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#3



FILE: [REDACTED] Office: LIMA, PERU Date: SEP 30 2008

IN RE: Applicant: [REDACTED]

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) and 8 U.S.C. § 1182(i).

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 Officer-in-Charge, 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 application will be denied.

The applicant, [REDACTED], a native and citizen of Peru, was found by the Officer-in-Charge 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; and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. She sought waivers of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) and 8 U.S.C. § 1182(i), 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 7, 2006.*

The AAO will first address the findings 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 remains in the United States after period of stay authorized by the Attorney General has expired 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 departure from the United States following accrual 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), do 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 before the AAO reflects that [REDACTED] entered the United States from Peru on a visitor's visa, remaining in the country for six-month increments from 1994 until October 1998 when immigration inspectors at the Miami port of entry cancelled her nonimmigrant visa because they determined she had been working without authorization while in the country. In September 1999, [REDACTED] tried to enter the United States using another person's passport and visa, and requested political asylum at secondary inspection. Because the

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.

immigration inspector found [REDACTED] fear of persecution credible, she was granted entry into the United States. In July 2000, [REDACTED] abandoned her political asylum application and informed the immigration judge that she was returning to Peru. The immigration judge granted her until October 19, 2000 to depart from the United States; [REDACTED] returned to Peru on April 17, 2002.

Based on the record, the AAO finds that the applicant accrued 1 year and 9 months of unlawful presence from July 2000 until her departure on April 17, 2002, and when she voluntarily departed from the country she triggered the ten-year bar. Consequently, the Officer-in-Charge's 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 turn to the finding of inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act. Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) 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.

The record reflects that in September 1999 [REDACTED] tried to enter the United States using another person's passport and visa. Because [REDACTED] sought to procure admission into the United States by presenting to immigration officials someone else's passport and visa, which is a willful misrepresentation of a material fact, her true identity, the Officer-in-Charge was correct in finding her inadmissible under section 212(a)(6)(C)(i) of the Act.

The AAO will now address the Officer-in-Charge's finding that waivers of inadmissibility should not be granted.

The waiver for unlawful presence is found under section 212(a)(9)(B) of the Act, which 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 under section 212(a)(9)(B)(v) of the Act is dependent upon the applicant's 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 and to his or her child is not a consideration under section 212(a)(9)(B)(v) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is Mr. Antonio Castillo, the applicant's spouse.

Section 212(i) of the Act provides a waiver of inadmissibility for fraud or willful misrepresentation. It provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 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.

A section 212(i) waiver is dependent upon showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Similar to the waiver for unlawful presence, any hardship to the applicant and to his or her child is not a consideration under section 212(i) of the Act. Thus, unlike section 212(h) of the Act where a child is included as a qualifying relative, he or she is not included under section 212(i) of the Act. Hardship to the applicant and to his or her child will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's naturalized citizen spouse.

Once extreme hardship is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

"Extreme hardship" is not a definable term of "fixed and inflexible meaning" and establishing it is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). *Matter of Cervantes-Gonzalez* lists the factors the Board of Immigration Appeals (BIA) considers relevant in determining whether an applicant has established extreme hardship under 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 *Cervantes-Gonzalez* here, extreme hardship to [REDACTED] must be established if he remains in the United States without his wife, and alternatively, if he joins her in Peru. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

A psychological evaluation of [REDACTED] is submitted on appeal. It is dated March 1, 2006 and was prepared by [REDACTED], a licensed psychologist. In the evaluation, [REDACTED] conveys the following. He was raised by both parents and grew up with an older half-brother. He is an only child from his parent's union. His mother has depression, his father died in 1984 in a boating accident, and he started to suffer from depression in 1983 after his brother killed himself. He never sought mental health treatment for his depression, self-medicating instead. He was married twice before and has three daughters from those marriages. His present wife resides in Peru with their 18-month-old U.S. citizen son and he travels to see them. Separation from his wife and son is causing him to have depressive symptoms, which impacts his work and productivity and makes him worry about losing his job. [REDACTED] recommends a psychiatric evaluation of [REDACTED] to assess the need for medication to stabilize his mood. She states that if he continues without treatment his depression will lead to decompensation of his mental state. [REDACTED] stated that "[REDACTED] family psychiatric history is positive for his mother who suffers from depression and his brother suffered from schizophrenia." *Psychological evaluation by [REDACTED] licensed psychologist.*

On appeal, counsel states that the applicant has demonstrated extreme hardship to her husband and U.S. citizen child. She states that [REDACTED] has depression and anxiety caused by separation from his wife and child, who live in Peru, and that [REDACTED] cannot join his family in Peru because he is the sole caretaker and provider for his mother who resides in a nursing home. Counsel states that [REDACTED] father died in a boating accident in 1984 and that his family has a history of mental health problems as his mother has depression and his brother committed suicide two years prior to his father's death. Living apart from his wife and child, counsel claims, is making [REDACTED] depressed and anxious, affecting his ability to work; and she states that traveling several times a year to Peru is financially straining him. Counsel indicates that a psychological evaluation of [REDACTED] reveals that medication and family reunification would benefit him and that his mental state will worsen if he is not united with his family. Counsel states that the applicant's child will experience extreme hardship if forced to live without the father. She conveys that *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), defines extreme hardship as "hardship that is unusual or beyond that which would normally be expected upon deportation," and that [REDACTED]'s circumstances meet this definition. Counsel claims that separation from a parent will cause extreme hardship to the applicant's child and to the absent parent.

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).

In *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), the court defines hardship as "unusual or beyond that which would normally be expected" upon deportation and it states that "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship."

The AAO finds that the psychological evaluation shows a history of depression for [REDACTED] and his mother and schizophrenia for his brother, who committed suicide. The evaluation conveys that [REDACTED]'s living separately from his son and wife has exacerbated his depressive symptoms to the point that he complains of poor stamina, decreased attention and concentration, disturbed sleep, insomnia, poor appetite, muscle tension, memory difficulties, social withdrawal, lack of initiative, excessive worry, apprehension, and pouts of crying. Given the psychiatric history of [REDACTED]'s family members, the AAO finds that the emotional hardship, which will be endured by [REDACTED] as a result of separation from his wife, is "unusual or beyond that which is normally to be expected" upon removal. *See Hassan, supra*. The AAO finds that the record establishes extreme hardship to the applicant's husband if he were to remain in the country without her.

The record fails, however, to establish extreme hardship to [REDACTED] in the event that he joined his wife in Peru.

No documentation has been presented to show that [REDACTED] would be financially unable to support his wife and child in Peru if her were to join them in Peru.

Counsel states that [REDACTED] cannot join his family in Peru because he must remain in the United States as he is the sole caretaker and provider for his mother, who resides in a nursing home. The AAO finds that no documentation has been furnished to show that [REDACTED] has been and is required to be his mother's caretaker and financial provider. Going on record without supporting documentary evidence is not sufficient for purposes 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)).

Each of the hardship factors raised here, both individually and in the aggregate, do not in this case establish extreme hardship to the applicant's husband in the event that he were to join his wife in Peru.

In summary, the applicant established extreme hardship to her husband if he were to remain in the United States without her. However, she has not established extreme hardship to him if he were to join her to live in Peru. Consequently, the applicant failed to demonstrate extreme hardship to a qualifying family member for purposes of relief under sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. § 1182(i) and 8 U.S.C. § 1182(a)(9)(B)(v).

Having found [REDACTED] statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) and 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. The application will be denied.