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

U.S. Citizenship and Immigration Services

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DATE: JUN 01 2012 Office: LIMA, PERU FILE [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility was denied by the Field Office Director, Lima, Peru, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Peru who entered the United States without inspection or admission on September 27, 1994. She was removed from the United States on May 21, 2008. The applicant was found to be inadmissible to the United States under 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 for more than one year and seeking readmission within 10 years of her departure from the United States. The applicant is married to a U.S. citizen, and she is the beneficiary of an approved Form I-130, Petition for Alien Relative (Form I-130). 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 live in the United States with her spouse and children.

In a decision dated February 8, 2010, the director concluded the applicant had failed to establish that her U.S. citizen spouse would experience extreme hardship if the applicant were denied admission into the United States. The waiver application was denied accordingly.

Through counsel, the applicant asserts on appeal that her husband will experience extreme emotional, physical and financial hardship if she is denied admission into the United States. In support of these assertions, counsel submits letters from the applicant, her family and friends; psychological evaluations; and medical and financial evidence. The entire record was reviewed and considered in rendering a decision on the appeal

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

> (i) [A]ny alien (other than an alien lawfully admitted for permanent residence) who-
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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.
>
> (ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

Section 212(a)(9)(B)(i) of the Act was added to the Act by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of PL 104-208, September 30, 1996) (IIRIRA).

IIRIRA became effective on April 1, 1997, and only periods of unlawful presence spent in the United States after its April 1, 1997, effective date count towards unlawful presence for sections 212(a)(9)(B)(i) of the Act purposes. Accrual of unlawful presence also stops on the date an adjustment of status application is properly filed, until the date the application is denied. *See* Memo. from Donald Neufeld, Act. Assoc. Dir., Dom. Ops., Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int. Ops., Pearl Chang, Act. Chief, Off. of Pol. and Stra., U.S. Citizenship and Immigration Serv., to Field Leadership, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,"* (May 6, 2009).

The record reflects the applicant entered the United States without admission or inspection on September 27, 1994. She was subsequently apprehended by U.S. Border Patrol agents and placed into deportation proceedings, and on February 16, 1996 she was granted voluntary departure, with an alternative order of deportation if she did not depart by July 31, 1996. The applicant did not depart the country; she married a U.S. citizen [redacted] a Form I-130 was approved on her behalf on August 20, 1997; and she filed a Form I-485 adjustment of status application based on her marriage [redacted]1999. After her request for a stay of removal was denied, the applicant was removed from the United States on May 21, 2008, and she has remained outside of the country since that time.

Based on the above facts, the applicant was unlawfully present in the United States from April 1, 1997 until January 20, 1999, when she filed her adjustment of status application. Inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, which is triggered upon departure, remains in force until the alien has been absent from the United States for ten years. In the present matter, the applicant has remained outside of the U.S for less than ten years. She is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act. Counsel does not contest the applicant's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act.

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

> Waiver.-The Attorney General 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Section 212(a)(9)(B)(v) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

Though hardships may not be extreme when considered abstractly or individually, the BIA has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I.&N. Dec. at 882). The adjudicator "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." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293

(quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The applicant's U.S. citizen spouse is her qualifying relative under section 212(a)(9)(B)(v) of the Act. The record contains references to hardship the applicant's children would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship under section 212(a)(9)(B)(v) of the Act. Accordingly, hardship to the children will be considered only to the extent that it causes the applicant's spouse to experience hardship.

The applicant's husband states in letters that he and their son and daughter (now 13 and 18 years old) have lived apart from the applicant since May 2008. The entire family is suffering due to the separation; he suffers when he hears their children cry every night because they miss the applicant; and the applicant also is suffering emotionally and financially in Peru. He states he is unable to meet the family's financial expenses on his own, he fears losing the house he and the applicant purchased in 2007, and he fears losing his job due to decreased work performance and because his employer is relocating to a facility two hours away from their home. In addition, he has been prescribed medication for headaches and sleeplessness since the applicant's departure. The applicant's husband states that unemployment and crime are high in Peru, he would be unable to find work there, and he worries about his family's safety in Peru. In addition, their son suffers from asthma, which was aggravated when they visited Peru, and their daughter has stomach problems. He indicates the family visited the applicant in Peru for one week, and both children became sick while there.

The record contains a letter from the applicant's husband's employer stating his attendance and work performance decreased after the applicant's removal from the country, the company has relocated to Pennsylvania, the applicant's husband chose not to take a position there because he was "focused on the resolution of his personal issues," and he no longer works for the company.

Financial evidence reflects the applicant and her husband earned about $33,000 and $53,000 a year, respectively, prior to the applicant's departure. The record also contains household bills and evidence the applicant's husband has been overdue on his home mortgage payment. A doctor's letter states the applicant's husband is suffering from chronic headaches, depression and insomnia due to distress caused by the applicant's deportation, and that he has been placed on medication. A psychiatric evaluation diagnoses the applicant's husband with severe recurrent major depressive disorder, generalized anxiety disorder, panic disorder, dysthymic disorder and post-traumatic stress disorder, due to his current circumstances.

The children state in their letters that they are sad about their mother's absence, they rarely see their father because of his work, and they want their mother back. A doctor's letter reflects their

son has mild asthma, requiring inhaler or steroid treatments as necessary, and their daughter has had problems with recurrent abdominal pain. According to psychiatric evaluations, their son has an adjustment disorder with depressed mood and post-traumatic stress disorder due mainly to the applicant's absence. Their daughter is diagnosed with post-traumatic stress disorder and anxiety disorder due predominantly to the applicant's absence. Therapy is recommended for both children.

Letters from friends attest to the applicant's good character and reflect the applicant's husband works most of the time to make ends meet and is rarely home. The letters indicate the daughter has taken on most of the housekeeping and cooking responsibilities in her family; the children are often at their friends' homes; and their father is unable to help them with homework, attend school events or take care of them when they are ill, due to his increased workload.

The applicant asks for forgiveness and writes their children are depressed and her husband is struggling emotionally and financially. She states also that her parents are unable to help her financially in Peru, that she has been unable to find work and lives with her uncle in Peru, and that her husband supports her financially. A psychological evaluation for the applicant reflects she has low self-esteem, moderate levels of anxiety and depression, and recommends therapy.

Upon review, the AAO finds the evidence in the record, when considered in the aggregate, establishes the applicant's husband is experiencing hardship in the United States that rises above the common results of removal or inadmissibility due to the applicant's inadmissibility. The applicant's husband has lost his employment because he could not relocate due to his personal circumstances, and he is at risk of losing their home. In addition, his emotional suffering is intensified by the suffering of their children, who he rarely sees due to his current working conditions; he relies heavily on friends to care for his family; and he is being treated for chronic headaches, insomnia and depression related to the applicant's removal from the country.

The cumulative evidence in the record also establishes the applicant's husband would experience hardship that rises beyond the common results of removal or inadmissibility if the applicant were denied admission into the United States and he relocated with his family to Peru. The applicant's husband would lose their home and he worries about the effects of moving their children to Peru. A U.S. Department of State country-conditions report corroborates the applicant's husband's safety concerns about living in Peru, stating that "[v]iolent crime, including carjacking, assault, sexual assault, and armed robbery is common in Lima and other large cities"; street crime is also prevalent in cities in Peru's interior; and recently there have been many instances of "armed robbery, rape, other sexual assault, and attempted rape of U.S. citizens and other foreign tourists in Arequipa and in Cuscocity." *See* http://travel.state.gov/travel/cis_pa_tw/cis/cis_998.html. Additionally, nighttime risks of robbery and unsafe road conditions exist outside major urban areas, and, "the entire Peru/Colombia border area is very dangerous because of narcotics trafficking and the occasional incursions of armed guerrilla forces." *Id.* When considered in the aggregate, the evidence establishes the applicant's husband would experience emotional and physical hardship that rises beyond the common results of removal or inadmissibility if the applicant were denied admission into the country and he relocated with his family to Peru.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). In evaluating whether section 212(a)(9)(B) of the Act relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the inadmissibility ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if s/he is excluded and/or deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives). *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must:

> [B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.

Id. at 300 (citations omitted).

The unfavorable factors in this matter are the applicant's accrual of unlawful presence in the United States [redacted] until January 20, 1999. The favorable factors are her U.S. citizen spouse and children, and the hardship they would face if the applicant is denied admission into the United States. Favorable factors additionally include the applicant's good moral character, as established in affidavits from friends, and the applicant's lack of a criminal record.

The AAO finds that although the immigration violations committed by the applicant are serious in nature and cannot be condoned, taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

Upon review of the totality of the evidence, the AAO finds that the applicant has established extreme hardship to her U.S. citizen husband, as required under section 212(a)(9)(B)(v) of the Act. It has also been established that the applicant merits a favorable exercise of discretion. The applicant has therefore met her burden of proving eligibility for a waiver of her ground of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act. Accordingly, the Form I-601 appeal will be sustained.

ORDER: The appeal is sustained.