



U.S. Citizenship
and Immigration
Services

H2

DEC 09 2009

FILE: [REDACTED] Office: LIMA, PERU

Date:

IN RE: Applicant: [REDACTED]

APPLICATIONS: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i); and 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:

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge (OIC), Lima, Peru, and 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 Argentina who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of her last departure from the United States; and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for willfully misrepresenting a material fact by concealing her unlawful presence in an attempt to obtain a nonimmigrant visa. The record indicates that the applicant is married to a naturalized United States citizen and she is the beneficiary of an approved Petition for Alien Fiancé(e) (Form I-129F). The applicant 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), and section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with her United States citizen husband.

The OIC found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Officer in Charge*, dated May 22, 2007.

On appeal, the applicant, through counsel, asserts that "[t]he finding that the applicant did not meet the standard of extreme hardship to a qualifying relative is in error." *Form I-290B*, filed June 26, 2007.

The record includes, but is not limited to, counsel's appeal brief, declarations from the applicant and her husband, letters from [REDACTED] regarding the applicant's husband's emotional state, and a psychological evaluation on the applicant's husband. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) 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.
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- (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212 of the Act provides, in pertinent part, that:

- (i) (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the [Secretary], 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 resident spouse or parent of such an alien...

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

(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 [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.

In the present application, the record indicates that the applicant initially entered the United States on June 22, 2000 under the Visa Waiver Program. The applicant was authorized to remain in the United States until September 21, 2000; however, she did not depart the United States until August 2002. On December 23, 2002, [REDACTED] filed a Form I-129F on behalf of the applicant. On September 24, 2003, [REDACTED] filed another Form I-129F on behalf of the applicant. On October 31, 2003, the applicant's first Form I-129F was approved and the applicant's second Form I-129F was terminated. On August 18, 2004, the applicant filed a Form I-601. On May 23, 2005, the OIC denied the Form I-601, finding the applicant failed to establish that she had a qualifying relative for a waiver under section 212(i) and section 212(a)(9)(B)(v) of the Act. On August 15, 2005, the applicant and [REDACTED] married by proxy in Texas. On November 30, 2005, the applicant's naturalized United States citizen husband, [REDACTED], filed another Form I-129F on behalf of the applicant. On December 27, 2005, the applicant's third Form I-129F was approved. On June 29, 2006, the applicant filed another Form I-601. On May 22, 2007, the OIC denied the Form I-601, finding the applicant accrued more than a year of unlawful presence, she willfully withheld a material fact in an attempt to obtain a nonimmigrant visa, and she failed to demonstrate extreme hardship to her United States citizen spouse. On November 17, 2007, the applicant attempted to enter the United States under the Visa Waiver Program; however, she was denied admission based on her previous overstay and was returned to Argentina.

The AAO notes that counsel does not dispute that the applicant misrepresented herself in order to gain entry into the United States; therefore, the AAO finds that the applicant willfully misrepresented a material fact in order to obtain a benefit under the Act and is inadmissible under section 212(a)(6)(C) of the Act.

Additionally, the applicant accrued unlawful presence from September 21, 2000, the date the applicant's authorization to remain in the United States expired, until August 2002, the date the applicant departed the United States. The applicant is attempting to seek admission into the United States within 10 years of her August 2002 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

The applicant is seeking a section 212(i) and section 212(a)(9)(B)(v) waiver of the bar to admission resulting from violations of sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act. Waivers under sections 212(i) and 212(a)(9)(B)(v) of the Act are dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the alien herself experiences upon removal is irrelevant to sections 212(i) and 212(a)(9)(B)(v) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's United States citizen spouse. 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).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (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.

Counsel asserts that "[e]ither living without [the applicant] in the US or moving to Argentina would be an extreme hardship for the [the applicant's husband]." *Appeal Brief*, page 2, filed July 23, 2007. In an undated psychological report, [REDACTED] diagnosed the applicant's husband with dysthymic disorder and recommended that he take anti-depressants. In an undated letter, [REDACTED] states the applicant's husband has above average stress. The AAO notes that the applicant's husband is suffering some emotional and psychological hardship through his separation from the applicant; however, if the applicant's husband joins the applicant in Argentina then the depression would presumably no longer be an issue.

Counsel states the applicant's husband's "ex-wife has stated she would fight any attempt by [the applicant's husband] to move their children out of the country.... Because of the children and his position at his current company of employment he cannot move to another state, much less another country." *Appeal Brief*, *supra* at 1-2. The AAO notes that the applicant's son is twenty (20) years old and is in college, and his daughter will be eighteen (18) years old on December 25, 2009. Additionally, the AAO notes that the applicant's husband told [REDACTED] that he would relocate to San Diego, where he had another job opportunity, when his children were in college. Counsel states "[w]ithout a healthy environment and solid familial connections the children's mental health development will be negatively affected." *Id.* at 2. The AAO notes that the applicant's stepchildren may experience some hardship in

being separated from their father; however, they are not qualifying relatives for a waiver under section 212(a)(9)(B)(v) and section 212(i) of the Act.

Counsel states that “[f]actors such as [the applicant’s husband’s] specialization and Argentina’s depressed economy ensure that [the applicant’s husband] would be unable to financially provide for his family.” *Id.* at 2. The AAO notes that the applicant’s husband works as an engineer, and it has not been established that he has no transferable skills that would aid him in obtaining a job in Argentina or that there are no employment opportunities for him in Argentina. Additionally, the AAO notes that the applicant’s husband is a native of Argentina who speaks Spanish, and he spent his formative years in Argentina. It has not been established that he has no family ties in Argentina. In fact, the AAO notes that the applicant’s husband’s parents reside in Argentina. The AAO finds that the applicant failed to establish that her husband would suffer extreme hardship if he joined the applicant in Argentina.

The AAO finds that counsel has demonstrated extreme hardship to the applicant’s husband if he remains in the United States without the applicant; however, it has not been established that the applicant’s husband would suffer extreme hardship if he joined the applicant in Argentina. The AAO notes that the record fails to demonstrate that the applicant will be unable to contribute to her husband’s financial wellbeing from a location outside of the United States. Moreover, the United States Supreme Court has held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981). The AAO, therefore, finds the applicant has failed to establish extreme hardship to her husband if he joins her in Argentina.

In limiting the availability of the waiver to cases of “extreme hardship,” Congress provided that a waiver is not available in every case where a qualifying family relationship exists. The AAO recognizes that the applicant’s husband has endured hardship as a result of separation from the applicant; however, he has not demonstrated extreme hardship if he were to join the applicant in Argentina.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant’s husband caused by the applicant’s inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C)(i) and section 212(a)(9)(B)(i)(II) of the Act, the burden of proving eligibility remains entirely 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.