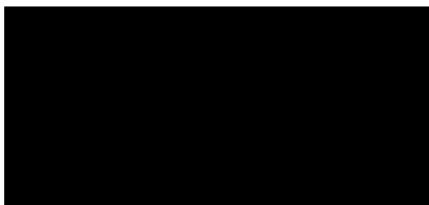


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HB

MAR 15 2007

FILE:



Office: LIMA, PERU

Date:

IN RE:



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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Officer-in-Charge (OIC) in Lima, Peru, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed.

The applicant, [REDACTED], is a native and citizen of Peru 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. [REDACTED] is the wife of [REDACTED], a U.S. naturalized citizen. 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 reside in the United States with her husband.

The OIC in Lima, Peru, stated that [REDACTED] entered the United State with a B-2 visa in April 1998, with authorization to stay until October 1998. She departed in December 1999. [REDACTED] reentered the United States in February 2000 and was allowed to remain until August 2000. She departed on December 20, 2001. [REDACTED] therefore, accumulated more than 365 days of unlawful presence in the United States. She again attempted to enter the United States via Miami, Florida, in March 2002. Immigration officials discovered her previous overstays and removed her under section 235(b) of the Act. The OIC found the applicant inadmissible 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 more than one year. The OIC determined that [REDACTED] failed to establish extreme hardship to a qualifying relative, as required under 212(a)(9)(B)(v) of the Act; accordingly, he denied her waiver of inadmissibility. *Decision of the OIC*, dated May 23, 2005.

The AAO will address in this proceeding the applicant's admissibility under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), and the denial of the waiver of inadmissibility.

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 Secretary, 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 Attorney General [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.

...

Unlawful presence accrues when an 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)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). Exceptions and tolling for good cause are set forth in sections 212(a)(9)(B)(iii) and (iv) of the Act, 8 U.S.C. § 1182(a)(9)(B)(iii) and (iv), respectively. The periods of unlawful presence under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II), are not counted in the aggregate. Each period of unlawful presence in the United States is counted separately for purposes of section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(II). Memo, Virtue, Acting Assoc. Comm. INS, *Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence* (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998). For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997. DOS Cable, *supra.*; and *IIRIRA Wire #26, HQIRT 50/5.12*. The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. DOS Cable, *supra.* See also *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).

The director correctly found that the applicant was unlawfully present in the United States for more than one year. She entered the United States with a B-2 visa in April 1998 with authorization to stay until October 1998. She departed in December 1999. She reentered the United States in February 2000, with authorization to stay until August 2000 and departed on December 20, 2001. Here, it is clear that [REDACTED] accrued more than one year of unlawful presence in the United States from October 1998 to December 1999, and that she departed from the country, triggering the ten-year bar. She also accrued more than one year of unlawful presence in the United States from August 2000 to December 20, 2001, and then departed from the country. She was removed from the country in March 2002 based on her prior violations of stay. Thus, the OIC correctly found her 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 more than one year.

[REDACTED] seeks a waiver of inadmissibility under section 212(a)(9)(B)(v). 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 [REDACTED]. Hardship to [REDACTED] is not a permissible consideration under the statute and will be considered only insofar as it results in hardship to a qualifying relative. [REDACTED] spouse is the only qualifying relative here. If extreme hardship to the qualifying relative, which is her husband, is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(i) of the Act; see also *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

On appeal, [REDACTED] states the following. His wife qualifies for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The hardship in his case is more than what would normally be expected upon deportation. He is 60-years-old and will be 70-years-old when his wife is allowed to return to the United States. These are the last years of his life and not being able to spend them with his wife is an extreme hardship. His mother is 90-years-old and lives in the United States; he cannot move to Brazil away

from her because he could not financially afford to visit her if he moved to Brazil. He met the applicant shortly after his first wife died. He suffers from disabling back pain which affects his ability to do everyday chores, which the applicant helped with. The applicant overstayed in the United States because of his relationship with her. He states that his case fits the hardship requirement of extreme hardship as set forth in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), which requires that extreme hardship be more than that which would normally be expected upon deportation. *Form I-290B Attachment*

The documents in the record include letters from [REDACTED] family members; a declaration from Mr. [REDACTED] documents relating to trips to Brazil and money sent there; photographs; invoices; a treating physician's final report (dated July 21, 2000); the Form I-601; and other materials. The entire record has been reviewed in rendering this decision.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 564 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) lists the factors that it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. 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. *Matter of Cervantes-Gonzalez* at 564. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-566 (BIA 1999).

In *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I & N Dec. 880, 882 (BIA 1994).

U. S. courts have stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Separation from one's spouse will therefore be given appropriate weight in evaluating the hardship factors in the present case.

The AAO will now apply the *Cervantes-Gonzalez* factors to the present case to the extent they are relevant in determining extreme hardship to the applicant's spouse, [REDACTED]. It is noted that extreme hardship to Mr.

must be established in the event that he joins the applicant; and in the alternative, that he remains in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In his declaration, dated April 30, 2004, states the following. His wife died in February 1998, and his relationship with the applicant began on Mother's Day in 1998. He worked in the construction field. He suffered from serious disc and spinal problems and in 1989 he had an operation and returned to work in 1991, after nearly two years of extensive rehabilitation and physical therapy. In 2000 he was forced to retire due to health reasons. While he lived with the applicant, from 2000 to December 2001, she took care of many things around the house that he could not physically do, including daily chores. The applicant attempted to return to the United States in March of 2002 but was refused entry into the country. He married the applicant in Brazil in June of 2002. The two months while he was in Brazil were very difficult as he is not fluent in Portuguese. He has lived in the United States for 37 years and at his age could not become accustomed to a new country and language. His extended family lives in the United States. He travels to Brazil as frequently as possible and that it is difficult for him to financially support the applicant while she lives in Brazil. He suffers emotionally and economically without the applicant's presence.

The letters in the record from family members describe how the applicant has been a companion and care provider to . The letter from dated September 1, 2003, indicates that the applicant is needed to assist as well as her nephew, who lives with and works at a supermarket.

The treating physician's final report (PR-3) in the record (dated July 21, 2000) indicates that is "unable to perform his usual and customary work duties as a traffic maintenance worker II, due to permanent residual disability relating to his lower back that precludes him from heavy lifting, repeated bending, and stooping." The report states that has "constant slight to moderate lower back pain that increases to a moderate level with repeated bending or heavy lifting."

The AAO finds that the evidence in the record does not establish extreme hardship to if he remains in the United States. The treating physician's final report indicates that is unable to perform his work as a traffic maintenance worker II because he can no longer engage in "heavy lifting, repeated bending, and stooping." has not shown that the report's findings signify that he is similarly unable to perform common household chores. The AAO notes that the strenuous nature of the work performed by a traffic maintenance worker differs from the everyday work around a house. has not established that the applicant's presence is required in order for him to perform his daily activities. The AAO is not unsympathetic to the emotional hardship that will endure as a result of separation from his wife. However, his situation, if he remains in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship based on the record. In *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Court of Appeals upheld the BIA's finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission." (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). The Ninth Circuit in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme

hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. The record before the AAO is insufficient to show that the emotional hardship endured by [REDACTED] is unusual or beyond that which is normally to be expected upon deportation.

[REDACTED] indicates that he has lived in the United States for 37 years and if he were to relocate to Brazil to be with his wife he would not be able to adjust to life there, and would be separated from his extended family in the United States. *Matter of Cervantes, supra* at 567, indicates that it is relevant to consider whether the applicant's spouse married the applicant after removal proceedings began. In *Matter of Cervantes*, the Court stated that:

[T]he respondent's wife knew that the respondent was in deportation proceedings at the time they were married. In contrast to the respondent's assertions on appeal, this factor is not irrelevant. Rather, it goes to the respondent's wife's expectations at the time they were wed. Indeed, she was aware that she may have to face the decision of parting from her husband or following him to Mexico in the event he was ordered deported. In the latter scenario, the respondent's wife was also aware that a move to Mexico would separate her from her family in California. We find this to undermine the respondent's argument that his wife will suffer extreme hardship if he is deported.

(citations omitted).

Here, although [REDACTED] did not marry [REDACTED] after removal proceedings began, prior to their marriage he was aware that in March 2002 she had been refused entry into the United States. Thus, [REDACTED] was aware at the time he wed that the applicant was not allowed entry into the United States and that he might be faced with the decision of parting from her or following her to Brazil in the event that she was not allowed entry into the country. In the latter scenario, [REDACTED] was also aware that a move to Brazil would separate him from his family in the United States. The AAO finds that, in applying the Court's reasoning in *Matter of Cervantes* to the situation here, this undermines [REDACTED]'s argument that he would suffer extreme hardship if his wife's waiver is not granted and he relocated to Brazil to be with her.

[REDACTED] has expressed that he will endure extreme economic hardship if his wife's waiver of inadmissibility is not granted. In *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981), the U.S. Supreme court found that economic detriment alone is insufficient to establish extreme hardship. Although the economic hardship endured by [REDACTED] is relevant in determining whether extreme economic hardship exists, such hardship alone is insufficient to constitute extreme hardship under the Act.

Having fully weighed the factors mentioned above, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

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 an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is denied.