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U.S. Citizenship
and Immigration
Services

H4



FILE:

Office: LIMA, PERU

Date: SEP 14 2006

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B) of the Immigration and Nationality Act (the 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 officer in charge (OIC) at the U.S. Embassy in Lima, Peru denied the waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, [REDACTED], is a native and citizen of Peru who entered the United States without inspection in about April of 1999, and applied for a Form-601 waiver on May 23, 2006. In order to live in the United States with her U.S. citizen fiancé, [REDACTED] and their U.S. citizen child, the applicant seeks a waiver of inadmissibility under § 212(a)(9)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B), for being unlawfully present for more than one year, departing the United States, and then seeking admission.

Ms. [REDACTED] first entered the United States in about April of 1999, without inspection. On June 27, 2000, she applied for asylum with the Miami Asylum Office. The filing of her asylum application stopped Ms. [REDACTED] unlawful presence in the United States.¹ At that time, she had accrued approximately 454 days of unlawful presence. The Asylum Office denied her asylum application and referred her to the Immigration Judge, who denied her case and ordered her removal on June 9, 2004. Ms. [REDACTED] appealed her asylum case to the Board of Immigration Appeals (BIA), who denied her case on February 22, 2005. At that time, Ms. [REDACTED] began accruing unlawful presence again. She left the United States on June 29, 2005 to return to Peru because of a family emergency. Between the date the BIA denied her appeal and the time she departed the United States, the applicant accrued an additional 128 days of unlawful presence. On August 18, 2005, Mr. [REDACTED] filed a Form I-129F Petition for Alien Fiancé on behalf of Ms. [REDACTED]. Ms. Caceres has accrued over one year of unlawful presence and is inadmissible for 10 years. § 212(a)(9)(B)(i)(II).

The OIC determined that Ms. [REDACTED] is inadmissible under § 212(a)(9)(B) for being unlawfully present for more than one year, departing the United States, and seeking admission. The OIC also concluded that Ms. [REDACTED] had failed to establish that extreme hardship would be imposed on her qualifying relative, her husband, and denied the Application for Waiver of Ground of Inadmissibility (Form I-601). The OIC also denied Ms. [REDACTED] Form I-212 Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212). As both applications were adjudicated in the same decision by the OIC, the AAO will do the same.

On appeal, counsel for the applicant submits the following documents not previously submitted: 1) a note from Mr. [REDACTED]'s former psychiatrist, Dr. [REDACTED] diagnosing him with bipolar disorder and attention deficit disorder and prescribing him Zoloft; 2) documentation relating to the various medical conditions of Mr. [REDACTED] brother; 3) a U.S. State Department country report on Peru; 4) a description of major depressive disorder; 5) the birth certificate of Mr. [REDACTED] son; 6) pictures of Mr. [REDACTED] son, exhibiting a deep indentation in the chest; and 7) a detailed, supplemental hardship statement by Mr. [REDACTED]. Counsel asserts that Mr. [REDACTED] will suffer extreme hardship, psychologically, emotionally and

¹ The AAO notes that the OIC indicated that the applicant worked without authorization while her asylum application was pending. If accurate, the filing of an asylum application would not have stopped the tolling of unlawful presence. There is nothing in the record to verify that the applicant worked prior to the issuance of work authorization, therefore, the period of time during which her asylum application was pending will not count towards her unlawful presence.

financially, if his wife and child are not permitted to reside with him in the United States. *Brief in Support of Motion to Reconsider, dated August 2, 2006.*

In addition to the above mentioned brief and documentation, the record includes a previous hardship statement from Mr. [REDACTED] and a letter from Ms. [REDACTED] in which she describes how her life would be destroyed if her husband were denied permission to reside in the United States. The AAO reviewed the record in its entirety before issuing its decision.

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 concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. In examining whether extreme hardship has been established, the BIA has held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the

combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

Hardship the applicant herself experiences upon denial of her application for admission is not considered in these waiver proceedings. Hardship the couple's U.S. citizen child would suffer is only considered insofar as it results in extreme hardship to the qualifying relative.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The AAO notes that extreme hardship to Ms. [REDACTED] spouse must be established in the event that he accompanies his wife and son to live in Peru and, in the alternative, in the event that he remains in the United States separated from his wife and son.

The first part of the analysis requires Ms. [REDACTED] to establish extreme hardship to her husband, in the event that he moves with her to Peru. In this case, the record reflects that Mr. [REDACTED] was born and raised in the United States. Mr. [REDACTED] is a public school teacher at Nova Middle School in Florida. He does not speak fluent Spanish. The record contains evidence that substantiate his fear of not finding gainful employment in Peru. *See Mr. [REDACTED] Hardship Statement and the U.S. Department of State Background Note: Peru, June 2006.* Mr. [REDACTED] current job provides benefits that include medical health coverage for him in the United States. It is the insurance he gets from his job that pays for his treatment for bipolar disorder. He would lose the ability to pay for his treatment if he moved to Peru. In addition, the AAO notes that Mr. [REDACTED] plays an integral part in taking care of his brother [REDACTED] who suffers from Crohn's disease, severe back pain, and major depression. Mr. [REDACTED] feels a great responsibility to take care of his brother. The AAO recognizes that the family would suffer economic detriment and their wage-earning potential would be diminished if Mr. [REDACTED] moved to Peru, and that the standard of living for the family would be reduced. If they moved there, [REDACTED] would lose his job, and he would be unable to pay for his own medical treatment in Peru. If [REDACTED] relocated to Peru, the family would suffer both financial and personal hardships. It is clear that Mr. [REDACTED] has spent his entire life in the United States and has no family in Peru or any other significant ties in Peru. This lack of support, combined with the diminished family income likely in Peru and the loss of his job, home, and social ties lead to a conclusion that Mr. [REDACTED] would indeed suffer extreme hardship if he chose to move to Peru to avoid separation from his wife and son.

The second part of the analysis requires Ms. [REDACTED] to establish extreme hardship to her husband in the event that he remains in the United States separated from her and their son. The medical documentation together with Mr. [REDACTED]'s detailed hardship statement reveal that Mr. [REDACTED] is suffering in reaction to the separation from his fiancé, and in particular, from his infant son who is in poor health and whom Mr. [REDACTED] has not yet met. According to Mr. [REDACTED] "I have bipolar disorder and have been suffering extreme depression due to the separation from my fiancé and son." Mr. [REDACTED] credits his relationship with his fiancé for bringing him back from a state of depression that left him unable to work for most of 2004. Included in the record are medical records that document Mr. [REDACTED]'s mental illness and the fact that he requires medication to manage this illness. This documentation supports Mr. [REDACTED]'s fears about the extreme hardship he would suffer if he stayed in the United States apart from his fiancé and son. Although counsel did not submit an evaluation from a psychological professional and only submitted background documentation on major depressive disorder and not bipolar disorder, the AAO finds the documentation in the

record sufficient to conclude that Mr. [REDACTED] would also suffer extreme hardship if he remains separated from his fiancé and son for an extended period of time. Mr. [REDACTED] clearly articulated that his emotional welfare is dependent on the welfare of his family, in particular his infant son, and that he could not bear the trauma of separation from his fiancé and son or the trauma of uprooting himself from his life in the United States, away from his sick brother and elderly parents, and to a country where he would be unable to work and where he does not speak the language. His statement reveals the high level of anxiety that Mr. [REDACTED] is suffering and will suffer if he does not have the companionship and care of his wife and the presence of his son.

Based on the above evidence, the applicant has established that the cumulative general emotional effect that separation from his wife and child would have on Mr. [REDACTED] combined with the increased financial, personal and familial burdens that he would face, render the hardship in this case beyond that which is normally experienced in most cases of removal.

Discounting the hardship Mr. [REDACTED] would face in either the United States or Peru if his wife were refused admission is not appropriate. Given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, the AAO finds that the applicant has established that her husband would suffer extreme hardship if her waiver of inadmissibility were denied. In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The AAO must “balance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *See Matter of Mendez-Morales, supra* at 300 (BIA 1996). (Citations omitted).

The adverse factors in the present case are the applicant’s initial entry without permission and unauthorized presence for which she now seeks a waiver.

The favorable and mitigating factors are the extreme hardship to her husband if she were refused admission and her supportive relationship with her husband.

The AAO finds that, although the applicant’s initial illegal entry and unauthorized stay were serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. As adjudication of a Form I-212 is based on the same discretionary factors, the AAO finds that the applicant merits a favorable finding on her Form I-212.

ORDER: The appeal is sustained. Both the I-601 waiver and the Form I-212 are granted