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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: LIMA, PERU Date: SEP 29 2009

IN RE: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Officer in Charge (OIC), Lima, Peru, denied the instant waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Brazil, is the spouse of a U.S. citizen, is the mother of a U.S. citizen daughter, and is the beneficiary of an approved Form I-130 petition. The applicant was found inadmissible to the United States under section 212(a)(9)(B)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II) for unlawful presence of greater than one year, and under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for procuring a nonimmigrant visa through fraud or material misrepresentation. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her husband and daughter.

The OIC found that the applicant had been unlawfully present in the United States for more than a year and is therefore inadmissible pursuant to section 212(a)(9)(B)(i) of the Act. He further found that the applicant was inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for having made a material misrepresentation in seeking to procure an immigration benefit. Further still, he found that the applicant had failed to establish extreme hardship to her U.S. citizen spouse, and denied the application.

On appeal, counsel argued that the decision denying the waiver application placed undue emphasis on the applicant's ineligibility and failed to consider countervailing factors. Although counsel did not appear to contest the OIC's determination of inadmissibility on either basis, the AAO will review those determinations.

Section 212(a)(6)(C)(i) of the Act provides:

> In general.—Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The OIC stated, "[The applicant] entered the United States with a B-2 visa in March of 2001. She began working without authorization within two weeks of entry, violating the Department of State's 30-60 day rule and triggering the 212(a)(6)(C) ineligibility."

The record shows that the applicant entered the United States on March 20, 2001 on a tourist visa, without employment authorization. A Memorandum Report of an interview of the applicant on June 14, 2006 at the American Consulate in Rio de Janeiro, Brazil, shows that the applicant admitted that she began working without two weeks of her initial entry into the United States.

The Department of State has developed a 30/60-day rule that applies when an alien states a nonimmigrant purpose (tourism, visiting relatives, *etc.*) either on his or her application for a B-2 visa or to an immigration officer at the port of entry, and then violates that nonimmigrant status by

engaging in behavior incompatible with that status. *DOS Foreign Affairs Manual,* § 40.63 N4.7-1(3).

Under this rule, "when violative conduct occurs more than 60 days after entry into the United States, the Department does not consider such conduct to constitute a basis for an INA 212(a)(6)(C)(i) ineligibility." *Id.* at § 40.63 N4.7-4.

Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis in these situations to be persuasive. In the case at hand, the applicant accepted employment after entering on a B-2 visa. Accepting employment was incompatible with her nonimmigrant status.

Because the applicant accepted employment within two weeks of entering the United States, the AAO finds that the applicant entered the United States with the preconceived intention of seeking unlawful employment, finds that she misrepresented her intention when she entered. The applicant is therefore inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for having entered the United States by fraud or willfully misrepresenting a material fact.

The remaining issue upon which the OIC based his decision is the finding that the applicant was unlawfully present in the United States for more than a year.

Section 212(a)(9)(B)(i) of the Act provides:

> Any alien (other than an alien lawfully admitted for permanent residence) who –
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> > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or
> >
> > (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,
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> is inadmissible.

On a Biographic Information form (Form G-325A) that she signed on July 24, 2004, and on an Application for Immigrant Visa and Alien Registration (Form DS-230) that she signed on June 14, 2006, the applicant stated that she lived in Hyannis, Massachusetts from March 2001 to November 2002. On the Form I-601 waiver application, the applicant stated that she had previously been in the United States from March 20, 2001 to November 19, 2001. U.S. Citizenship and Immigration Service (USCIS) computer records confirm that the applicant entered the United States on March 20, 2001 as a B-2 visitor for pleasure and that she departed the United States on November 19, 2002.

That evidence is sufficient to show that the applicant entered the United States on March 20, 2001 on a B-2 visitor's visa. Non-immigrant B-2 visas are typically issued for a stay of up to six months, and the record contains no indication that the applicant's B-2 visa was exceptional in that regard. The applicant's presence in the United States became unlawful on September 20, 2001. The evidence shows that she remained in the United States until November 19, 2002, a period greater than a year after her presence became unlawful. The applicant then departed the United States and is therefore inadmissible pursuant to section 212(a)(9)(B)(i) of the Act.

The AAO finds that the applicant is inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i) of the Act. The remainder of this decision will address whether waiver of the applicant's inadmissibility is available, and, if so, whether waiver of inadmissibility should be granted.

Section 212(a)(9)(B)(v) of the Act provides, in pertinent part:

> The Attorney General [now Secretary of Homeland Security] 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.

Section 212(i)(1) of the Act provides, in pertinent part:

> The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien . . . .

A waiver of inadmissibility under either section 212(a)(9)(B)(v) or section 212(i)(1) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.,* the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or her child is not directly relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's husband is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

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 nonexclusive list of 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).

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).

Counsel provided the first pages of the applicant's husband's 2002 and 2005 Form 1040 U.S. Individual Income Tax Returns. Those returns show that he declared total income of $19,805 and $41,414 during those years, respectively.

In a letter, dated August 3, 2006, the applicant's husband stated that he wants his daughter to enjoy all of the benefits of her U.S. citizenship, and that she can have a far better standard of living in the United States.

The applicant's husband stated that he loves his wife and daughter very much and characterized his forced separation from them as extreme hardship. Although he stated that he visits them routinely, he also stated that his daughter does not recognize him; is afraid to be alone with him; and addresses her grandfather, the applicant's father, as daddy. He stated, "(W)e can only surmise what the long term effects of separation from me are or will be." He provided no other evidence pertinent to those long-term effects.

The applicant's husband stated that his mother is ill, and his parents are unable, therefore, to visit his daughter, who is their only grandchild. He also stated that, when his daughter eventually comes to the United States, she will not know her extended family there, which will be difficult for her.

The applicant's husband stated that he is not wealthy and would prefer to spend money on his daughter's education, rather than air fare. He noted that his business suffers when he visits Brazil. He stated that he does not speak Portuguese, and if obliged to live in Brazil, which has its own restrictions on foreign workers and immigration, he would be unable to obtain employment. He

stated that if he is obliged to sell his house he would suffer a substantial loss, but provided no evidence pertinent to that point either.

The applicant's husband acknowledged that his daughter is healthy and has no current medical needs.

In the brief filed on appeal, counsel stated that the applicant faces a ban of ten years for overstaying her visa by two months. Counsel has misstated the law and the facts of this case. The basis of the applicant's inadmissibility pursuant to section 212(a)(9)(B)(i) of the Act is her unlawful presence in the United States for a period of one year or more. She is also inadmissible pursuant to section 212(a)(6)(C)(i) for having misrepresented her reason for coming to the United States.

Counsel stated that if the applicant's husband goes to Brazil to live with the applicant and their child, he will lose his business. He stated that the applicant's husband is unable to speak Portuguese and "will be subjected to an economic death sentence, since **employment is practically non-existence** [sic] in the area where [the applicant and their] daughter live." [Emphasis in the original.] He stated that, if the applicant's husband were unable to earn sufficient income to pay his mortgage, he would lose his home in Massachusetts.

Counsel further stated that, by leaving the United States, the applicant's husband would be "[g]iving up his citizenship in fact . . ." Counsel further stated that, if the applicant's husband moves to Brazil, "In effect he will be **exiled from the United States** by circumstances, demeaning his U S Citizenship," [Emphasis in the original.]

Counsel stated that, if waiver is not granted and the applicant's husband remains in the United States, "He looses [sic] continued **contact with his wife and infant daughter,**" [Emphasis in the original.] and that "Since he tries to be with his wife and daughter as frequently as his income will allow, **he looses** [sic] **business** from his customers." [Emphasis in the original.]

That the applicant's husband would be separated, at least temporarily, from any family he might have in Massachusetts if he moved to Brazil is established.[1] Notwithstanding counsel's assertions, the applicant's husband would not be obliged to give up his citizenship, in fact or in law, if he moved to Brazil, would not be banished from the United States, and the evidence does not establish that he would be subjected to "an economic death sentence."

Counsel asserted that a previously submitted real estate tax bill showed that the applicant's husband's home was previously valued at $181,700, and that other evidence previously submitted

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[1] Counsel asserted that, "[The applicant's husband's] entire family is . . . in Massachusetts." A Form G-325A in the record, which the applicant signed on May 24, 2006, indicates that the applicant's husband's mother and father live in Marlboro, Massachusetts. Although the record contains no evidence pertinent to the residence of any other family the applicant's husband may have, the AAO accepts that the applicant would be separated from his family, other than his wife and child, at least temporarily, if he moved to Brazil.

established that its value had dropped more than 25 percent. Although that evidence is not in the record as currently constituted before the AAO, the AAO will assume, *arguendo*, that those facts are established. Counsel asserted that, therefore, if the applicant's husband were forced to sell his home, he would suffer a great financial loss.

Because of the asserted lack of available employment in the applicant's area of Brazil, counsel asserted that the applicant's husband, if he moved to Brazil, would be unable to make the mortgage payments on his Hyannis, Massachusetts home, and would therefore lose it. Counsel provided a mortgage statement demonstrating that the applicant's husband's mortgage payment is $322.41 per month.

Counsel provided no evidence to support his assertion that "employment is practically [non-existent]" in the part of Brazil where the applicant lives. He provided no evidence, other than the applicant's husband's abstract statement, that Brazilian law would not permit the applicant's husband to live in Brazil and to work there. Although counsel provided the applicant's husband's statement as support for the proposition that he does not speak Portuguese, the AAO notes that one would expect the applicant and her husband to speak a common language, and the applicant stated, on the Form DS-230 in the record, that she speaks only Portuguese. Further, the record contains no evidence that suitable employment in Brazil is unavailable to English-speaking people unable to speak Portuguese.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

As support for the assertion that the applicant's husband would be unable to retain his home if he moved to Brazil, counsel stated, ". . . the minimum wage [in Brazil] is $163 per month and only one[-]third of the workers [in Brazil earn] the minimum wage." In support of those assertions, counsel provided the first and twenty-second pages of a U.S. Department of State Report on Human Rights Practices in Brazil. Page 22 of that report states that the minimum wage was raised to the equivalent of $163 per month and that, ". . . approximately one in three workers earned the minimum wage or less." Far from supporting counsel's assertion that only one-third of Brazilian workers earn the minimum wage, that statement indicates that two-thirds of Brazilian workers earn more than the minimum wage. Counsel has misstated the evidence, and, further, provided no evidence to demonstrate that the applicant's husband would likely be unable to earn a living in excess of the minimum wage in Brazil.

Further, counsel did not address the possibility that the applicant's husband might be able, if he went to Brazil, to rent his Hyannis home for an amount sufficient to cover his modest mortgage payment. Even if the applicant's husband were unable to find employment in Brazil, the implication that the applicant's husband would then necessarily lose his home to foreclosure, or be forced to sell it at a loss, is insufficiently supported.

Counsel stated,

> It should need no exposition that [the applicant's husband's] standard of living will radically change [if he moves to Brazil]. In Hyannis he has access to some of the finest medical care in the world, the availability of food goes without saying. The education possibilities for his daughter are a matter of common knowledge. The ability of [the applicant's husband] to earn a living and be with his family in Hyannis should also be given weight. There should be no need to provide further exposition of the differences between rural Brazil and a community less than two hour's drive from Boston, MA., a community where he has lived his entire life.[2]

[Errors in the original.]

Other than that contained in the twenty-second page of the State Department report, counsel provided no evidence pertinent to the standard of living in Brazil, and that page of that document does not demonstrate that adequate education, food, and medical care are unavailable in Brazil. The evidence is insufficient to show that any difference in those factors between the United States and Brazil would occasion hardship to the applicant's husband which, when combined with the other hardship factors in this case, would rise to the level of extreme hardship.

Counsel stated, "Common knowledge dictates that separation from a father is a major psychological event . . . ." The approvability of the waiver application hinges on hardship to the applicant's husband, not to the child. The record does not demonstrate that the applicant's husband's separation from his child, or from the applicant, is causing him greater hardship than would be expected in a typical case of removal.

Although counsel has asserted that the applicant's husband, if he went to Brazil, would be unable to find work, would be unable to earn a living wage if he found work, and would lose his Massachusetts home, the evidence does not support any such finding. The evidence is insufficient to demonstrate that, if he went to Brazil, the applicant's husband would suffer economic hardship which, when combined with the other hardship factors in this case, would rise to the level of extreme hardship.

Separation from one's spouse or child is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the "extreme hardship" standard, hardship must be greater than the normal, expected hardship involved in such cases. The evidence in the record is insufficient to demonstrate that, if he went to Brazil to live for some period of time, the applicant's husband's separation from his family in the United States would

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[2] A G-325A, Biographic Information form in the record states that the applicant's husband was born in Framingham, Massachusetts. Various documents show that the applicant's husband now lives in Hyannis, Massachusetts. The record contains insufficient evidence, however, to support counsel's assertion that the applicant has lived in Massachusetts his entire life.

cause him hardship which, when combined with the other hardship factors in this case, rises to the level of extreme

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's husband faces extreme hardship if the applicant's waiver application is not granted and he goes to Brazil to live. Rather, the record suggests that he would face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States.

If he remains in the United States, on the other hand, the applicant's husband will be unable, at least presently, to live with his wife. A June 30, 2004 report from the Vice Consul of the U.S. Consulate General in Rio de Janeiro, Brazil, indicates that the applicant stated that she will not permit her daughter to go to the United States without her. If that is so, then the applicant's husband will be deprived of the ability to live with his daughter, and his daughter will be deprived of any advantage she might gain by living in the United States. Those deprivations, however, will not be the direct result of the failure to grant waiver in this case, but of the applicant's refusal to allow her daughter to go to the United States without her. Further, the evidence in the record is insufficient to show that the applicant's husband would thereby be subjected to hardship which, when aggregated with the other hardship factors in this case, rises to the level of extreme hardship.

Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "*extreme* hardship," Congress made clear that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai,* 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v) and INA § 212(a)(6)(C)(i), 8 U.S.C. § 1186(a)(6)(C)(i), and that waiver is therefore unavailable. The AAO

need not, therefore, consider whether this is an appropriate case in which to exercise its discretion to grant a waiver.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.