

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090



PUBLIC COPY

U.S. Citizenship
and Immigration
Services

H₃

FILE:

Office: LIMA, PERU

Date:

JUN 15 2009

IN RE:

APPLICATION:

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

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).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The applicant 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 for more than one year and seeking readmission within 10 years of his last departure. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife.

The officer-in-charge found that the applicant failed to establish extreme hardship to his U.S. citizen wife and denied the Form I-601 application for a waiver accordingly. *Decision of the Officer-in-Charge*, issued February 21, 2007.

On appeal, counsel for the applicant asserts that the applicant's wife will suffer extreme hardship should the applicant be prohibited from residing in the United States. *Statement from Counsel on Form I-290B*, dated April 17, 2007. Counsel further asserts that the officer-in-charge should have conducted a balancing of positive and negative factors in the present case. *Id.* at 1.

The record contains statements from counsel; statements from the applicant, the applicant's wife, and the applicant's acquaintances; medical documentation for the applicant's wife; a copy of the naturalization certificate for the applicant's wife; a copy of the applicant's marriage certificate, and; documentation regarding the applicant's unlawful presence in the United States and refusal of an immigrant visa. The entire record was reviewed and considered in rendering a decision on the appeal.

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.

(v) Waiver. – The Attorney General [now the Secretary of 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.

The record reflects that the applicant entered the United States without inspection in or about 1996. He applied for asylum and later withdrew his application. In 1998 an immigration judge ordered him deported. However, the applicant did not surrender for deportation as per the order. He departed in or about July 2006. Thus, the record shows by a preponderance of the evidence that the applicant accrued over one year of unlawful presence in the United States, at a minimum from the date he was ordered deported in 1998 until he departed in July 2006. As the applicant now seeks admission as an immigrant, he was found inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant does not contest his inadmissibility on appeal.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant experiences upon being found inadmissible is not a basis for a waiver under section 212(a)(9)(B)(v) of the Act. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These 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.

On appeal, counsel for the applicant asserts that the applicant's wife will suffer extreme hardship should the applicant be prohibited from residing in the United States. *Statement from Counsel on Form I-290B*, dated April 17, 2007.

Counsel previously stated that the applicant's wife depends on the applicant for economic support. *Prior Statement from Counsel*, dated June 30, 2006. Counsel asserted that the applicant's wife depends on medical insurance through the applicant's employment. *Id.* at 2. Counsel provided that the applicant's wife would be unable to fund medical coverage on her own due to her limited income

and health problems. *Id.* Counsel indicated that the applicant's wife depends on him for emotional support. *Id.*

The applicant's wife stated that the deportation of the applicant would constitute a de facto dissolution of their marriage. *Statement from the Applicant's Wife*, dated June 30, 2006. She provided that she does not have any other close family members, and that she and the applicant share a close bond. *Id.* at 1. She stated that she was severely injured in an automobile accident and that she has permanent injuries to her knee, back, neck, vertebral column, and sciatic muscles. *Id.* She indicated that she has a history of poor health, including recurrent problems such as abnormalities in the region of the sacroiliac joints, degenerative changes and adnexal cysts in the lumber spine, ovarian cystadenocarcinoma, wheezing and granulomatous disease, and cystic neoplasm. *Id.* She indicated that she has had numerous surgical procedures such as a hysterectomy for fibroids and ovary removal. *Id.* at 2. She provided that she was diagnosed with incisional hernia at the midline incision of a previous surgery which required additional surgery to repair. *Id.* She asserted that she is unable to stand or sit for long durations which prevents her from performing normal body functions on her own. *Id.*

The applicant's wife stated that she has no other friends or relatives to assist her, and that she requires the applicant's presence in the United States. *Id.* She provided that she wishes to have the applicant's emotional support. *Id.* The applicant's wife explained that the applicant prepares three meals per day for her, and that she would likely have to skip meals without his help. *Id.* She indicated that the applicant assists her with using the restroom, and that she would be unable to do so at regular intervals without his assistance. *Id.*

The applicant's wife stated that she would experience economic hardship without the applicant, as his income is required to help meet their needs. *Id.* at 3. She provided that her income is consumed with medicine, treatments, and household maintenance, thus she would not have adequate resources to hire assistance. *Id.*

The applicant stated that his wife requires his assistance, companionship, and financial support. *Statement from the Applicant*, dated June 30, 2006. The applicant explained that his wife's numerous medical conditions require a substantial amount of physical assistance in order to make her daily activities more bearable. *Id.* at 2. The applicant asserted that his wife would not have access to needed medical insurance without his employment. *Id.* at 3. He indicated that he would not have sufficient employment opportunities in Peru to support his wife. *Id.*

Upon review, the applicant has not established that his wife will suffer extreme hardship if he is prohibited from residing in the United States. The applicant presented evidence and explanation regarding his wife's health status. The AAO has examined all medical records submitted by the applicant. While it is evident that the applicant's wife has received medical care for several conditions, the applicant has not provided a clear account from a medical professional regarding his wife's current health and the effect any continuing conditions have on her ability to perform daily tasks. The applicant has not submitted evidence to reflect the outcome of the procedures his wife has received, thus the AAO is unable to determine whether she has made significant progress in her conditions, or if she requires ongoing treatment.

As noted by the officer-in-charge, the record does not show by a preponderance of the evidence that the applicant's wife in fact requires regular assistance from the applicant or another individual. The record reflects that the applicant's wife is employed full-time as a nanny at a rate of approximately \$34,000 per year. The fact that the applicant's wife is able to provide full-time childcare suggests that she is capable of performing independent tasks. The applicant has not shown that his wife presently is unable to engage independently in functions such as preparing food and using restroom facilities. While it is reasonable that the applicant's wife would benefit from the applicant's assistance, the record lacks sufficient evidence to show that the applicant's wife's health condition will result in extreme hardship should the applicant be prohibited from residing in the United States.

The applicant suggested that his wife will endure economic hardship should she remain in the United States alone. Yet, the applicant has not provided an account of his wife's regular expenses such that the AAO can determine the economic consequence of her meeting her needs alone. The applicant asserts that his wife depends on health insurance that she receives through his employment, yet the applicant has not submitted clear evidence to show that his wife in fact has health insurance. Thus the applicant has not shown that his absence from the United States would constitute a change in his wife's health coverage such that she would experience an economic detriment.

The applicant's wife expressed that she does not wish to be separated from the applicant, and that she will experience emotional hardship if they live apart. Yet, the applicant has not sufficiently distinguished his wife's emotional hardship from that which would ordinarily be expected when spouses reside apart due to inadmissibility. U.S. court decisions have held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *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. *Hassan v. INS*, *supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

Based on the foregoing, the applicant has not shown by a preponderance of the evidence that his wife will experience extreme hardship should he reside outside the United States and she remain.

The applicant has not shown that his wife would experience extreme hardship should she relocate to Peru to maintain family unity. As discussed above, the applicant has not provided adequate evidence to show his wife's present medical needs or her capacity to perform daily functions. Thus, the AAO is unable to conclude that she would experience significant hardship in Peru due to her health. The applicant has not provided sufficient explanation or evidence to show the economic impact relocation to Peru would have for his wife. As the applicant's wife is a native of Ecuador which borders northern Peru, it is presumed that she is familiar with the Spanish language and customs of the region. As the applicant's wife expressed that she has no close friends or family near her in the United States, it is evident that she would not endure separation from close family or

community should she relocate abroad. Thus, the applicant has not established by a preponderance of the evidence that his wife would experience extreme hardship should she relocate to Peru. The applicant has not established that denial of the present waiver application “would result in extreme hardship” to his wife. Section 212(a)(9)(B)(v) of the Act.

Counsel asserts that the officer-in-charge should have conducted a balancing of positive and negative factors in the present case. *Id.* at 1. However, under section 212(a)(9)(B)(v) of the Act, the applicant must first show extreme hardship to a qualifying relative before U.S. Citizenship and Immigration Services has discretion to approve his application for a waiver. 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. As balancing positive and negative factors is only relevant in determining whether a favorable exercise of discretion is warranted, the officer-in-charge did not err in declining to weigh such factors.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.