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U.S. Citizenship and Immigration Services

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MAY 01 2007

FILE: [redacted] Office: LIMA, PERU Date:

IN RE: [redacted]

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

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant, [redacted] is a native and citizen of Brazil. She was found to be inadmissible to the United States pursuant to 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 one year or more. She 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 return to the United States to join her U.S. citizen husband, [redacted]

The OIC concluded that the applicant had failed to establish that her bar to admission would impose extreme hardship on a qualifying relative, her U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the OIC*, July 5, 2005.

On appeal, the applicant states, through counsel, that "[s]ufficient consideration was not given to the extreme medical/psychological condition" of the applicant's U.S. citizen spouse. *Notice of Appeal to the Administrative Appeals Office (AAO) (Form I-290B),* dated July 25, 2005. As evidence of [redacted] medical and psychological condition, the applicant submitted a psychological evaluation, based on an interview and psychological/personality testing by a licensed psychologist. *Psychological Evaluation,* conducted by [redacted], August 3, 2005. The psychologist concluded that [redacted] is suffering from a mild to moderate degree of anxiety and a significant degree of depression"; that he "is undergoing a severe and extreme degree of emotional distress because of the separation from his wife and the difficulties with her entrance into the United States"; and that he has a "fragile and deteriorating mental state" and "is in significant danger for suicide." *Id.,* p. 7.

The applicant also asserts that "waivers for 'unlawful presence' are similar to discretionary waivers under sections 212(h) and 212(i) of the INA, in that the adjudicator is called upon to balance the gravity of the offense (unlawful presence) against the hardship to the qualifying . . . relative . . .. The greater the willfulness and extent of the offense (unlawful presence) the greater the extent of the hardship to the qualifying relative that should be required." *Brief in Support of Appeal,* dated August 30, 2005, p. 4. She states that she never knowingly or intentionally committed the offense of "unlawful presence" and that, as in the balancing of equities involved in the adjudication of all discretionary waivers, her "non-culpability in bringing about her offense of 'unlawful presence' should support a finding of extreme hardship" in the circumstances of her case. *Id.,* p. 9.

The applicant states that [redacted] has two adult sons who suffer from schizophrenia, one of whom lives with him, and a daughter who is in college who needs his support. *Brief in Support of Appeal, supra*, p.7. The record includes letters from [redacted]s mother, sister, and a friend reiterating that [redacted] must remain in the United States to help one son with constant supervision and to maintain residency in Florida so that his daughter can attend college. They point out that his responsibilites to his children require him to live in the United States but that his desire to be with his wife places him in an untenable position if she cannot reside in the United States with him. Also on appeal, the applicant asserts that he has been diagnosed with diabetes, depression, elevated cholesterol, enlarged prostate and chronic back problems requiring surgery, and that his medical benefits would not extend to Brazil and he would be unable to receive quality medical care in Brazil. *Id.* at p. 8. In support of this assertion, the applicant submits U.S. Department of State Consular

Information noting that Medicare does not cover medical expenses abroad and that medical care, while generally good, varies in quality and may not meet U.S. standards outside the major cities.

The applicant also asserts that [redacted], at 70 years old, would not be able to find employment and could not support his family in Brazil, noting that he does not speak fluent Portuguese, and Brazil has a high unemployment rate. *Id.* The record also includes the U.S. Department of State Country Report for Brazil (*Country Reports on Human Rights Practices – 2004,* February 28, 2005), which notes that income distribution is highly skewed, and that the national minimum wage did not provide a decent standard of living for a worker and family. Also included in the record is [redacted] statement in which he describes his loving relationship with the applicant and the financial and emotional hardships he has suffered due to separation from her. *Statement of* [redacted] March 24, 2005. He lists among his financial hardships the costs of supporting two households, one for [redacted] in Brazil and the other for himself; international and other travel costs to visit her; and the loss of income from his real estate sales, reduced from $95,326 in 2002 to $28,105 in 2004; he notes that he pays $24,000 for his daughter's support and education while she attends the University of Florida, but that she will graduate in 2006. *Id.* p. 3. [redacted] also states that his wife did work in Brazil, but for low wages, $200 per month, and that for women, age discrimination is a common practice. *Id.* The entire record was reviewed and considered in rendering this decision.

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

> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> . . . .
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> (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.
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> . . . .
>
> (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 [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 the applicant entered the United States on a visitor visa in June 1998 and received two six-month extensions; she did not leave the United States, however, until September 2002, thus overstaying her visa by over two years. She re-entered the United States on the same visitor visa in February 2003 and returned to Brazil in May 2003. Upon attempting to return to the United States again in July 2003, she was denied entry and returned to Brazil. She married [redacted] in Brazil in April 2004 and applied for an immigrant visa at the American Consulate in Rio De Janeiro. As she had resided unlawfully in the United States for over a year and is now seeking admission

within 10 years of her last departure from the United States, the OIC correctly found the applicant inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding. The applicant's assertion that she never intended to commit the offense of "unlawful presence" is not relevant, as the statutory language is clear and does not include the element of intent.

A waiver of inadmissibility under section 212(a)(9)(B)(v) 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 herself is not a consideration under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. [redacted] U.S. citizen spouse is her only qualifying relative.

If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(a)(9)(B)(v) of the Act; *see also Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996). Contrary to the applicant's assertion that an adjudicator must consider the severity of the criminal act, "unlawful presence" in this case, in order to make a discretionary hardship determination, establishment of extreme hardship and eligibility for a waiver requires a separate discretionary determination. *Matter of Mendez-Moralez, supra.* In *Matter of Mendez-Moralez,* the Immigration Judge had found that the respondent had established extreme hardship to a qualifying relative, but denied the 212(h) waiver in the exercise of discretion; the BIA agreed with the Immigration Judge and found that establishing extreme hardship and statutory eligibility for a section 212(h) waiver does not create any entitlement to that waiver; extreme hardship, once established, is but one favorable discretionary factor to be considered in the discretionary grant of the waiver. *Id.* at 301.

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.

> 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).

U.S. courts have stated that "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant,

weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case, even though, unlike this case, at issue in *Cervantes-Gonzalez* was a waiver under section 212(i) of the Act. To clarify, the BIA held "[a]lthough it is, for the most part, prudent to avoid cross application between different types of relief of particular principles or standards, we find the factors articulated in cases involving suspension of deportation and other waivers of inadmissibiliity to be helpful, given that both forms of relief require extreme hardship and the exercise of discretion." *Cervantes-Gonzalez, supra,* at 565, citing *Matter of Mendez-Moralez, supra* ("applying discretionary factors articulated in a section 212(c) case to a waiver of inadmissibility under section 212(h)(1)(B) of the Act"); *Hassan v. INS,* 927 F.2d 465, 467 (9th Cir. 1991) ("noting that suspension cases interpreting extreme hardship are useful for interpreting extreme hardship in section 212(h) cases.") As in the analysis in *Cervantes,* these factors relate to the level of extreme hardship which [redacted] qualifying relative, her husband, would experience if she were not granted admission to the United States.

The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record reflects that [redacted] was born in 1962 in Sao Paulo, Brazil. [redacted] was born in New Jersey, where his mother and sister still reside. According to [redacted] they met in December 1998, when the applicant was visiting the United States with her former husband and children; they maintained their acquaintance, and began dating in 2001. In September 2002, the applicant returned to Brazil with her children; she returned to the United States in February 2003 and lived with [redacted] approximately three months, when she again returned to Brazil. She attempted to enter the United States in July 2003, but was denied entry, and returned to Brazil. [redacted] visited her there several times in 2003 and 2004, and they were married in Brazil in April 2004 [redacted] continued to periodically visit [redacted] in 2004 and 2005, but states that he has not been able to visit since March 2005 due to financial stress. *See Psychological Evaluation, supra* at 2. According to the psychologist, his physical and mental health have deteriorated since then.

The record contains numerous bills and receipts indicating that [redacted] has spent significant amounts of money traveling to Brazil and transferring funds to [redacted] in Brazil. The record is not clear regarding the couple's finances or employment record. The record contains several tax forms (1099-MISC) showing income for [redacted] from Associates of Boca Raton for 2002-2004, confirming his statements of earnings in those years (ranging from approximately $95,000 to $28,000), but there are no income tax returns that would indicate his full income. [redacted] reported in 2003 that she was self-employed and owned a parking lot (Record of Sworn Statement, July 24, 2003). On April 8, 2005, she reported that she worked as a personal secretary in Sao Paolo (Form G-325, *supra*), but depends fully on [redacted] for financial support (Memorandum Report of Interview, *supra*).

According to information provided by the applicant at her visa interview at the American consulate in Brazil on April 8, 2005, the applicant has two children, an adult daughter who is married and lives in Sao Paolo and a son who was 16 and lived with her in Sao Paolo and whom she supported (Memorandum Report of Interview, *supra*); her parents both reside in Sao Paolo (Form G-325A). [redacted] states that he has two adult sons who have been diagnosed with mental illness, and an adult daughter in college, all of whom represent deep mutual attachments that, if interrupted by a move to Brazil, would cause extreme hardship to [redacted]. Other than his statements and the statements of his relatives and a friend, there is no evidence in the record regarding these children, neither their whereabouts, their dependence on [redacted] or their mutual affection, and no evidence of any medical diagnosis of mental illness or treatment or financial or emotional attachment.

[redacted] states that his health will suffer if he moves to Brazil. However, there is no evidence, such as hospital or other medical reports, of a diagnosis of or treatment for any health problems suffered by [redacted] that would support a conclusion that [redacted] would suffer any medical hardship if he chose to move to Brazil. His health concerns reflect the concerns of someone his age. Reports of country conditions in Brazil, however, do not indicate that [redacted] would be without proper medical care there, only that Medicare will not cover costs and that treatment may not always be on a par with treatment in the United States.

If he remains in the United States separated from his wife, he will be able to maintain his current income and familial relationships and continue to receive the medical care to which he is accustomed. He has clearly indicated, however, that he will suffer psychologically and emotionally from separation from his wife. His psychological evaluation, conducted in August 2005, concludes that he suffers from significant depression and is in danger of suicide. This evaluation is of limited use, however, as it is based on a single meeting consisting of one interview lasting less than two hours and testing lasting approximately four hours and is not supported by evidence that [redacted] received treatment or required follow-up evaluation from a mental health professional. While the evaluation is helpful in providing an understanding of the background and challenges of the applicant's husband, it does not show that he is suffering or will suffer emotional consequences beyond those ordinarily experienced by families who are separated as a result of removal or inadmissibility.

Regarding financial hardship, the record indicates that [redacted] is gainfully employed in the United States and can earn an adequate living in real estate if he chooses to continue his current employment. If he chooses to relocate to Brazil and give up his current income, there is no evidence to indicate that he and [redacted] would not be able to support themselves in Brazil, though the loss of [redacted]s income would represent some financial detriment. There is no evidence to support claims that [redacted] cannot find employment in Brazil; in fact, the record contradicts that claim. The record also reflects that [redacted] has extensive family ties in Sao Paulo, where she was born and resided for most of her life, indicating that she and [redacted] would not be without community support if they chose to reside in Brazil together. Courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS,* 794 F.2d 491, 497 (9th Cir. 1986) ("lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient"); Shooshtary v. INS, 39 F.3d 1049 (9th Cir. 1994) ("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"); *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); *INS v. Jong Ha Wang,* 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

Other than financial records that show that [redacted] has spent significant amounts of money for travel and to support his wife in Brazil and a psychological evaluation indicating that he is suffering emotionally, there is no evidence in the record that is relevant to a hardship determination, and no supporting evidence from authorities that would give any additional weight to the declarations in the record. Although the statements of [redacted] and others are relevant and are taken into consideration, little weight can be afforded them in the absence of supporting evidence. *Matter of Kwan,* 14 I & N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that [redacted] faces extreme hardship if his wife is refused admission. The AAO recognizes that [redacted] will suffer emotionally as a result of separation from the applicant and would see a change in his finances if he lost the income he earns from real estate sales in Florida. His situation, however, is typical of individuals separated as a result of removal or inadmissibility and does not rise to the level of extreme hardship based on the record. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

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. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.