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U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted] Office: LIMA, PERU Date: MAR 10 2008

IN RE: Applicant: [Redacted]

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The applicant is a native and citizen of Brazil 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. The applicant is married to a naturalized citizen of the United States. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the Officer-in-Charge denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the Officer-in-Charge, dated February 14, 2006.* The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility.

Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

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). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.<sup>1</sup> For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.<sup>2</sup>

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. *See* DOS Cable, note 1. *See also Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists). With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997).

The record reflects that the applicant entered the United States in December 1998 on a visitor's visa, which allowed her to stay in the United States for six months. It shows that the applicant requested and was granted an extension of stay for six months; however, she failed to depart at the expiration of the extended stay, remaining in the United States until December 2003. For purposes of calculating unlawful presence under section 212(a)(9)(B) of the Act, the applicant began to accrue time in unlawful presence when she exceeded her extension of stay, which would have occurred in January 2000. When the applicant voluntarily departed

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<sup>1</sup> 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).

<sup>2</sup> *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

from the country in 2003, she triggered the ten-year-bar. Consequently, the Officer-in-Charge was correct in finding her inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The AAO will now address the finding that the grant of a waiver of inadmissibility is not warranted.

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

- (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.

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 a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relative in this case is the applicant’s husband. If extreme hardship to the 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 record contains letters, birth and marriage certificates, divorce decrees, copies of photographs, and other documents.

The letter dated April 18, 2005 by the applicant’s husband conveys that he met his wife in 1999 and shortly afterwards had serious medical problems, which eventually included a hip replacement. He states that he has no close family members, so the applicant stayed and cared for him and they fell in love. He states that he and the applicant returned to Brazil and when he returned to the United States without her, he realized that life without the applicant was impossible. He then returned to Brazil and married the applicant in November 2004.

A letter of the same date by the applicant’s husband states that it was at his urging that the applicant stayed with him at a time when he was faced with health problems.

The April 14, 2005 letter by [REDACTED], with Washington University Physicians, states that the applicant’s husband has been a patient for many years and that he has substantial health problems including severe degenerative joint disease with a recent hip replacement. [REDACTED] states that it would be in the best interest of the applicant’s husband, both physically and mentally, to have the applicant with her husband to care for his various needs.

In a letter addressed to the U.S. Department of Homeland Security, Lima, Peru, the applicant’s husband states that he is under the care of [REDACTED] for joint disease, high blood pressure, and other problems. He states that his wife stayed with him during the time of hip replacement surgery and recovery. He states that life without her is sad and depressing and her absence presents an extreme hardship to him. He states that moving to Brazil at his age and with his health problems would not be feasible. He states that he does not

speaking Portuguese, could not work in Brazil, and with his limited funds could not afford health insurance. He states that short visits to Brazil have strained his finances and that moving there would require him to leave his home, his church, and his many friends who have been supportive.

The January 25, 2006 letter by [REDACTED] states that the applicant's husband has been a patient for 15 years. He states that over the past year the applicant's husband has developed, in his opinion, a severe depression and has even had thoughts of suicide, because of separation from his wife. [REDACTED] states that prior to this event the applicant's husband never had depression or any affective disorder. He states that the applicant's husband does not have the financial means to travel back and forth on a regular basis.

The letter by a friend of the applicant's husband, [REDACTED] conveys that "[a]t age 65, this is the first marriage for [REDACTED]. It has taken him a long time to find this wonderful caring woman."

On appeal, the applicant's husband states that the applicant is all that he has and her absence causes him great anguish, mental distress, and hardship. He states that life without her seems unthinkable, and at his age, he cannot live in Brazil.

The AAO has carefully considered all of the submitted evidence 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, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) lists the factors it considers relevant in determining whether an applicant has established extreme hardship under section 212(i) of the Act. The factors, which relate to the applicant's "qualifying relative," 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. *Id.* at 565-566.

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)).

Applying the *Cervantes-Gonzalez* here, extreme hardship to the applicant's husband must be established in the event that he remains in the United States without the applicant, and in the alternative, that he joins the applicant to live in Brazil. 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 establishes that the applicant's husband would experience extreme hardship if he were to remain in the United States without his wife.

The record shows that the applicant's husband, who is now 68 years old and is retired, has severe degenerative joint disease and recently had hip replacement. It conveys that the applicant cared for her husband while he recuperated from the operation. The most recent letter by [REDACTED] states that the applicant's husband, who has been a patient for 15 years, has developed, in his opinion, a severe depression and has thoughts of suicide, because of separation from his wife. [REDACTED] states that the applicant's husband never had depression or any affective disorder prior to separation from this wife. In light of the advanced age, health problems, and severe emotional distress of the applicant's husband, the AAO finds that he would experience extreme hardship if he were to remain in the United States without his wife.

The record establishes that the applicant's husband would experience extreme hardship if he were to join her to live in Brazil.

The record reveals that the applicant's husband has severe degenerative joint disease and recently had hip replacement. It reflects that he has been a patient of [REDACTED] for 15 years. The applicant's husband states that he does not speak Portuguese, and moving to Brazil would require him to leave his home, his church, and his friends. The applicant's husband conveys that he would not be able to afford health insurance in Brazil. In the context of the advanced age and significant health problems of the applicant's husband, and of his long-term relationship with his physician, the AAO finds that he would experience extreme hardship if he were to join his wife to live in Brazil.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do 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). The record supports a finding of significant hardships over and above the normal economic and social disruptions.

The grant or denial of the above waiver does not depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's husband.

The unfavorable factor in this matter is the applicant's unlawful presence in the United States. The AAO notes that the applicant does not appear to have committed any crimes.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's immigration violation, it finds that the hardship imposed on the applicant's husband as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.