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U.S. Citizenship and Immigration Services
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U.S. Citizenship
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Services



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FILE: [REDACTED]

Office: LIMA

Date:

SEP 21 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 (INA), 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).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Officer in Charge (OIC), Lima, Peru, denied the instant waiver application. The matter 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 Peru, the wife of a U.S. citizen, the mother of a U.S. citizen daughter, and the beneficiary of an approved Form I-130 petition. The OIC found that the applicant had been unlawfully present in the United States for more than a year and is therefore inadmissible pursuant to section 212(a)(9)(B)(i) of the Act. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her husband and daughter. The district director also found that the applicant had failed to establish that failure to approve the waiver application would cause extreme hardship to her U.S. citizen spouse, and denied the application.

On appeal, counsel asserted that the evidence shows that the applicant's husband would suffer extreme hardship if the waiver application is not approved. Counsel also stated that certain dates stated in the decision of denial were incorrect and that the applicant had not been unlawfully present in the United States as long as the OIC stated.

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

Any alien (other than an alien lawfully admitted for permanent residence) who –

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

The record indicates that the applicant applied for admission to the United States on January 13, 1993, and was admitted until July 12, 1993. She applied for asylum on February 17, 1994. Her asylum application was referred to an immigration judge on February 17, 1998. The immigration judge denied the asylum application on August 27, 1998. The applicant appealed to the Board of Immigration Appeals (BIA), which dismissed her appeal on June 18, 2002. On that date the applicant no longer had a pending asylum application, and her presence in the United States became unlawful. The notice from the BIA accorded the applicant 30 days to voluntarily depart the United States. It was sent to the applicant's address of record.

In an undated letter, the applicant stated that she received a notice during 2002 that her appeal was denied and that the notice indicated that she should wait for another notice. She stated that she

waited until sometime after her employment authorization expired, and then, in November of 2004, went to a USCIS office for information. The applicant was again informed that her asylum application was denied and departed the United States on December 14, 2004 at Miami International Airport.

The only 2002 notice in the record pertinent to the denial of the applicant's appeal is the June 18, 2002 decision of the BIA. That notice did not request that the applicant wait for some later notice, but, rather, as was noted above, granted her 30 days to leave the United States.

The applicant's presence in the United States was unlawful during the period from June 18, 2002, when her appeal from the denial of her asylum application was dismissed, to December 14, 2004, when she left the United States.¹ That period is greater than one year. The applicant's departure triggered a ten-year inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. That ten-year inadmissibility has not expired. The applicant therefore remains inadmissible pursuant to section 212(a)(9)(B)(i) of the Act. The remainder of this decision will address whether waiver of the applicant's inadmissibility is available, and, if so, whether waiver of inadmissibility should be granted.

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

The Attorney General [now Secretary of Homeland Security] 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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act 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 or her child is not directly relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's husband is the only qualifying relative in this

¹ Although the applicant submitted her asylum application less than six months after her initial admission to the United States expired, the record indicates that she worked while that asylum application was pending and that on at least one occasion may have permitted her employment authorization to lapse for more than one year. Although, pursuant to 212(a)(9)(B)(iii)(II) of the Act unlawful presence does not ordinarily accrue while an asylum application is pending, it does accrue if the applicant, during that time, is working without authorization. The applicant may be inadmissible under section 212(a)(9)(B)(i)(II) of the Act for one or more periods of a year or more before the appeal of her asylum application was denied, but during which time she was working without authorization. Because the applicant's unlawful presence after the denial of her asylum application is clear, however, the AAO will not rely on those possible additional periods of unlawful presence in today's decision.

case. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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 nonexclusive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. 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. The BIA has held:

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).

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 a letter dated May 15, 2006, the applicant’s husband stated that his youngest daughter is 11 years old, that he wants to be part of her life, and that she has been away from him since December 2006. He stated that the forced separation and cultural change has affected her and has therefore affected him and his wife. He stated that his wife and child depend upon his support in Peru and are in a less comfortable position than they were in the United States. He stated that he worries that he may become sick and be unable to support them, and that the thought of that causes him stress. He also stated that his wife and child now live in a “less secured environment.”

In connection with her asylum application, the applicant submitted newspaper articles and a report from the U.S. Department of State pertinent to country conditions in Peru. Other than her husband’s statement that his child and the applicant live in a “less secured environment,” the applicant did not present any evidence that she is now endangered by the conditions in Peru.

On appeal, counsel asserted that the evidence submitted shows that denial of the waiver application would cause extreme hardship to the applicant’s husband.

In stating that the applicant and the child are in a “less comfortable position,” the applicant’s husband appears to mean that they are living at a lower standard of living in Peru than they were used to in the United States. That lowered standard of living of the applicant and child is not directly relevant to the approvability of the waiver application. The issue is whether the hardship that denial of the waiver applicant causes the applicant’s husband hardship that rises to the level of extreme hardship. The applicant provided no corroborating evidence of her lesser standard of living, no corroborating evidence that the lesser standard of living available to the applicant and the child in Peru is causing hardship to the applicant’s husband, and no evidence pertinent to the severity of any such hardship to the applicant’s husband. The evidence in the record does not demonstrate that the asserted lesser standard of living to which the applicant and the child are subjected in Peru is causing or will cause hardship to the applicant’s husband which, when considered together with the other hardship factors in this case, rises to the level of extreme hardship.

Although the applicant’s husband stated that he is obliged to support his wife and child in Peru, he provided no evidence pertinent to the expense of his provision for their support, and no evidence pertinent to his income. Although any such expense necessarily represents some degree of hardship, the AAO is unable, because of the lack of evidence, to determine the degree of hardship that expense is causing the applicant’s husband. Further, the applicant did not provide evidence to demonstrate that she is unable to contribute to her own support in Peru. The evidence does not demonstrate that, if he remains in the United States, his obligation to support his wife and child will cause him financial hardship which, when considered together with the other hardship factors in this case, will rise to the level of extreme hardship.

Although the applicant’s husband stated that he might become sick and be unable to continue to support his wife and child in Peru, and that thinking about that possibility is causing him stress, he provided no evidence to demonstrate that such a disability is likely, or even a reasonable possibility, and no medical or psychological evidence to demonstrate the gravity of the stress that this concern is causing him. Given the lack of evidence, the AAO is unable to find that the stress caused to the applicant’s husband by his asserted preoccupation with the hypothetical possibility of being unable to support his wife and child in Peru is causing him hardship which, when considered with the other hardship factors in this case, rises to the level of extreme hardship.

The applicant’s husband stated that his child and the applicant now live in a “less secured environment.” Although evidence in the record demonstrates that some danger to some people has existed in some parts of Peru in the recent past, the record contains no evidence to demonstrate specifically the degree of danger the applicant’s child and the applicant are in. Further, danger to the applicant and the child are not directly relevant to any material issue in this matter. Rather, the issue in this case is the hardship that danger causes to the applicant’s husband. The record contains no evidence pertinent to that central point. The AAO is unable to find, based on the evidence in the record, that the asserted danger to the child and the applicant is causing the applicant’s husband hardship which, when considered with the other hardship factors in this case, rises to the level of extreme hardship.

The applicant's husband stated he wants to be part of his daughter's life, and that the forced separation and culture shock have affected her and, therefore, affected him and his wife. Other than that abstract assertion, the applicant's husband did not provide any evidence pertinent to the effect that separation and culture shock have had on his child, or his wife, or him. Given that lack of evidence, the AAO cannot find that the effect of the separation and culture shock on the child has caused hardship to the applicant's husband which, when considered with the other hardship factors in this case, rises to the level of extreme hardship.

Further, the applicant and her husband did not address whether the applicant's husband is able to join the applicant and their child in Peru without experiencing extreme hardship. Under these circumstances, the AAO cannot find that the evidence demonstrates that the applicant's husband would experience extreme hardship if he joined his wife to live in Peru.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's husband faces extreme hardship if the applicant's waiver application is not granted. Rather, the record suggests that he will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse and a child are removed from the United States.

Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress made clear that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

Separation from one's spouse or child is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the "extreme hardship" standard, hardship must be greater than the normal, expected hardship involved in such cases.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *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). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. See *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v) and that waiver is therefore unavailable. The AAO need not, therefore, consider whether this is an appropriate case in which to exercise its discretion to grant a waiver.

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. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.