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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

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FILE:

[Redacted]

Office: LIMA, PERU

Date:

OCT 02 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 (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.

John F. Grissom

Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Brazil. He 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 and seeking admission within ten years of his last departure. He is married to a United States citizen and has three U.S. citizen children. He 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).

The Officer in Charge concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on May 16, 2007.

On appeal, counsel for the applicant states that the applicant's spouse and children will suffer extreme hardship if the applicant is excluded from the United States because his spouse suffers from a rare heart condition, and the spouse and her children need the applicant's physical and emotional support.

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-

(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 [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 establishes that the applicant entered the United States as a tourist in 1986 and remained in the United States until he was removed on December 12, 2004. Therefore, the applicant was unlawfully present in the United States for over a year from April 1, 1997, the effective date of the

unlawful presence provision of the Act until December 12, 2004,<sup>1</sup> and is now seeking admission within ten years of his last departure from the United States. Accordingly, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

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 is not directly relevant in section 212(a)(9)(B)(v) proceedings and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez*, 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 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).

The AAO notes that extreme hardship to a qualifying relative must be established whether he or she accompanies the applicant or 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 includes, but is not limited to, counsel’s brief; statements from the applicant’s spouse and stepchildren; photographs of the applicant, his spouse and his stepchildren; numerous statements

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<sup>1</sup> The AAO notes that during this period, the record indicates that the applicant’s unlawful presence was twice broken by grants of voluntary departure of unknown length. While the applicant did not accrue unlawful presence while these voluntary departure orders were in effect, these breaks do not alter the fact that the applicant accrued unlawful presence well in excess of one year prior to his removal from the United States.

from physicians treating the applicant's spouse for Prinzmetal's angina and Shingles; a psychological evaluation of the applicant's spouse by Licensed Medical Social Worker [REDACTED] an educational/developmental evaluation of the applicant's son by [REDACTED] court records regarding the applicant's previous divorces and custody of his U.S. citizen son; birth certificates for the applicant's spouse and stepchildren; a marriage certificate for the applicant and his spouse; employment statements for the applicant; employment verification for the applicant's spouse; medical documents pertaining to the applicant's spouse's medical conditions; and country conditions information on Brazil.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

Counsel states that the applicant's spouse suffers from Prinzmetal's angina and has recently contracted Shingles. Medical documentation submitted into the record includes statements from numerous physicians verifying the conditions of the applicant's spouse, that she has been treated for Prinzmetal's angina since suffering a heart attack 19 years ago at the age of 28, and has recently contracted Shingles, a nerve-resident disease that can be brought on by emotional stress. Documentation in the record, including a report from the American Heart Association, indicates that sufferers of Prinzmetal's angina can experience provokable coronary arterial vasospasms, which range in consequence from pain and physical incapacitation to severe pain and potentially death. Statements by physicians treating the applicant's spouse also state that emotional stress can exacerbate the applicant's spouse's medical condition, and is the likely underlying cause of her Shingles.

The applicant's spouse asserts in her statement that the applicant is crucial to helping her during her angina attacks. She states that previously her mother assisted her during these attacks, administering medication to her, and in addition caring for her teenage children during her incapacitation, but that her mother passed away in 2004. The applicant's spouse further states that she suffers from bouts of depression. A statement from [REDACTED] finds the applicant's spouse is suffering from depression based on her separation from her husband. The record documents that the applicant's spouse's mother died on August 1, 2004. Based on the record before it, the AAO finds the applicant has established that his spouse has a severe medical condition, and that his exclusion would result in an extreme hardship to her if she remained in the United States.

An applicant must also establish that the relocation of a qualifying relative would result in extreme hardship to that relative. The applicant's spouse states that she does not speak Portuguese, that she would not be able to receive the same level of care in Brazil, and that her health is best served by remaining with the team of doctors who have treated for the last 19 years. While the AAO does not find the record to establish that adequate healthcare could not be provided to the applicant's spouse in Brazil, it notes the serious nature of her medical condition and that her current medical care is provided by doctors who have long-term experience in dealing with her specific conditions. Moreover, it observes the potential for harm presented by the applicant's spouse's inability to speak Portuguese in dealing with her health care needs in Brazil. As already noted by the OIC, the record contains sufficient evidence to establish that the applicant's spouse would suffer extreme hardship if she were to relocate with the applicant to Brazil.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors cited above, supports a finding that, based on her medical condition, the applicant's spouse would face extreme hardship if her husband is refused admission. Therefore, having found the applicant statutorily eligible for relief, the AAO will now examine the factors relevant to the exercise of discretion in the granting of a waiver.

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 . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion 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 he is excluded and 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*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[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).

In this case, the negative factors include the applicant's failures to depart the United States in compliance with Orders of Voluntary Departure, his long-term unlawful presence and his periods of unauthorized employment in the United States. On appeal, counsel for the applicant asserts there were mitigating circumstances to the applicant's failure to depart, namely custody of his United States citizen son and his duty to provide for his son. The positive factors in this case include the applicant's U.S. citizen spouse and children, the extreme hardship that would be experienced by his spouse if he were to be excluded from the United States; his commitment to his stepchildren as reflected in their statements; his involvement in and support of community activities; his physical, and emotional support of his spouse and stepchildren during her angina attacks, and his paternal relationship with his United States citizen son. The AAO concludes that these favorable factors outweigh the unfavorable factors in the applicant's case. It therefore finds that the applicant qualifies for a waiver of his inadmissibility pursuant to 212(a)(9)(B)(v) of the Act.

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 met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.