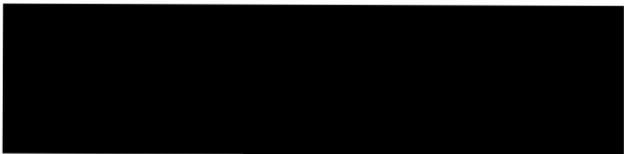




U.S. Citizenship
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FILE:

Office: LIMA, PERU

JAN 23 2007

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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, Lima, Peru. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Peru 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 and seeking readmission within 10 years of his last departure from the United States. The applicant's spouse is a U.S. citizen and he is seeking a waiver of inadmissibility in order to reside in the United States.

The officer-in-charge found that based on the evidence in the record, the applicant failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *Decision of the Officer-in-Charge*, dated August 29, 2005.

On appeal, the applicant asserts that the officer-in-charge erred in determining that he did not show extreme hardship. *Form I-290B*, dated September 22, 2005.

The record includes, but is not limited to, the applicant's brief, statements from the applicant and his spouse, a letter from the applicant's spouse's physician, a statement from the applicant's sister, money wire receipts and information on conditions in Peru. The entire record was reviewed and considered in rendering a decision on the appeal.

The record reflects that the applicant entered the United States in 1990, applied for asylum in 1993 (which was subsequently denied), was ordered deported in 1995 and returned to Peru in September 2002.¹ The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until his departure in 2002. The 10 year bar was triggered by the applicant's departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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

¹ The AAO notes that if the applicant was admitted to the United States with a fraudulent visa as indicated by the officer-in-charge, he would also be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

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.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. The AAO notes that hardship to the applicant's daughter is only relevant to the extent it causes hardship to the applicant's spouse. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship. These factors include the presence of lawful permanent resident or U.S. citizen family ties to 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.

Therefore, an analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The AAO notes that extreme hardship to the applicant's spouse must be established in the event that the applicant's spouse relocates to Peru or in the event that she remains in the United States, as she is not required to reside outside of the United States based on denial of the applicant's waiver request. The record reflects that the applicant is currently residing in Peru.

The first part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that she relocates to Peru. In regard to family ties within the United States, the applicant's sister states that the applicant's spouse's mother resides in the United States, she is in pain from severe arthritis and she is living with the applicant's spouse. *Statement of Applicant's Sister*, at 1, dated July 5, 2004. The record reflects that the applicant's spouse is originally from Mexico and there is no indication that she has any ties to Peru other than the applicant. The applicant states that his spouse cannot reside in Peru without permission from Peru and that this is far from certain. *Brief in Support of Appeal*, at 7, dated September 22, 2005. There is no substantiating evidence that the applicant's spouse cannot obtain permission to reside in Peru.

The applicant states that his daughter has never been outside of the United States, her support system is in the United States, she has never lived in a rural land, she would not be able to obtain help for her hyperactivity and her education may be affected. *Supra.* at 4,7. Therefore, it appears that raising the child in Peru would cause difficulty to the applicant's spouse. The record includes a physician's letter which states that the applicant's spouse has diabetes and hypertension, and the loss of emotional and financial spousal support has made her anxious and depressed. *Letter from [REDACTED], M.D.*, dated September 9, 2005. The applicant asserts that the quality of medical care in Peru is sporadic and there is no guarantee that his spouse will receive adequate monitoring or care should her condition worsen. *Brief in Support of Appeal*, at 8. The AAO notes that there is no substantiating evidence of the lack of appropriate medical care in Peru, although the record indicates that they may not be able to afford such care should it exist.

The applicant's sister details the applicant's inability to obtain employment and his unsafe living conditions. *Statement of Applicant's Sister*, at 2. The applicant states that it is extremely hard to obtain steady employment that would provide for the entire family, there are safety issues due to assaults which the police ignore and his family would be targeted as they are from the United States. *Applicant's Statement*, at 1, dated August 14, 2004. The applicant's spouse states that the applicant has been unable to find a permanent job and he lives with his relatives as he cannot afford an apartment. *Applicant's Spouse's Statement*, at 2, dated March 31, 2005. The record reflects that the national minimum wage did not provide a decent standard of living for a worker and family. *U.S. Department of State, Peru Country Reports on Human Rights Practices*, at 22, dated March 31, 2003. Based on the totality of the aforementioned circumstances, the AAO finds that the applicant's spouse would face extreme hardship upon relocation to Peru.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his spouse remains in the United States. The applicant states that he was active in his spouse's life and child's life, he contributed to their financial support and he watched their child when his spouse worked. *Brief in Support of Appeal*, at 4. The applicant states that his spouse is increasingly unable to cope with her medical problems, the additional work to meet the loss of his earnings and their daughter's medical problem of hyperactivity. *Id.* The applicant states that his spouse's medical problems have been exacerbated by his absence and by raising a hyperactive child by herself. *Id.* at 7. The applicant's spouse states that since her husband has left, she has been suffering from depression and anxiety for which she is taking medication. *Applicant's Spouse's Statement*, at 2. The physician's letter states that the loss of emotional and financial spousal support has made her anxious and depressed and she is taking antidepressants. *Letter from [REDACTED]*

M.D. The applicant's spouse also details some of the common financial and physical problems that are caused by separation and single parent households. *Applicant's Spouse's Statement*, at 2,4. The applicant's sister states that the applicant's spouse is also caring for her ailing mother. *Statement of Applicant's Sister*, at 1. Considering the aforementioned factors, the AAO finds that extreme hardship has been established in the event that the applicant's spouse remains in the United States without the applicant.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the

exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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." *Id.* at 300. (Citations omitted).

The main adverse factors in the present case are the applicant's unlawful entry and presence, failure to timely depart the United States pursuant to the deportation order and his unlawful employment.

The favorable factors include the presence of the U.S. citizen spouse and child, the lack of a criminal record, extreme hardship to his spouse and the applicant's good character, as evidenced by statements in the record.

The AAO finds that the applicant's violations are serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.