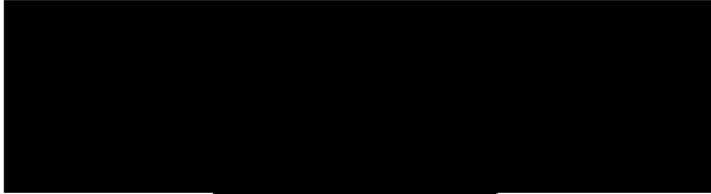




U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: LIMA, PERU Date: JUN 27 2007

IN RE: [Redacted]

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: 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 Acting Office in Charge, Lima, Peru denied the application and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion to reopen will be granted. The previous decision shall be withdrawn. The application will be approved.

The applicant is a native and citizen of Argentina 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 is the spouse of a U.S. citizen and the stepfather of a U.S. citizen son and two U.S. citizen daughters. He seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his spouse, stepson and stepdaughters.

The acting 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 for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting Officer in Charge*, dated January 27, 2005.

On July 8, 2005, the AAO dismissed the applicant's appeal because the applicant failed to establish that extreme hardship would be imposed upon his wife, the qualifying relative. *Decision of AAO*, dated July 8, 2005.

The record reflects that, on September 26, 1999, the applicant was admitted to the United States as a nonimmigrant visitor under the Visa Waiver Pilot Program. The applicant remained in the United States past his authorized stay which expired 90 days after his admission. On September 6, 2002, the applicant was apprehended by immigration officers and was ordered removed from the United States. On September 13, 2002, the applicant was removed from the United States and returned to Argentina, where he has since resided. On January 22, 2003, the applicant married his U.S. citizen spouse, [REDACTED] in Argentina. On September 11, 2003, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant which was approved on April 8, 2004. On July 26, 2004, the applicant filed an Application for Immigrant Visa and Alien Registration (Form DS-230) based on the approved Form I-130. On September 23, 2004, the applicant filed the Form I-601 with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his spouse.

On motion, [REDACTED] contends that she will suffer extreme hardship if the applicant's waiver is not approved. *See Applicant's Statement*, dated August 8, 2005. In support of her contentions, [REDACTED] submits the referenced affidavit, affidavits from other family members, and medical documentation in regard to her mother. The entire record was reviewed and considered in rendering a decision in this case.

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 acting officer in charge based the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on the applicant's admission to being unlawfully present in the United States from December 19, 1999, the date on which his authorized nonimmigrant stay expired, until September 13, 2002, the date on which he was removed from the United States and returned to Argentina. The applicant does not contest the acting officer in charge's determination of inadmissibility.

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 on the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the alien himself experiences upon removal is not considered in section 212(a)(9)(B)(v) waiver proceedings. Congress *specifically* did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship in 212(a)(9)(B)(v) cases. Thus, hardship to the applicant's U.S. citizen stepson and stepdaughters will not be considered in this decision, except as it may affect the applicant's spouse, the only qualifying relative.

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. 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. 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).

Since [REDACTED] is a U.S. citizen and is not required to reside outside the United States as a result of the denial of the applicant's waiver, extreme hardship must be established whether she resides in the United States or Argentina.

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).

The record reflects that [REDACTED] is a U.S. citizen by birth. The applicant has three children from a previous marriage who are U.S. citizens by birth and whose statements in the record indicate they are over 18 years of age. The applicant and [REDACTED] do not have any children together. [REDACTED] mother has been diagnosed with cancer and is undergoing radiation and hormonal therapy. The record reflects further that the applicant is in his 30's, [REDACTED] is in her 40's and that [REDACTED] may have some mental health concerns.

[REDACTED] contends that she will suffer financial and emotional hardship whether she remains in the United States without the applicant or remains in Argentina in order to reside with the applicant. [REDACTED] was employed in the United States as an office manager for a period of five years and has been employed in Argentina by helping to run the applicant's parents' cyber café. The applicant was employed as the head of a receiving department for a period of two years in the United States and has been employed in Argentina by helping to run his parents' cyber café. [REDACTED] in her statement, indicates that she was unable to continue traveling back and forth to Argentina due to the prohibitive costs and the emotional and physical toll it took on her. She states that, in Argentina, she and the applicant earn only enough money to provide a little food and the bare necessities. [REDACTED] submitted medical letters indicating that her mother has been diagnosed with breast cancer and is undergoing radiation and hormonal treatments. She states that she and the applicant are needed to support her mother through these treatments. The medical letters indicate that [REDACTED] mother will require emotional and physical support from all family members and tolerate her therapy better if she is able to have the support of her family. *See Medical Letters*, dated July 1, 2005. [REDACTED] in her statement, contends that her mother needs help in dealing with her operation and recovery and should not have to worry about her daughter and son-in-law being stuck in another country. [REDACTED] mother, in her affidavit, states that she has had to undergo many procedures in relation to her breast cancer without the emotional and physical support she needs from [REDACTED] and the applicant.

[REDACTED] in her statement, reports that she and the applicant have been the victims of crime in Argentina, including an incident in which a gun was held to the applicant's head and misfired. She states that she and the applicant fear for their lives on a daily basis. She states that she and the applicant have contracted pneumonia on a number of occasions since residing in Argentina and have suffered from depression as a result of living in Argentina and being separated from family in the United States. [REDACTED] states that she is concerned about her children in the United States who are experiencing financial and emotional problems without her and the applicant. She states that if she and the applicant were able to reside in the United States they could ease both the financial and emotional suffering her children have endured.

While the AAO notes the statements made by [REDACTED] regarding her situation in Argentina, it does not find the record to contain any documentation that would support her claims regarding the economic hardship she states she is facing, the violence that she indicates she has experienced or her health problems. Neither does the record establish that her concern for her son and two daughters may be distinguished from that commonly felt by any mother separated from her children as a result of removal. However, the AAO takes note of the medical documentation that establishes that [REDACTED] mother has been diagnosed with breast cancer since [REDACTED] moved to Argentina to live with the applicant. It also acknowledges the July 1, 2005 letter written by [REDACTED] of the Central Utah Cancer Center, which states that [REDACTED] mother, during her treatment, requires the emotional and physical support of all family members. In light of the serious nature of her mother's illness, the AAO concludes that [REDACTED] continued residence in Argentina would constitute an extreme emotional hardship for her, particularly as her family members, other than the applicant, live in the United States.

The AAO also concludes that [REDACTED] would experience extreme emotional hardship if she were to return to the United States to care for her mother and the applicant remained in Argentina. In her statements, [REDACTED] contends that she and the applicant are soul mates and cannot live without each other. She states that they tried living apart for the first two years following the applicant's removal, but that this arrangement did not work because they needed each other to survive. While the AAO notes [REDACTED] statements, it does not find them to establish that she would experience extreme emotional hardship if she were separated from the applicant. In nearly every marital relationship, separation results in considerable hardship to the individuals involved. However, in the present case, the normal distress that would result from [REDACTED] separation from her husband would be compounded by the emotional strain created by her mother's life-threatening illness. Accordingly, the emotional hardship [REDACTED] would experience upon return to the United States would be significantly greater than that normally generated by the separation of a husband and wife. Therefore, the AAO finds that the applicant has established that [REDACTED] would face extreme hardship if she returns to the United States and the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien 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 adverse factor in the present case is the unlawful presence for which the applicant seeks a waiver and his removal order. The favorable and mitigating factors in the present case are the extreme hardship to the applicant's spouse if the applicant were refused admission, the absence of any criminal background, and the applicant's spouse's significant ties to the United States.

The AAO finds that, although the immigration violation committed by the applicant was 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. Accordingly, the appeal will be sustained.

In his decision, the acting officer in charge also denied the applicant's Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal, as a matter of discretion based on his denial of the Form I-601. However, Chapter 43.2 of the *Adjudicator's Field Manual* directs that, in cases where an alien has filed both a Form I-601 and Form I-212, the waiver request must be adjudicated first. Only in cases where the Form I-601 is denied and the decision is final may the Form I-212 be denied as a matter of discretion. In the present case, the acting officer in charge's determination regarding the Form I-



601 was not final and, therefore, the Form I-212 should not have been denied. In that the Form I-601 is now approved, the AAO withdraws the denial of the Form I-212 by the acting officer in charge. Accordingly, the Form I-212 is, once again, pending before Citizenship and Immigration Services. The acting officer in charge must consider the application on its merits.

ORDER: The motion to reopen is granted. The prior decision is withdrawn and the Form I-601 application is approved. The acting officer in charge's denial of the Form I-212 is withdrawn.