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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File:

Office: LIMA, PERU

Date:

MAY 17 2001

IN RE: Applicant:



Application:

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

IN BEHALF OF APPLICANT:



Public Copy

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Lima, Peru, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native of Chile and dual citizen of Chile and Italy who was found by a consular officer to be inadmissible to the United States under § 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 a period of one year or more. The applicant is married to a United States citizen and is the beneficiary of an approved petition for alien relative. He seeks the above waiver in order to travel to the United States to reside with his spouse.

The officer in charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly.

On appeal, counsel asserts that the officer in charge did not apply the proper standard and did not consider all of the factors presented to establish extreme hardship to the applicant's spouse. In addition, counsel states that the officer in charge failed to consider hardship to the applicant's mother in denying the applicant's request.

On appeal, counsel requests oral argument stating that it is necessary due to the lack of published precedent concerning waivers under § 212(a)(9)(B)(v) of the Act, the lack of any regulatory or other official guidance concerning the standard to be applied in these cases, and the seriousness of the potential impact to the applicant's spouse. In addition, counsel requests expedited processing of this matter on the ground that the lengthy processing time would result in further, undue and extreme hardship to the applicant's spouse.

Oral argument is limited to cases where cause is shown. 8 C.F.R. 103.3(b). Counsel has not established that this case involves unique facts or issues of law which cannot be adequately addressed in writing, therefore the request for oral argument is denied.

The record reflects that the applicant initially entered the United States as a nonimmigrant visitor in 1990. He remained longer than authorized, living with his lawful permanent resident mother and attending college without authorization. In 1994, the applicant departed the United States to play professional soccer in Italy. He returned to the United States on September 1, 1995, utilizing the same nonimmigrant visa that he had used to enter in 1990. He again remained in the United States longer than authorized and did not depart until June 18, 2000. On July 20, 2000, the applicant attempted to reenter the United States, was stopped by an immigration officer, withdrew his application for admission and returned to Chile.



Section 212(a) of the Act states:

CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-
Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(9) ALIENS PREVIOUSLY REMOVED.-

* * *

(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 from the United States, is inadmissible.

* * *

(v) WAIVER.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Section 212(a)(9)(B) of the Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974); Matter of Soriano, 21 I&N Dec. 516 (BIA 1996).

In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

After reviewing the IIRIRA amendments to the Act relating to fraud, misrepresentation and unlawful presence in the United States, and after noting the increased penalties Congress has placed on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar in some instances, eliminating children as a consideration in determining the presence of extreme hardship, and providing a ground of inadmissibility for unlawful presence after April 1, 1997, it is concluded that Congress has placed a high priority on reducing and/or stopping fraud, misrepresentation and unlawful presence of aliens in the United States.

The Board has held that extreme hardship is not a definable term of fixed and inflexible meaning, and that the elements to establish extreme hardship are dependent upon the facts and circumstances of each case. These factors should be viewed in light of the Board's statement that a restrictive view of extreme hardship is not mandated either by the Supreme Court or by its own case law. See Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996).

It is noted that the requirements to establish extreme hardship in the present waiver proceedings under § 212(a)(9)(B)(v) of the Act do not include a showing of hardship to the alien as did former cases involving suspension of deportation. Present waiver proceedings require a showing of extreme hardship to the citizen or lawfully resident spouse or parent of such alien. This requirement is identical to the extreme hardship requirement stipulated in the amended fraud waiver proceedings under § 212(i) of the Act, 8 U.S.C. 1182(i). Therefore, it is deemed to be more appropriate to apply the meaning of the term "extreme hardship" as it is used in fraud waiver proceedings than to apply the meaning as it was used in former suspension of deportation cases.

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board stipulated that the factors deemed relevant in determining whether an alien has established "extreme hardship" in waiver proceedings under § 212(i) of the Act include, but are not limited to, the following: (1) the presence of a lawful permanent resident or United States citizen spouse or parent in this country; (2) the qualifying relative's family ties outside the United States; (3) 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; (4) the financial impact of departure from this country; (5) and finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

In Perez v. INS, 96 F.3d 390 (9th Cir. 1996), the court stated that "extreme hardship" is hardship that is unusual or beyond that which would normally be expected upon deportation. The common results of deportation are insufficient to prove extreme hardship.

The 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.

The record contains a letter from the applicant's spouse stating that she would suffer emotionally and economically if separated from the applicant. She cannot afford to live in her apartment with only one salary and has spent thousands in plane tickets and hotel rooms to visit her husband in Chile. In addition, she is depressed and lonely and has become physically ill due to traveling to visit her husband.

The record also contains a letter from the spouse's physician dated January 4, 2001, indicating that the spouse has been a patient for fifteen years, suffers from bilateral vesicle ureteral reflux, and requires medical follow-up every three months to avoid complications of her condition. While the spouse's medical condition is unfortunate, there is no indication in the record that the applicant's presence is integral to his spouse's care and treatment or that suitable care and treatment is unavailable in Chile.

A review of the factors presented, and the aggregate effect of those factors, indicates that the applicant's spouse is undergoing hardship due to separation. The applicant has failed, however, to show that the qualifying relative would suffer extreme hardship over and above the normal social and economic disruptions involved if the applicant is not permitted to reside in the United States at this time. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing the favorable or unfavorable exercise of the Attorney General's discretion.

In proceedings for application for waiver of grounds of inadmissibility under § 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.