their household expenses. Counsel contends that the applicant's wife would suffer financial hardship because she earns less than \$10,000 per year through a small construction company she owns. The AAO notes that income tax returns for 2000 to 2002 submitted with the applicant's affidavit of support indicate that his wife earned about \$3300 and \$7700 in the two years before she married the applicant, but no more recent income tax returns were submitted to document her current income or the applicant's income. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). There is insufficient evidence on the record to establish that the applicant's removal would result in extreme economic hardship to his wife if she remained in the United States without him. Further, as noted above, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, *supra*, that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

Counsel states that permanent separation from the application would result in extreme hardship to his wife, but there is no evidence on the record to establish that the emotional effects of separation from the applicant would be more serious than the type of hardship a family member would normally suffer when faced with the prospect of her spouse's removal or exclusion. Although the depth of her concern over the prospect of being separated from her husband is not in question, a waiver of inadmissibility is only available where the resulting hardship would be unusual or beyond that which would normally be expected upon removal or exclusion. The prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families. But in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship and familial and emotional bonds exist.

The record establishes that the applicant's son would be unable to relocate to Peru with him because the applicant does not have custody of him. See *Consent Paternity Judgment* dated March 17, 2003. It appears from the record, however, that any emotional or financial hardship to the applicant's son and wife if they remained in the United States would be the type of hardship that family members would normally suffer as a result of removal or exclusion. U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996) (defining "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation); *Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship). Counsel made no claim and submitted no evidence indicating that the applicant's wife would experience hardship if she were to relocate with him to Peru. Therefore, the AAO cannot make a determination of whether the applicant's wife would suffer extreme hardship if she moved to Peru.

A review of the documentation in the record reflects that the applicant has failed to show that the hardships faced by the qualifying relatives, when considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. 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(h) of the Act, the burden of proving eligibility remains entirely with the applicant. 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.