U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

H4

[redacted]

File: [redacted] Office: LIMA, PERU Date: SEP 14 2005

IN RE: [redacted]

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).

IN BEHALF OF PETITIONER:

[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.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge, Lima, Peru. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the decision of the officer-in-charge to deny the application. The matter is now before the AAO on motion to reopen and reconsider. The motion to reopen will be denied. The motion to reconsider will be granted, and the prior decision of the AAO will be affirmed.

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 her last departure from the United States. The applicant seeks 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, as contemplated by section 212(a)(9)(B)(v) of the Act. The application was denied accordingly. *Decision of the Officer-in-Charge,* dated March 6, 2006. On May 22, 2006, the AAO affirmed this decision on appeal.

On June 22, 2006, the applicant filed the present Motion to Reopen and Reconsider the AAO's decision. On motion, counsel for the applicant contends that the applicant's sister-in-law was granted a hardship waiver based on similar facts, and thus the denial of the present application constitutes a violation of equal protection of the applicant's rights. *Brief from Counsel,* dated June 19, 2006. Specifically, counsel states that in both cases, the applicants' U.S. citizen children suffered adverse effects from family separation, including anxiety and depression. *Id.* at 2. Counsel provides that the applicant's son became physically ill in Peru, and he experienced seizures. *Id.* Counsel asserts that the applicant's son's hardship is in excess of that experienced by the applicant's sister-in-law's children. *Id.* at 3.

Counsel states that in each case the applicants' spouses endured financial and emotional hardship due to supporting U.S. citizen children while living separate from the applicants. *Id.* Counsel indicates that the applicant's husband is responsible for financially supporting two households, one in the United States and one in Peru, and such economic burden requires all of his savings. *Id.* Counsel states that, as the only wage earner, the applicant's husband is unable to raise the their son in the United States without the applicant's assistance. *Id.* at 4.

Counsel asserts that the applicant's husband faces greater hardship than that under consideration in the applicant's sister-in-law's case. *Id.* at 3. Counsel provides that, while the applicant's sister-in-law's husband speaks Spanish, the applicant's husband does not. *Id.* Counsel states that, should the applicant's husband relocate to Peru, he would be unable to secure any employment due to his unfamiliarity with the Peruvian language and culture and poor economic conditions in the country. *Id.* at 4.

Counsel contends that the AAO failed to properly consider the evidence of record. *Id.* at 3. Counsel indicates that the AAO mischaracterized reports on conditions in Peru, underestimating the level of crime in Peru and the performance of the economy. *Id.* at 3-4. Counsel asserts that the AAO failed to recognize the gravity of the applicant's son's medical condition, as the applicant's son has experienced life-threatening seizures and

the cessation of breathing, and no explanation has yet been discovered. *Id.* at 4. Counsel states that, though the AAO indicated that health care is generally good in Lima, the applicant and her son are likely to seek health care in rural areas where treatment is inadequate. *Id.*

Counsel asserts that the factors of hardship to the applicant's husband, when considered in aggregate, constitute extreme hardship. *Id.*

Counsel provides that the AAO erroneously claimed that no contentions were made regarding hardship to the applicant's mother. *Id.* Counsel asserts that the applicant' permanent resident mother is suffering extreme hardship by being deprived of the opportunity to form a bond with her grandson, as explained in the brief in support of the applicant's Form I-212 waiver application. *Id.*

Based on the foregoing, counsel contends that the AAO's decision constitutes a violation of the applicant's due process rights. *Id.* at 5.

On motion, the applicant submits a brief from counsel; a copy of the applicant's mother's Form I-551 permanent resident card; documentation in connection with the waiver proceeding of the applicant's sister-in-law, including a statement from the husband of the applicant's sister-in-law and a psychological evaluation of the applicant's sister-in-law's family members; a previously submitted statement from the applicant's husband, and; reports on conditions and medical care in Peru. The record further contains a brief from counsel in support of the Form I-601 application; statements from the applicant and her husband; the applicant's spouse's family tree; photographs; a medical letter and records for the applicant's son; support letters for the applicant, and; information on conditions in Peru. The entire record was reviewed and considered in rendering a decision on this motion.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

On motion, counsel for the applicant addresses facts that were previously presented to Citizenship and Immigration Services (CIS.) While counsel discusses facts that were under consideration in a separate proceeding before the AAO, such facts are not considered new in the present matter. The applicant has not identified any new events or facts as contemplated by the regulation at 8 C.F.R. § 103.5(a)(2).

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy

[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the applicant has not met that burden and the motion to reopen will be denied.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Upon review, the applicant has asserted that the AAO's prior decision "was based on an incorrect application of law or Service policy" by stating specific legal grounds on which the AAO was in error. 8 C.F.R. § 103.5(a)(2). The applicant has supported these assertions by making references to the evidence of record and pertinent case law. Thus, the AAO will grant the motion to reconsider, and reassess the matter in light of the applicant's contentions.

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 record reflects that the applicant entered the United States without inspection in 1991 and applied for asylum. The applicant's asylum application was denied and she was granted voluntary departure with a departure date in March 1996. The applicant departed the United States in April 2005. Therefore, the

applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until April 2005, the date of her departure from the United States. Accordingly, the applicant is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of her last departure from the United States. The applicant does not contest her inadmissibility on motion.

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. Hardship the applicant or her child experience as a result of denial of the application is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. 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 pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen spouse or parent in 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.

Upon review, the applicant has not established that a qualifying relative will experience extreme hardship if she is prohibited from entering the United States. The evidence of record contains explanations of hardships that the applicant's son will endure if the applicant's waiver request is denied. However, hardship to the applicant's son is not a relevant concern in the present matter. Section 212(a)(9)(B)(v) of the Act. While the AAO acknowledges that the applicant's son will bear significant consequences if separated from one of his parents, only hardship to the applicant's husband may be properly considered in this section 212(a)(9)(B)(v) waiver proceeding.

While direct hardship to an applicant's child is not relevant in waiver proceedings under section 212(a)(9)(B)(v) of the Act, all instances of hardship to qualifying relatives must be considered in aggregate. Hardship to a family unit or non-qualifying family member should be considered to the extent that it has an impact on qualifying family members. Thus, hardships to the applicant's son will be examined to assess their effect on the applicant's husband.

On motion, counsel primarily bases his assertions on a comparison between the present matter and a waiver proceeding involving the applicant's sister-in-law. However, the applicant has not provided complete documentation of her sister-in-law's waiver proceeding, nor has she established that it serves as binding precedent in these proceedings. The applicant does not provide evidence that her sister-in-law's case was approved, and counsel fails to identify what CIS office or court of law issued the referenced decision. While counsel compares hardship to the applicant's son to that of the applicant's sister-in-law's children, the AAO lacks basic information about the applicant's sister-in-law's case such as under what provision of law she was

found inadmissible. Thus, the AAO is unable to determine whether the applicant's sister-in-law's children were qualifying relatives in her case. 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)). Based on the foregoing, the applicant has not presented sufficient evidence or information such that the AAO is compelled to draw conclusions based on a comparison between her sister-in-law's case and the present matter.

Counsel asserts that the applicant's husband will endure financial hardship if the applicant is prohibited from entering the United States. Counsel reports that maintaining two households is depleting the applicant's husband's resources. However, it is noted that the applicant is a licensed vocational nurse. *Statement from Applicant's Husband*, dated June 11, 2005. The applicant has not shown that she is unable to work in Peru, such that she is unable to meet her financial needs without relying on her husband's support. The record reflects that the applicant's husband has held a stable position in the United States since August 12, 2002, and he earned an income of $95,812.61 in 2005. *Letter from* [redacted] dated November 28, 2005; *2005 IRS Form W-2 for the Applicant's Husband.* The record further shows that the applicant and her husband own two real properties, one of which was valued at $431,550 on January 28, 2005 with an outstanding mortgage of $175,945.71. Thus, the applicant's husband has access to significant economic resources and an annual compensation well above the 2006 poverty line for a family of three, evaluated as $16,600. *See Form I-864P, Poverty Guidelines.* While the applicant submitted copies of property tax and credit card bills, these documents reflect modest, ordinary expenses.

Counsel discusses medical needs of the applicant's son, yet the applicant has not provided any documentation of outstanding expenses, or an explanation from a doctor of existing conditions or anticipated future needs. The applicant has not submitted a complete account of her husband's regular expenses such that the AAO can fully assess his financial situation. Again, 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. at 165.

It is understood that the applicant's husband would incur expenditures if he should relocate abroad with the applicant, and he would likely be compelled to relinquish his employment in the United States. However, as a U.S citizen, the applicant's husband is not required to reside outside the United States as a result of the applicant's inadmissibility. He would not, by necessity, endure the economic consequences associated with relocating abroad. Accordingly, the applicant has not shown that her husband will endure substantial economic hardship should the applicant be prohibited from entering the United States.

The applicant's husband expressed that he is experiencing emotional hardship due to separation from the applicant and their son. *Statement from Applicant's Husband* at 1-2. He indicated that he is deprived of their love, companionship, comfort, and support, and he provided that the financial burden on his family contributes to his emotional hardship. *Id.* at 1. He described his experience with conditions in Peru on two visits, and he expressed concern for his wife's and son's well being due to crime in Lima. *Id.* at 1-2. He stated that his son draws attention as one of light skin and partial American descent, and such individuals are the targets of financial crimes including kidnapping. *Id.* at 2. The applicant's husband further expressed

concern regarding his son's welfare in Peru due to his son's episodes of illness and inadequate healthcare. *Letter from Applicant's Husband*, dated August 24, 2005.

The AAO acknowledges that family separation is difficult. However, regarding the applicant's husband's separation from his son, as a U.S. citizen the applicant's son is not required to reside outside of the United States as a result of the applicant's inadmissibility. The applicant's son may reside in the United States with the applicant's husband if the family chooses such an arrangement. Though counsel indicates that the applicant's husband would be unable to care for his son alone, the record reflects that the applicant's husband has ample economic resources to obtain childcare services during his working hours.

The applicant's husband indicated that he is experiencing emotional distress regarding his son's access to medical care. However, as noted above the applicant's son may freely travel to and reside in the United States, thus he may avail himself of health services in the United States if the family chooses. Further, the applicant has not submitted medical documentation that supports that her son is suffering from current health problems such that he is in need of care above that which would ordinarily be required for a young child. A doctor noted that the applicant's son suffered convulsions incident to a fever, yet the record does not show that this condition was more than a temporary illness from which the applicant's son has not fully recovered. Counsel's speculation regarding the health status of the applicant's son is not sufficient evidence to establish that the applicant's son has unusual medical needs. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, the applicant has not established that, should her son remain in Peru, he will be unable to obtain necessary medical care.

The AAO acknowledges the applicant's husband's perception that conditions in Peru are less favorable than in the United States. The statements of the applicant's husband strongly suggest that he will remain in the United States should the applicant's waiver request be denied. Thus, separation of the applicant and her husband seems a likely result of denial of the present waiver application. However, the record does not reflect that the applicant's husband will endure emotional hardship that is greater than that which would ordinarily be expected of the relatives of those deemed inadmissible.

U.S. 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, *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. 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. *Hassan v. INS, supra,* held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

As noted above, hardship to the applicant's son is considered to the extent that it has an impact on the applicant's husband. While the applicant has shown that her son has endured illness, the record does not

support that either remaining in Peru or returning to the United States presents health risks for her son such that the applicant's husband will have cause for heightened concern. Should the applicant's husband wish to bring his son to the United States, he may do so. It is evident that the applicant's son will suffer emotional consequences if he is separated from either of his parents, yet the applicant has not established that her son will suffer an unusual psychological impact that will significantly affect that applicant's husband. The applicant has not shown that her husband will endure substantial hardship due to sharing in the hardship of his son.

Counsel contends that the applicant's husband would experience extreme hardship should he relocate to Peru, as he does not speak the local language, the economy is poor, and crime is high. However, as noted above, the applicant's husband is not required to reside outside the United States as a result of the applicant's inadmissibility. Pursuant to section 212(a)(9)(B)(v) of the Act, in order to establish eligibility for a waiver, an applicant must show that denial of the application "*would* result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien." Section 212(a)(9)(B)(v) of the Act (emphasis added). Accordingly, the applicant must show that all of her husband's options constitute extreme hardship. If the applicant's husband would experience extreme hardship if he relocated abroad, yet he would not experience extreme hardship if he remained in the United States, the applicant would have failed to show that denial of her application "would result in extreme hardship." In such circumstances, should the applicant's husband relocate abroad, it would be his personal choice to endure greater hardship. Thus, in adjudicating an application for a waiver under section 212(a)(9)(B)(v) of the Act, Citizenship and Immigration Services (CIS) must consider hardships to qualifying relatives relating to relocating abroad and remaining in the United States.

All instances of hardship to the applicant's husband have been considered separately and in aggregate. In light of the above discussion, the applicant has not shown that her husband would experience extreme hardship should he remain in the United States. Accordingly, the applicant has not shown that her husband would suffer extreme hardship should she be prohibited from entering the United States.

Counsel provides that the AAO erroneously claimed that no contentions were made regarding hardship to the applicant's permanent resident mother, as assertions were made in the brief in support of the applicant's Form I-212 waiver application. Counsel states that the applicant's mother is suffering extreme hardship by being deprived of the opportunity to form a bond with her grandson. Yet, beyond this general contention, the record contains no further evidence or explanation of hardships to the applicant's mother. Thus, the applicant has not established that her mother will experience hardship that goes beyond that which would ordinarily be expected of the family members of those deemed inadmissible. Accordingly, the applicant has not shown that her mother will experience extreme hardship if the applicant is prohibited from entering the United States.

Counsel contends that the AAO's decision violates the applicant's constitutional rights. Counsel contends that the fact that the applicant's sister-in-law's waiver was granted based on the same facts renders denial of the present application a violation of equal protection. Yet, as discussed above, the applicant has not submitted sufficient explanation or documentation to show that her sister-in-law's case was similar to her own. Counsel claims that the AAO's decision denies the applicant due process. However, the Act provides a process through which an applicant can apply to waive a ground of inadmissibility. The applicant availed

herself of that process, including the rights to appeal the adverse decision of the district director to the AAO and the right to file the present motion. The fact that the applicant failed to meet her burden within that process does not reflect that she was denied due process. Counsel's assertions regarding violations of the applicant's Constitutional rights are not persuasive.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not sustained that burden. Based on the foregoing, the previous decision of the AAO will be affirmed.

ORDER: The motion to reopen is denied and the motion to reconsider is granted. The previous decision of the AAO is affirmed.