

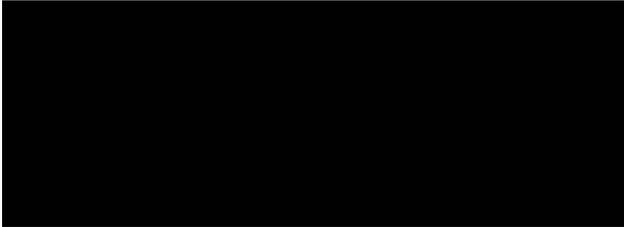
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U.S. Department of Homeland Security
Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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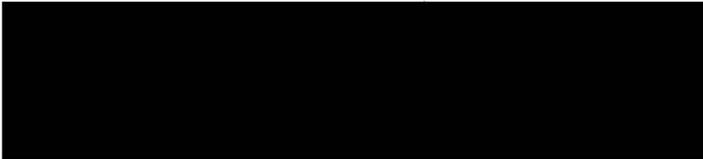
Office: LIMA, PERU

Date: **JAN 08 2010**

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(i)

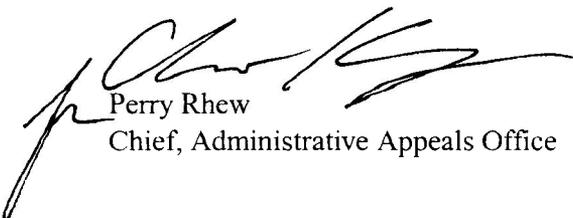
ON BEHALF OF APPLICANT:



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 Field Office Director, 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 46-year-old native and citizen of Brazil who was found to be inadmissible to the United States pursuant to: (1) 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; (2) section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), as an alien who has sought to procure a visa or admission into the United States through fraud or misrepresentation; and (3) section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), for failure to attend removal proceedings. The applicant is married to a citizen of the United States, and she seeks a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(i), in order to reside with her husband in the United States.

The director determined that under section 212(a)(6)(B) of the Act, the applicant's failure to attend removal proceedings rendered her inadmissible to the United States for five years from the date of her departure from the United States on November 21, 2007. *See Decision of the Director*, dated Aug. 27, 2008. Finding no available waiver for this ground of inadmissibility, the director determined that the Application for Waiver of Grounds of Inadmissibility (Form I-601) for the applicant's unlawful presence and misrepresentation was premature. *Id.* The applicant's spouse filed a motion to reopen or reconsider the decision of the director, contending that the denial of the waiver is causing extreme hardship. *See Form I-290B, Notice of Appeal or Motion*, filed Nov. 26, 2008. Upon reopening and reconsideration, the director confirmed the applicant's inadmissibility for unlawful presence, misrepresentation, and failure to attend her removal proceedings in 2004. *See Decision of the Director*, dated Aug. 13, 2009. The director determined that the applicant was inadmissible under section 212(a)(6)(B) of the Act for failure to attend her removal proceedings until November 21, 2012. *Id.* Because there is no waiver for this ground of inadmissibility, the director denied the waiver application. *Id.* The applicant filed a timely appeal. *See Form I-290B, Notice of Appeal or Motion*, filed Sept. 14, 2009.

On appeal, the applicant contends through counsel that the director erred in denying her application. *See id.* First, counsel states that the director failed to consider the extreme physical and emotional hardships to the applicant's spouse caused by the denial of the waiver. *Id.*; *see also Affidavit of* [REDACTED] dated Oct. 13, 2009. Second, counsel claims that the applicant did not receive actual notice of her removal hearing. *Id.* Third, counsel asserts that the director conducted improper fact finding. *Id.*

The record contains, among other things, a copy of the couple's marriage certificate, indicating that they were married on May 4, 2007, in Georgia; two affidavits from the applicant's husband, [REDACTED] discussing the hardships caused by the denial of the waiver; an affidavit from the applicant; and medical records for the applicant's husband.

The AAO reviews these proceedings de novo. *See* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision

except as it may limit the issues on notice or by rule.”). The entire record was considered in rendering a decision on the appeal.

The record reflects that the applicant was apprehended after crossing into the United States on May 24, 2003. *See Form I-213, Record of Deportable/Inadmissible Alien*. The applicant was personally served with a Notice to Appear for removal proceedings. *See Notice to Appear*, dated May 24, 2003. The Notice to Appear indicated that the applicant’s removal hearing would be calendared before an immigration judge in Phoenix, Arizona, but did not include the time and date of the hearing. *See Notice to Appear*. On May 30, 2003, the applicant was released from detention on her own recognizance. *See Order of Release on Recognizance*, dated May 30, 2003. On July 30, 2003, the Immigration Court notified the applicant by mail that her case would be scheduled for a hearing on January 7, 2004, in Phoenix, Arizona. *See Notice of Hearing in Removal Proceedings*. On January 7, 2004, the applicant’s removal hearing was called on the Phoenix immigration court’s docket for a hearing. *See Order of the Immigration Judge*. The applicant was not present at the hearing. *Id.* Finding no good cause for the applicant’s failure to appear at the hearing, the immigration judge determined that all claims for relief had been abandoned, and ordered the applicant removed from the United States. *Id.*

The applicant and her spouse married on May 4, 2007, in Georgia. *See Marriage Certificate*. The applicant stated that she departed from the United States in November, 2007. *Form G-325A, Biographic Information*, signed by the applicant on June 1, 2008. The applicant’s spouse filed a Petition for Alien Relative (Form I-130) on January 21, 2008, and U.S. Citizenship and Immigration Services (USCIS) approved the petition on February 22, 2008. *See Form I-130, Petition for Alien Relative*. The applicant did not indicate that she had been placed in immigration proceedings in 2003 on her Form I-130, or during her interview with a United States Consular Officer. *See id.*; *see also Form DS-230, Application for Immigrant Visa*.

The record supports the director’s determination that the applicant is inadmissible for having been unlawfully present in the United States for more than one year under section 212(a)(9)(B)(i)(II) of the Act; as an alien who has sought to procure a visa or admission into the United States through fraud or misrepresentation under section 212(a)(6)(C)(i) of the Act; and for failure to attend removal proceedings under section 212(a)(6)(B) of the Act.

Section 212(a)(9) 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.

The applicant accrued unlawful presence in the United States during the period from May 24, 2003, until her departure on November 21, 2007. The applicant's unlawful presence for a period of more than one year, and her departure from the United States triggered the ten-year bar in section 212(a)(9)(B)(i)(II) of the Act. *See Matter of Rodarte-Roman*, 23 I&N Dec. 905, 909 (BIA 2006). Section 212(a)(9)(B)(v) of the Act provides a discretionary waiver of this ground of inadmissibility "if it is established to the satisfaction of the [Secretary of Homeland Security] 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."

Section 212(a)(6)(C)(i) of the Act provides:

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.

Here, the applicant was apprehended after crossing into the United States on May 24, 2003, and she was personally served with a Notice to Appear for removal proceedings. *See Form I-213, Record of Deportable/Inadmissible Alien; Notice to Appear*. The applicant failed to attend her removal proceedings on January 7, 2004, and the immigration judge ordered the applicant removed from the United States in absentia. *See Order of the Immigration Judge*. The applicant misrepresented a material fact when she indicated on the Form I-130 that she was never under immigration proceedings. *See Form I-130*. The applicant again misrepresented a material fact when she failed to disclose her 2003 placement in removal proceedings to a United States Consular Officer. *See Form DS-230, Application for Immigrant Visa*. Additionally, the applicant misrepresented material facts when she failed to include her residence and work history in the United States from 2003 to 2005 on her Biographic Information Form (Form G-325A). *See Form G-325A*, dated June 1, 2008. Accordingly, the evidence shows that the applicant misrepresented material facts in an attempt to obtain a visa or admission into the United States, and she is therefore inadmissible under section 212(a)(6)(C) of the Act. *See Matter of S- and B-C-*, 9 I&N Dec. 436, 447-49 (BIA 1960; A.G. 1961) (stating that a misrepresentation is material if the alien is ineligible on the true facts, or if the misrepresentation shut off a line of inquiry which may have resulted in ineligibility).

Section 212(i) of the Act provides a discretionary waiver of this ground of inadmissibility "if it is established to the satisfaction of the [Secretary of Homeland Security] 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." In order to obtain a hardship waiver for unlawful presence or misrepresentation, an applicant must show that the bar imposes an extreme hardship on a qualifying relative. *See 8 U.S.C. §§ 1182(a)(9)(B)(v), 212(i)*. Under the plain language of the statute, hardship to the applicant, or to his or her children or other family members, may not be considered, except to the extent that this hardship affects the applicant's qualifying

relative. *See id.* (specifically identifying the relatives whose hardship is to be considered); *see also INS v. Hector*, 479 U.S. 85, 88 (1986). Additionally, extreme hardship to the qualifying relative must be established in the event that he or she remains in the United States and in the event that he or she accompanies the applicant to the home country. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-68 (BIA 1999) (en banc) (considering the hardships of family separation and relocation). Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996) (en banc).

The concept of extreme hardship to a qualifying relative “is not . . . fixed and inflexible,” and the determination is based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565. In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a non-exhaustive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. These factors include: 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 565-66. Family separation is also an important calculation in the extreme hardship analysis. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (per curiam) (“When the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.”); *Matter of Lopez-Monzon*, 17 I&N Dec. 280 (Commr. 1979) (noting in the context of a waiver under section 212(i) of the Act that the intent of the waiver is to provide for the unification of families and to avoid the hardship of separation).

Additionally,

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, e.g., economic detriment due to loss of a job or efforts ordinarily required in relocating or adjusting to life in the native country. Such ordinary hardships, while not alone sufficient to constitute extreme hardship, are considered in the assessment of aggregate hardship.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (internal quotation marks and citation omitted). However, “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that mere economic detriment and emotional hardship caused by severing family and community ties are common results of deportation and do not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit held that economic hardship and adjustment difficulties did not constitute hardship that was unusual or beyond that which would normally be expected upon deportation. In *INS v. Jong Ha Wang*, 450

U.S. 139 (1981), the U.S. Supreme Court held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The record reflects that the applicant's spouse, [REDACTED] is a 61-year-old native and citizen of the United States. *See Birth Certificate of [REDACTED]* The applicant and her husband have been married for more than two years. *See Marriage Certificate.* The applicant has three children from a previous marriage. *See Form I-130, Petition for Alien Relative.* The applicant's spouse asserts that he is suffering extreme medical, emotional, and financial hardships as a result of the denial of the waiver.

The record reflects that [REDACTED] has foot ulcers, a serious and chronic condition that requires him to be off his feet as much as possible. *See Letters from [REDACTED] and [REDACTED]*. He "cannot care for himself without assistance in order to prevent his condition from worsening." *Letter from [REDACTED]* When [REDACTED] was in the United States, she "was his primary caretaker, ensuring that his dressings were changed, his wounds cleaned, and ensuring that he ma[d]e it to all of his doctors [sic] appointments." *Id.* [REDACTED] stated that [REDACTED] "is at risk for further infection, and possible limb amputation if not cared for properly," and that "[i]t is imperative that [REDACTED] wife be allowed to care for him." *Id.* [REDACTED] also suffers from diabetes. *See Affidavit of [REDACTED]* dated Apr. 4, 2008. [REDACTED] reports that he lives by himself, and has no one to help him with his medical conditions. *Id.*

In addition to his medical concerns, [REDACTED] reports that he worries about the applicant constantly, and that both of them are "in a very depressed and desperate state." *Affidavit of [REDACTED]* dated Oct. 13, 2009. He states that he is "completely alone without [his] wife [REDACTED] and in an extremely difficult situation at this point in [his] life." *Id.* [REDACTED] indicates that he qualifies for disability, but states that he must continue to work to keep up his home and to support the applicant in Brazil. *Id.*

[REDACTED] contends that he cannot relocate to Brazil because of his medical conditions. *See Affidavit of [REDACTED]*, dated Apr. 4, 2008. His doctors are concerned about sanitation in Brazil, and they do not want him to travel there for fear that his feet will become infected, which may result in amputation. *Id.* Further, [REDACTED] has his business and family in the United States, and he does not speak Portuguese. *Id.*; *see also Form G-325A, Biographic Information* (showing that [REDACTED] has been self-employed in the construction business since 1969).

Here, it appears that the multiple hardships caused by the separation from his wife, when considered in the aggregate, constitute extreme hardship. *See Matter of O-J-O-*, 21 I&N Dec. at 383; *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565. Further, based on [REDACTED] medical conditions, and his business and family ties in the United States, it appears that relocation to Brazil would also cause extreme hardship. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66 (recognizing importance of U.S. ties and significant health conditions, particularly where there is diminished availability of medical care).

However, because the applicant also is inadmissible under section 212(a)(6)(B) of the Act, a ground for which no waiver is available, a hardship waiver cannot be granted at this time. Section 212(a)(6)(B) of the Act provides:

Failure to Attend Removal Proceeding

Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

Where an immigration judge has entered an in absentia order of removal under section 240(b)(5) of the Act, 8 U.S.C. § 1229a(b)(5), that order is generally sufficient to establish that the alien had sufficient notice of the proceeding and that the alien can be found to have failed to attend the proceeding. Although there are no available waivers for this ground of inadmissibility, there is an exception for individuals who establish "reasonable cause" for failing to attend a removal hearing. *See* Section 212(a)(6)(B) of the Act.

Counsel appears to contend that the applicant had reasonable cause for her failure to attend her removal proceedings because the applicant claims that she did not receive notice of the removal hearing. *See Form I-290B, Notice of Appeal*. This contention lacks merit as the evidence shows that the applicant had sufficient notice of her removal hearing. On May 30, 2003, the applicant signed a Form I-220A, Addendum to an Order of Release on Recognizance that stated her address in Danbury, Connecticut. *See Form I-220A*. Accordingly, the notice of the applicant's removal hearing was mailed to that address. *See Notice of Hearing*.

Moreover, the immigration judge entered an in absentia order of removal, which is generally sufficient to show that the applicant had actual or constructive notice of the hearing. Although the applicant claims that she did not receive actual notice of her hearing, the record shows that she had constructive notice of the time and date of her hearing. When the applicant was personally served with her Notice to Appear, she was given actual notice of the obligation to provide an address and telephone number at which she may be contacted regarding immigration proceedings, as required by section 239(a)(1)(F) of the Act, 8 U.S.C. § 1229(a)(1)(F). *See Notice to Appear; see also* 8 C.F.R. § 1003.15(d) (stating that if the Notice to Appear does not include the alien's address, the alien must provide written notice of her address to the immigration court within five days of service of the document). The Notice to Appear instructed the applicant to immediately notify the Immigration Court in writing upon a change in address or telephone number, as required by section 239(a)(1)(F)(ii) of the Act, 8 U.S.C. § 1229(a)(1)(F)(ii). *See Notice to Appear*. Further, the Notice to Appear indicates that the applicant was given oral notice in Portuguese of the place of her removal hearing, and of the consequences of a failure to appear. *Id.* Additionally, the applicant's Order of Release on Recognizance required her to report monthly to a deportation officer, and reiterated her obligation to report for her removal hearing. *See Order of Release on Recognizance*, dated and signed by the applicant on May 30, 2003.

On July 30, 2003, the Immigration Court notified the applicant that her case was scheduled for a hearing on January 7, 2004, in Phoenix, Arizona. *See Notice of Hearing in Removal Proceedings*. The hearing notice was served by mail to the applicant's address of record in Danbury, Connecticut. *Id.* If the applicant failed to receive the hearing notice because of a change in her address, there is no evidence in the record that the applicant notified the immigration court in writing of her address change, as required by section 239(a)(1)(F)(ii) of the Act. Although the applicant's spouse claims that the applicant unsuccessfully "tried repeatedly to notify the CBP office in Arizona that she was now in Georgia and of her new address," *see Letter from [REDACTED] to [REDACTED]* dated Sept. 28, 2009, the record contains no evidence of these attempts, and the applicant has provided no documentation to support this claim. Accordingly, the applicant has failed to demonstrate reasonable cause for failure to attend her removal hearing. *See* Section 240(b)(5) of the Act, 8 U.S.C. § 1229a(b)(5) (providing for removal in absentia after written notice, and stating that written notice is sufficient if provided at the applicant's most recent address); 8 C.F.R. § 1003.26(d) (same); *see also Matter of G-Y-R*, 23 I&N Dec. 181, 189 (BIA 2001) (en banc) ("In those instances where actual notice is not accomplished, the statute will permit constructive notice when the alien is aware of the particular address obligations of removal proceedings and then fails to provide an address for receiving notices of hearing."); *Wijeratene v. INS*, 961 F.2d 1344, 1347 (7th Cir. 1992) (stating that where the applicant "had moved to another location in New York, and she had not informed the IJ or her representative of her new address . . . [the applicant's failure] to receive notice of the second hearing . . . was entirely her own fault").

In sum, the director correctly determined that the applicant is inadmissible under section 212(a)(6)(B) of the Act as an alien who without reasonable cause failed to attend her removal proceeding, and who is seeking admission within five years of her departure from the United States. Because the applicant is inadmissible under this section until November 21, 2012, and no waiver is available, the director correctly determined that at this time, no purpose would be served in determining the applicant's eligibility for a hardship waiver under section 212(a)(9)(B)(v) of the Act for her unlawful presence in the United States, or under section 212(i) of the Act for her misrepresentation. *See* 8 C.F.R. § 212.7(a)(1) ("An applicant for an immigrant visa . . . who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision."). Although counsel claims that the director conducted improper fact-finding below, any alleged improprieties are rendered moot by the AAO's de novo review and determination based on the documentation in the record.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. The applicant has failed to overcome the basis for denial of her Form I-601 waiver of inadmissibility. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.