



U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: LIMA, PERU

Date: **MAY 21 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:

[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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Peru who was found to be inadmissible to the United States under 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 sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 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 28, 2006.*

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.¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.²

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).

The record reflects that the applicant entered the United States without inspection in 1989, remaining until he voluntarily departed in July 2005.

For purposes of calculating unlawful presence under section 212(a)(9)(B) of the Act, the applicant began to accrue time in unlawful presence on April 1, 1997. From that date to July 2005, the applicant accrued 8 years of unlawful presence, and when he voluntarily departed from the country, he triggered the ten-year-bar.

¹ 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).

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

Consequently, the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II), is correct.

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

A waiver under section 212(a)(9)(B) of the Act for unlawful presence 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 an applicant and to his or her child are not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, they are not included under section 212(a)(9)(B) of the Act. Thus, hardship to the applicant and his children will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s lawful permanent resident spouse. 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, divorce decrees, a marriage certificate, and other documents.

On appeal, counsel states that the applicant and his wife have three children who are 4, 24, 20, and 23 years old. She states that the applicant and his wife divorced in 1994 and remarried in 2001. She states that the applicant, who is the family’s breadwinner, provides a stable home, especially for his four-year-old son [REDACTED]. Counsel states that the applicant’s wife is financially strained without her husband’s income, working part-time jobs and rarely seeing her son. Counsel states that the applicant’s wife did not work in 2002 and 2003, while her husband was in the United States, so as to care for [REDACTED]. Counsel indicates that it will be unaffordable for the applicant’s wife to visit him, and that the stress of the applicant’s absence and of raising [REDACTED] without his father has led the applicant’s wife to seek counseling. Counsel states that the applicant’s wife’s suicidal thoughts are caused by separation from her husband or not having a father for [REDACTED]. She states that the applicant’s daughter is stressed because she helps her mother and [REDACTED]. Counsel states that *Matter of Lopez-Monzon*, 17 I&N Dec. 280 (Comm. 1979), indicates that family reunification is the primary reason for the waiver and failure to weigh all factors relating to family is reversible error. She states that the intent of the applicant’s wife was never analyzed and that the family should reunite in the United States rather than in Peru. Counsel states that the applicant has no other means of adjustment of status/legalization and *Matter of Monreal*, 23 I&N Dec. 56, 63 (BIA 2001) conveys that this must be considered. Counsel states that the immigration officer did not indicate the weight of the individual factors, and did not discuss the lack of proper medical care or schooling for [REDACTED], or the effect that a move to Peru would have on the applicant’s wife and [REDACTED] or the emotional hardship it would have on them and the

family members as a whole. Counsel states that the applicant's wife knew that her husband was illegal in the United States; however, when they remarried in 2001, she thought that everything would be resolved in filing for legalization.

The letter dated October 22, 2005 by the applicant's wife conveys that she feels lonely without her husband and his absence is more painful when her three-year-old son asks for his father. She states that her other children miss their father, that she is now their father and mother, and that her son no longer attends college in order to help her financially.

The letter of May 22, 2006 by [REDACTED] with Centro de Consejeria Cristiana states that the applicant's wife sought help because of anxiety caused by her husband's absence and that she will receive eight counseling sessions and guidance and support to help her with [REDACTED]

The letter dated March 24, 2006 by the president of FAA Credit Union conveys that [REDACTED], the applicant's daughter, has been employed there since June 13, 2006, and that although [REDACTED] and her mother are trying to maintain their household, [REDACTED] has been strained financially and emotionally by her father's deportation.

In her letter dated October 24, 2005, the applicant's daughter conveys that she misses her father, that she has a close relationship with her family, and that she stopped attending college to work full-time to help her mother financially.

The letters by the applicant's sons convey that their father is needed to support the family and they commend his character.

The record reflects that the applicant's children are lawful permanent residents or U.S. citizens.

In rendering this decision, the AAO has carefully considered the documentation in the record.

"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). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors 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. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *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 wife must be established in the event that she joins the applicant, and in the alternative, that she remains in the United States without him. 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 fails to establish that the applicant’s wife would endure extreme hardship if she remained in the United States without the applicant.

With regard to family separation, courts in the United States have stated that “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).

However, in *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the 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). In *Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994), the court upheld the finding of no extreme hardship if Shooshtary’s lawful permanent resident wife and two U.S. citizen children are separated from him. *Id.* 1050-1051. As stated in *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), “[e]xtreme hardship” is hardship that is “unusual or beyond that which would normally be expected” upon deportation and “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991)). In *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985), the Ninth Circuit stated that deportation is not without personal distress and emotional hurt.

The record reflects that the applicant’s wife is very concerned about separation from her husband and his separation from their children, especially [REDACTED]. It conveys that after nearly one year of separation from her husband, she sought counseling to cope with her situation. The AAO is mindful of and sympathetic to the emotional hardship that is undoubtedly endured as a result of separation from a loved one. After a careful and thoughtful consideration of the record, however, the AAO finds that the situation of the applicant’s wife, if she remains in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as required by the Act. The record before the AAO is insufficient to show that the emotional hardship, which has been and will be endured by the applicant’s wife, is unusual or beyond that which is normally to be expected upon deportation or exclusion. *See Hassan, Shooshtary, Perez, and Sullivan, supra.*

The applicant's wife claims that she has experienced financial hardship without her husband's income. Although letters by the applicant's daughter and her daughter's employer indicate that the applicant's wife is in financial straits, the record has no documentation to substantiate the claim of extreme financial hardship such as income tax records and wage statements of the applicant's wife, and documentation of her monthly household expenses. In the absence of such documentation, the AAO is not able to ascertain whether the applicant's income is needed to meet his family's household expenses. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel states that the possibility of other means of adjusting status must be considered in determining hardship. However, the AAO notes that this factor is insufficient, in itself, to support a finding of extreme hardship to a qualifying relative.

The record is insufficient to establish that the applicant's wife would experience extreme hardship if she were to join the applicant to live in Peru.

The conditions in the country where the applicant's wife would live if she joined her husband are a relevant hardship consideration. "While political and economic conditions in an alien's homeland are relevant, they do not justify a grant of relief unless other factors such as advanced age or severe illness combine with economic detriment to make deportation extremely hard on the alien or his qualifying relatives." *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994), citing *Matter of Anderson*, 16 I & N Dec. 596 (BIA 1978).

Although hardship to an applicant's child is not a consideration under section 212(a)(9)(B) of the Act, the hardship endured by the qualifying relative, as a result of his or her concern about the welfare of her child, is a relevant consideration.

With the case here, counsel states that [REDACTED] would not receive proper medical care and the same education that is offered in the United States in Peru. The AAO finds that no documentation has been provided to show that [REDACTED] has a serious health problem that requires medical treatment in the United States; no documentation has been furnished to show the differences between the United States and Peruvian school systems. Furthermore, in *Ramirez-Durazo v. INS*, 794 F.2d 491, 498 (9th Cir. 1986) the court upheld the BIA's finding that the disadvantage of reduced educational opportunities is insufficient to establish extreme hardship.

Counsel states that the impact of moving to Peru upon the applicant's wife and [REDACTED] and on the family members as a whole had not been considered in determining hardship. Courts have found that a lower standard of living and cultural adjustment do not constitute extreme hardship. In *Ramirez-Durazo v. INS*, 794 F.2d 491, 498 (9th Cir. 1986), the court found that a "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient" to establish extreme hardship. In *Bueno-Carrillo v. Landon*, 682 F.2d 143 (7th Cir. 1982), the court stated that inability to "maintain the standard of living at home which they have managed to achieve in this country" is not extreme hardship.

The AAO finds that the additional factors that are stated in *Matter of Ige* that need to combine with economic detriment to make living in Peru extremely hard on the applicant's wife are missing.

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.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in removal has not been met so as to warrant a finding of extreme hardship to the applicant's wife in the event that she remained in the United States without the applicant, and in the alternative, that she joined the applicant to live in Peru. Having carefully considered each of the hardship factors raised, 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 section 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 he merits a waiver as a matter of discretion.

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 remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.