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FILE:

Office: LIMA, PERU

Date: NOV 24 2008

IN RE:



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 Officer-in-Charge (OIC), Lima, Peru, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be sustained. The application will be approved.

The applicant, [REDACTED] is a native and citizen of Brazil who was found 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] sought a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the OIC denied, finding that [REDACTED] failed to establish hardship to a qualifying relative. *Decision of the OIC, dated February 27, 2006.* The applicant submitted a timely appeal.

The AAO will first address the 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).

Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

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). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.<sup>1</sup> For purposes of section 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. *See DOS Cable, note 1. See also Matter of Rodarte, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).*

The record reflects that the applicant entered the United States from Canada without inspection on January 26, 2000, remaining in the country until September 10, 2005, at which time he voluntarily returned to Brazil. The record therefore shows that [REDACTED] accumulated over five years of unlawful presence in the United States, and when he departed on September 10, 2005, he triggered the ten-year-bar of section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

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<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, [REDACTED] (April 4, 1998).

<sup>2</sup> See DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

The AAO will now address the finding that granting a waiver of inadmissibility is not warranted.

Section 212(a)(9)(B) of the Act provides that:

- (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.

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 an applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s U.S. citizen spouse, [REDACTED]. 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).

“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, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether there is 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 to the qualifying relative; and significant conditions of health, particularly when tied to unavailability of suitable medical care in the country to which the qualifying relative would relocate. *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).

Applying the *Cervantes-Gonzalez* here, extreme hardship to [REDACTED] must be established in the event that she remains in the United States, and alternatively, that she joins her spouse to live in Brazil. A qualifying relative is not required to reside outside of the United States if the applicant’s waiver application is denied.

Counsel on appeal describes [REDACTED]'s character and her employment as a social worker. He states that [REDACTED] is concerned about separation from her husband and parents. To establish extreme hardship to [REDACTED] counsel refers to [REDACTED]'s affidavits and letters, and to a letter by [REDACTED] employer, by a psychotherapist at Prescott Health Care, LLP; by [REDACTED] with Pentucket Medical Associates; by her mother; by her father; by her mother's doctor; by the applicant's brother; by the application; by the director of admissions and marketing at Southern New Hampshire University; and by two pastors. These documents are summarized as follows:

- In the affidavit dated July 23, 2007, [REDACTED] states that she was treated at Pentucket Medical Associates North Andover for ongoing stress, marital separation, depression, insomnia, and suicidal thoughts caused by separation. She conveys that on June 27, 2007, she was treated at a hospital emergency room for insomnia caused by separation from her husband. She indicates that she has been attempting to become pregnant since March 2006 and was informed that she needed to undergo treatment to have children. She states that she has struggled financially without her husband. She relays that she has been to Brazil six times in the last two years; that she does not speak the Portuguese language; that violence in Brazil makes her uncomfortable; and that when she was in Brazil while her husband was working, she was locked at home for security reasons. She states that in December 2006, she went to the hospital on three occasions while she was in Brazil because of a virus. She conveys that she and her husband took marriage classes in Brazil that were spoken in the Portuguese language, and her husband translated for her. She indicates that she is needed to care for her mother who is receiving chemotherapy treatments and her husband's presence would help her. She states that her husband was diagnosed with emotional depression, which is caused by their separation.
- In her affidavit dated March 29, 2006, [REDACTED] conveys that she has depression and anxiety attacks, and that her ability to function as a social worker has declined because of her two-year separation from her husband, with whom she has a close relationship and hopes to have children. She states that she will not find employment in Brazil's devastated economy, a country where she does not know its language, laws, or customs. She states that gender discrimination exists in Brazil, as shown in the U.S. Department of State Country Report on Human Rights Practices in Brazil. Ms. [REDACTED] conveys that Brazil's national minimum wage, which approximately one in three workers earned, did not provide a decent standard of living for a worker and family. She states that Brazil is a poor country with problems of violence and discrimination against women and children. Ms. [REDACTED] indicates that she is enrolled in a Master's Degree in Community Economic Development, and will not be able to complete the program if she moves to Brazil; and if she completes it, she will not be able to obtain a job in her field in Brazil. She indicates that she provides care for her parents and is active in the community. [REDACTED] states that her uncle disappeared in the September 11, 2001, bombing; that her mother has metastatic breast cancer, which is in her hip and lungs; and that her father has uncontrolled cholesterol and blood pressure, for which he was taken to the emergency room.
- In the October 25, 2005 letter, [REDACTED] states that she has a close relationship with her husband who came to the United States due to financial hardship. She conveys that her husband encouraged her to learn Portuguese; so now, as a social worker, she communicates with the Portuguese-speaking

community, which was difficult to reach because of their language. Her husband encouraged her to lose weight, her parents have health problems, she should have children while she is 33 years old, and she would lose her job if she moved to Brazil.

- The letter by [REDACTED] supervisor dated March 29, 2006, conveys that [REDACTED] is overwhelmed with the thought of her husband not being able to return to the United States, and is conflicted with the thought of leaving her parents, school, community, and employment to move to Brazil. The supervisor stated that [REDACTED] indicates that she will struggle to find employment in a country where she does not speak the language. The supervisor stated that [REDACTED] has been employed there since May 2005, and that her employment is at risk because her job performance has slowed since her husband has not returned from Brazil. She further states that over the past several months, [REDACTED] ability to effectively manage her cases has decreased significantly because of her interpersonal conflicts.
- The letter dated March 28, 2006, by [REDACTED] a psychotherapist, states that [REDACTED] has a diagnosis of major depressive disorder and a second diagnosis of generalized anxiety disorder and that she is taking fluoxetine HCL 20 mg for depression and trazadone HCL 50 mg for sleep. She states that [REDACTED] condition is directly related to separation from her husband. [REDACTED] conveys that [REDACTED] score on the Beck Depression Inventory indicates that her depression is in the severe range and she describes [REDACTED] emotions and physical health. She states that [REDACTED] behavioral problems and emotional distress are having a detrimental effect on her relationships with others and her ability to function in a work and school environment and that her condition may continue for years.
- The letter dated June 28, 2007, by [REDACTED], of Pentucket Medical Associates, documents [REDACTED] visit for ongoing stress, marital separation, depression, insomnia, and some fleeting suicidal thoughts subsequent to separation from her husband for two years. Ms. [REDACTED] is advised to seek counseling and is given medication for coping.
- In her letter dated March 27, 2006, [REDACTED] mother conveys that she is cancer patient and will be taking chemotherapy indefinitely. She indicates that her daughter takes care of her, bringing her to appointments. She states that her daughter and her daughter's husband are depressed about their separation. She states that she receives social security and had lost her job due to health problems.
- The letter by [REDACTED] father indicates that his daughter has provided support to him and to his wife, and he conveys his son-in-law is of good character.
- The March 19, 2007 letter by [REDACTED] is needed to care for her mother during chemotherapy treatments, that [REDACTED] brings her mother to a ointments, that she takes care of her mother's daily needs, and that it would be a help to [REDACTED] if her husband were present.
- The letter by [REDACTED] youngest brother attests to his older brother's good character and the close relationship between his brother and his brother's wife.

- In his letter dated March 9, 2006, the applicant stated that he is struggling to find employment in Brazil, a country where the base salary for someone who did not finish high school, which is his situation, is \$140 USD. He states that he is financially supported by his wife while he looks for work, and he describes his childhood and future plans.
- The March 27, 2006 letter by the Director of Admissions and Marketing at Southern New Hampshire University conveys that [REDACTED] has been enrolled as a full-time Masters of Science student since September 2005. He states that he has had the opportunity of interacting with students at various levels and that [REDACTED] has sought counsel from him throughout her tenure regarding academic and personal issues. He stated that the purpose of his letter is to convey his perceptions on how [REDACTED]'s appeal has affected his wife's performance as a graduate student. He indicates that based on his observations and discussions with faculty, [REDACTED] has performed well during her first term of study, but the faculty have seen a significant decline in her performance, such as assignments being turned in late, and [REDACTED] seeming distracted and overwhelmed. He reasons that the drop in academic performance may be directly related to her husband's immigration problems.

The record contains other documentation as well, including copies of various prescriptions for medication, and medical records of the applicant and his wife. It contains a declaration of the participation of the applicant and his wife in church services in Brazil and a declaration that they had taken a marriage course. The medical records of [REDACTED] mother disclose that she has invasive stage IV breast cancer, and since January 7, 2004, has undergone surgical, chemotherapy, and radiation treatments; and that her metastatic breast cancer has "predominant bone involvement" with pulmonary disease as well. The wage statement of [REDACTED] reflects she is employed full time, earning \$20.28 per hour. Her wage statement ending March 18, 2006 shows net pay of \$1,067. The record contains invoices with delinquent balances, a warrant to collect, credit union statements, cancelled checks, and a real estate title insurance policy.

The AAO has carefully considered all of the evidence in the record in rendering this decision.

With regard to family separation, courts have stated that "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).

The AAO finds that in considering the documentation in the record accumulatively, and in light of the holdings in *Salcido-Salcido* and *Cerrillo-Perez*, the submitted documentation, particularly the letter by Ms. [REDACTED] employer, which indicates that [REDACTED] position as a social worker is in jeopardy because separation from her husband has impacted her work performance, establishes extreme hardship to Ms. [REDACTED] if she were to remain in the United States without her husband.

If she joined her husband in Brazil, [REDACTED] would experience extreme emotional hardship because she would not be able to care for her mother who is undergoing treatment for cancer; she would have limited potential in finding employment in Brazil because she does not speak the Portuguese language; she would be unfamiliar with Brazil's culture and feel unsafe there; and she would disrupt her master's degree program. The AAO finds that the hardship factors raised here, and considered in the aggregate, establish extreme hardship to [REDACTED] if she were to join her husband to live in Brazil.

In conclusion, the factors presented in this case do 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).

The grant or denial of the above waiver does not depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's wife, the letters commending his character, his contribution to his community while he lived in the United States, his steady employment, and the passage of over three years since the applicant's immigration violation. The unfavorable factors in this matter are the applicant's periods of unauthorized presence. The AAO notes that the applicant does not appear to have a criminal record.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's breach of the immigration laws of the United States, the AAO finds that the hardship imposed on the applicant's spouse as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under 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. The applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained. The application is approved.