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U.S. Citizenship
and Immigration
Services

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FILE:

Office: LIMA, PERU

Date: JUN 06 2007

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 PETITIONER:

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

The applicant is a native and citizen of Chile who, on February 13, 2004, applied for a K-3 nonimmigrant visa as the spouse of a United States citizen who had filed a relative petition on his behalf, for the purpose of awaiting the approval of the relative petition and availability of an immigrant visa, pursuant to section 101(a)(15)(K)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(K)(ii). The relative petition filed on behalf of the applicant was approved on May 11, 2005. In adjudicating the K-3 nonimmigrant visa, the consular officer determined that the applicant was inadmissible to the United States under 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 over one year.

The OIC concluded that the applicant had failed to establish that extreme hardship would be imposed on any qualifying relatives and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility.

On appeal, the applicant contends that his United States citizen wife will suffer extreme hardship if he is required to remain in Chile. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

Regarding the applicant's grounds of inadmissibility, the record reflects that he entered the United States on a B-1/B-2 nonimmigrant visa in March 2000. He did not depart the United States, however, until December 2003. As he departed the United States more than one year after the expiration of his lawful status, the ten-year bar on admission was triggered.

The applicant is now seeking admission within ten years of his December 2003 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year. The applicant does not contest the director's finding of inadmissibility. Rather, he is filing for a waiver of inadmissibility.

Section 212(a)(9)(B)(v) of the Act provides that a waiver under section 212(a)(9)(B)(i)(II) of the Act is available solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Extreme hardship to the applicant herself is not a permissible consideration under the statute. In the present case, the applicant's husband is the only qualifying relative, so hardship to the applicant or her children may not be considered.

The record contains many references to the hardship that the applicant's wife's son would suffer if the applicant were refused admission into the United States. However, section 212(a)(9)(B)(v) of the Act provides that a waiver under section 212(a)(9)(B)(i)(II) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Congress specifically does not mention extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant himself a permissible consideration under the statute. In the present case, the applicant's wife is the only qualifying relative, and hardship to the applicant or his wife's son (or any other of her family members) will face cannot be considered, except as it may affect the applicant's wife.

Court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court of Appeals for the Ninth Circuit defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Ninth Circuit emphasized that the common results of deportation are insufficient to prove extreme hardship. The United States Supreme Court additionally 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 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 alien 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 *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted), the BIA held that:

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.

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion favorably to the applicant. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The record reflects that the applicant's wife is a fifty-two-year-old citizen of the United States. As she was born in Memphis, Tennessee, her citizenship was obtained at birth. She and the applicant have been married since September 26, 2003.

The record contains statements from the applicant's wife, the applicant's wife's son, the applicant's son's pediatrician, the applicant's son's principal, the applicant's son's psychologist, the applicant's wife's employer, the applicant's wife's psychologist, and the applicant's wife's physician. As noted previously, the applicant's wife is the only qualifying relative in this proceeding.

In her first statement, dated August 29, 2004, the applicant's wife details her great love for the applicant and discusses the hardship the couple's separation has inflicted; discusses previous difficulties she has faced, including losing her parents to a house fire, leaving college in order to care for her siblings, infertility, and divorce; discusses her relationship with the applicant; describes the loving relationship that her son and the applicant share; states that she needs her family reunited; asks that the applicant not be punished any further; states that if she did not have a son, her choice would be easy—she would relocate to Chile; discusses the applicant's love for the United States; and discusses the good nature of his character.

In her second statement, dated September 20, 2005, the applicant's wife discusses the wonderful role model that the applicant has been for her son; discusses the difficulties her son would face if the family were to relocate to Chile; states that, although she speaks some Spanish, that she is not understood well when she is in Chile; discusses the health problems of her grandmother and aunt, and describes her role in their lives; states that she speaks to the applicant nearly every day; states that she finds herself slipping into bouts of depression and despair at the prospect of not having the applicant return to her; describes how the situation has affected her work; and states that the applicant's many favorable attributes far outweigh the sole error in judgment he made in not departing the United States prior to the expiration of his visa.

In her third statement, dated April 19, 2006, the applicant's wife details how costly the prolonged separation from her husband has been. She states that she nearly had a nervous breakdown in December 2005 due to the stress; states that she was forced to relinquish her position as a director in the hospital for whom she works, as the combination of a director's role and its responsibilities combined with the stress of her family situation was too much to bear (she also states that this decision was made in concert with her psychologist and personal physician); states that she is currently taking anti-anxiety and anti-depression medications; states that, with her decreased financial standing, she may be required to sell a condominium she owns as an investment property; states that she still speaks to the applicant almost every day; discusses family difficulties that the applicant has faced in Chile; reiterates that she cannot take her son to Chile; states that her son's health and grades have suffered as a result of the applicant's continued absence from the home; states again that she loves the applicant passionately; and also states again that the applicant's many favorable attributes far outweigh the sole error in judgment he made in not departing the United States prior to the expiration of his visa.

The record also contains two letters from the applicant's wife's psychologist (dated October 12, 2004 and March 24, 2006) and a letter from her personal physician (dated April 14, 2006). Her psychologist states that she has seen the applicant's wife many times, and that she has experienced a great deal of grief and anxiety. She states that when the applicant's wife discovered there would be an additional fourteen-month delay in processing the case, she was "emotionally devastated to the point of considering having herself hospitalized." Her personal physician states that the applicant's wife has several physical conditions that are exacerbated by stress, including a skin condition that has required several courses of antibiotics, and diabetes. The physician states that, although her diabetic condition has been manageable in the past, recent test results show that her blood glucose control has been suboptimal. She states that she has prescribed both anti-anxiety and anti-depressant medication for the applicant's wife. Both doctors advise that the applicant's husband be allowed to return to the United States.

On appeal, counsel states her belief that, due to the apparent failure of the consulate to provide it with the complete waiver application, CIS did not give appropriate consideration to the cumulative impact of the following factors: (1) that applicant and his wife's substantial family ties to the United States; (2) the health of the applicant's wife, her son, and other dependent relatives; (3) the applicant's wife's important position in her community and the fact that her career could not be continued in Chile;¹ (4) economic conditions in Chile would result in a diminished standard of living and quality of life; and (5) that the applicant would not face inadmissibility had he not departed the United States and instead filed form I-485.

The AAO finds that the applicant's wife would face extreme hardship if she remains in the United States without him. The applicant has asserted, and submitted extensive documentation to establish, that his wife has suffered extreme setbacks in her career, familial relationships, and mental health as a result of his absence. The applicant's wife has demonstrated that she has a well-established relationship with her psychologist and physician, and the AAO has taken their assertions into consideration as well. The AAO finds that the applicant's wife's background—including the circumstances regarding her parents' death and the placing of her own ambitions on hold while she raised her siblings—also differentiates her situation from other spouses of waiver applicants, and the psychological effects of separation from her husband are beyond the norm. The AAO also finds that she would face extreme hardship if she were to join the applicant in Chile. A citizen of the United States by birth, the applicant's wife has no ties to Chile beyond those of the applicant, nor does she speak that country's language well. Nor would she have access to the mental health network upon which she has come to rely.

Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe.

The favorable factors in this matter are the extreme hardship the applicant's wife would face if the applicant were to remain in Chile, regardless of whether she accompanied him or remained in the United States, United

¹ However, the AAO notes that the inability to pursue one's chosen career or a reduction in standard of living does not necessarily result in extreme hardship. See *Ramirez-Durazo v. INS*, 794 F.2d 491, 499 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient."); *Shoostary v. INS*, 39 F.3d 1049 (9th Cir. 1994) (stating, "the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. . . .")

States citizen spouse, and apparent lack of a criminal record. The unfavorable factor in this matter is the applicant's period of unauthorized presence in the United States.

While the AAO does not condone his actions, the AAO finds that the hardship imposed on the applicant's wife as a result of his inadmissibility outweighs the unfavorable factor in this application. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i), the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the waiver application approved.

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