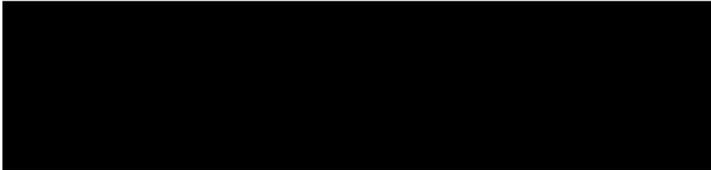


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FILE:



Office: LIMA, PERU

Date:

APR 11 2007

IN RE:

Applicant:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v)  
of the Immigration and Nationality Act, 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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The applicant [REDACTED] is a native and citizen of Chile who was found 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. [REDACTED] a U.S. citizen, is the wife of the applicant. The applicant seeks 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 OIC found the applicant failed to establish that he merits granting a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and denied the application, accordingly. On appeal, counsel asserts that the applicant has established that his wife would endure extreme hardship if his application for waiver of inadmissibility is denied.

The AAO will first address the director's finding of inadmissibility 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.

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.

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).<sup>1</sup> For purposes of section

<sup>1</sup> 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).

212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.<sup>2</sup> 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).

The OIC was correct in finding that the applicant was unlawfully present in the United States for more than one year. The record is not consistent as to the date that the applicant entered the United States. It reflects that he entered the United States without inspection in September 2000 or in January 2001. *Record of Deportable/Inadmissible Alien; Interview with Applicant at American Embassy, Santiago, Chile*. It indicates that he voluntarily departed from the United States in May 2003. *Interview with Applicant at American Embassy, Santiago, Chile*. It is clear that the applicant accrued more than one year of unlawful presence in the United States from September 2000 or January 2001 to May 2003, at which time he voluntarily departed from the country, triggering the ten-year bar.

The OIC found that the applicant did not merit a waiver of inadmissibility. He stated that the applicant married his wife on July 20, 2001, about six months after he entered the country without inspection. The OIC stated that the Form I-130 was submitted for the applicant on August 8, 2002. He stated that the applicant's wife followed her husband to Chile and lived at his parent's home, and that she later returned to the United States to maintain her job at a mortgage company. The OIC found the letter from the applicant's wife and other documents did not establish "extreme hardship," as required by the Act. The OIC, citing *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), stated that "even assuming that the Federal Government had no right either to prevent a marriage or destroy it . . . it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States.

On appeal, counsel states that the OIC did not properly consider the submitted evidence and that the evidence establishes that the applicant's waiver request should have been granted.

The AAO will now address the OIC's conclusion that a waiver of inadmissibility is not warranted in the present case.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 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 wife 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. See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

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

“Extreme hardship” is not a definable term of “fixed and inflexible meaning”; establishing extreme hardship is “dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 564 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The 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. *Id.* at 564. The BIA indicated that these factors relate to the applicant’s “qualifying relative.” *Id.* at 565-566.

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 from one’s family will therefore be given appropriate weight in evaluating the hardship factors in the present case.

The AAO will now apply the *Cervantes-Gonzalez* factors here in its consideration of hardship to the applicant’s wife. Extreme hardship to the applicant’s wife must be established in the event that she joins the applicant; and in the alternative, that she 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.

The record contains a letter sworn and subscribed on November 16, 2005 from the applicant’s wife in which she makes the following statements. She has been to Chile twice to visit her husband who has been living there since May 2003. She did not have the money to purchase the plane ticket to travel to Chile, and by taking a leave of absence to stay in Chile risked losing her job in the United States. She and her husband lived with his parents, and did not always have money to buy food. They took showers with cold water, and sometimes had to share a bed with her young brother-in-law. Her husband found it impossible to find employment and the temporary jobs he did find paid very little, about \$6 for over 15 hours of work. Her application for temporary residency was not approved because they could not provide proof of financial stability. Family and friends in the United States helped purchase a plane ticket to the United States so she could return to her job as a loan officer and processor. Not being with her husband has been a nightmare. She loves him and would like to have children soon as she is 40 years old and it will become difficult to

become pregnant without having a high-risk pregnancy. Her father died a few years ago and now she would like to care for her mother who lives with her and depends on her: she cannot walk without a cane, walker, or wheel chair. Her mother had three operations on her right knee and might require a fourth surgery. She helps her mother take showers, she shops and cooks for her, and takes her to doctor's appointments.

The record also contains a letter dated January 26, 2005 from the applicant's wife. In the letter she describes her depression and inability to sleep caused by worrying about her husband. She narrates living in Chile and her mother's health problems, which have already been described in the letter sworn and subscribed on November 16, 2005.

The record also contains a letter sworn and subscribed on November 16, 2005 from the mother of the applicant's wife. In the letter [REDACTED] a lawful permanent resident, states that her daughter had to stay in Chile seven months on each of her two trips because of financial difficulties. She states that she cannot walk without a cane, walker, or wheel chair, and relied on friends to help her while her daughter was in Chile. She has an infection in her knee from the last surgery and might need another surgery. She states that she is worried about her daughter who she depends on financially and for care. She states that her daughter financially struggled in Chile and did not always have food to eat and states that her daughter has the choice of divorcing her husband or leaving the United States. She states that her daughter has no future in Chile and cannot get temporary residency there.

The record contains a letter, dated November 15, 2005, from KSF Orthopaedic Center, P.A., which indicates that [REDACTED] the mother of [REDACTED] is receiving assistive care from [REDACTED] due to an orthopaedic condition with her right knee and that [REDACTED] may require surgery for this condition. The letter conveys that [REDACTED] is currently requiring the use of a walker and a wheelchair.

The record contains a bank statement for the period November 15, 2003 through December 17, 2003 reflecting transfer of funds.

The AAO finds that the evidence in the record fails to establish that the applicant's wife would endure extreme hardship if she joined her husband in Chile. [REDACTED] states that her request for temporary residency in Chile was denied because they could not provide proof of financial stability. There is no documentary evidence in the record showing that her request for temporary residency was not granted. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)). Ms. Aravena Saavedra states that her husband cannot find employment that will provide a living wage. Difficulty in finding employment or inability to find employment in one's trade or profession is mere detriment, relevant to a claim of hardship but not sufficient to require relief. *Santana-Figueroa v. INS*, 644 F.2d 1354, 1356 (9th cir. 1981). The Ninth Circuit stated that in a country with widespread poverty, complete inability to find work can have exceptionally severe personal and noneconomic consequences for an aged person with no means of support but his own labor. *Santana-Figueroa, supra*, at 1357. With the situation presented here, there is no independent evidence in the record reflecting complete inability of [REDACTED] his wife to find employment in Chile. There is no evidence about the economic conditions in Chile. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici, supra*.

The record fails to establish that the applicant's wife would endure extreme hardship if she remained in the United States. No evidence suggests that [REDACTED] would endure financial hardship if her husband's waiver application is not granted and she remained in the United States. She indicates that she has a good job working as a loan officer and processor. Although she assists with the financial support of her mother, there is no indication in the record that she requires income from her husband in order to care for herself and her mother.

[REDACTED] expresses that not being with her husband has been a nightmare and has caused her to be depressed. The AAO is mindful of and sympathetic to the emotional hardship that is endured as a result of separation from a loved one. It finds that [REDACTED] situation, if she 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 (9<sup>th</sup> Cir. 1991), the Ninth Circuit 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 (9<sup>th</sup> Cir. 1980) (severance of ties does not constitute extreme hardship). The Ninth Circuit in *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> 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 conveys that the emotional hardship to be endured by Ms. Aravena Saavedra, upon separation from her husband if she remains in the United States, is a heavy burden; but it is not unusual or beyond that which is normally to be expected upon deportation. The AAO finds that there is no evidence in the record establishing that [REDACTED] suffers from mental illness, as alleged by counsel.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.

In the final analysis, the AAO finds that 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 raised, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under 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 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. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.