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U.S. Citizenship
and Immigration
Services

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FILE:



Office: LIMA, PERU

Date:

MAR 20 2008

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 PETITIONER:

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.

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).

A handwritten signature in black ink that reads "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge (OIC), 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 the 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 and seeking readmission within 10 years of his last departure from the United States. The applicant is married to a citizen of the United States and seeks a waiver of inadmissibility in order to reside in the United States with his wife and step-children.

The OIC found that based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying family member, in this case his U.S. citizen spouse. The application was denied accordingly. *Decision of the Officer in Charge*, dated January 17, 2006. The AAO notes that the applicant's also filed a Form I-212, which was denied on January 16, 2006.

On appeal, the applicant's spouse, who is his qualifying family member, asserts that the applicant was the victim of immigration fraud and that this caused him to fail to attend his removal hearing. She further states that her financial situation has changed significantly since the applicant's Form I-601 was denied. *Form I-290B*, dated February 2, 2007.

In support of these assertions, the applicant's spouse submits additional evidence regarding the applicant's prior dealings with an immigration attorney and regarding her own financial situation. In addition to the new evidence submitted with the appeal, the record contains the following evidence that is relevant to the applicant's claim: the applicant's spouses birth certificate, which indicates that she is a United States Citizen; the applicant's marriage certificate; a letter and an affidavit from the applicant's mother-in-law; an affidavit and a letter from the applicant's spouse; an affidavit from the applicant' an affidavit from a family friend; and family photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) 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.

In the present application, the record indicates that the applicant entered the United States without inspection in November 2000. *Affidavit of* [REDACTED] dated December 12, 2005. When the applicant attempted to board an airplane in Texas on or about December 1, 2000, he was detained by immigration officials and then remained in custody for approximately one month. The applicant was released on a bond and issued a notice to appear, but failed to appear for his removal hearing before an immigration judge. Therefore, he was ordered removed in absentia on April 17, 2001. The applicant married his spouse in September 2003 and she filed a Form I-130 Petition for an Alien Relative for the applicant on March 5, 2004. In December 2005, the applicant returned to Brazil, where he remains. Because the applicant was unlawfully present in the United States from November 2000 until December 2005, and is applying for admission to the United States within 10 years of his last departure from the United States, he continues to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act because of his unlawful presence in the United States for more than one year.¹

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 alien himself experiences upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. 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

¹ The decision of the OIC also refers to the applicant's inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act and states that the basis for this finding was a prior determination made by a consular officer. However, the AAO has reviewed the record and has not found evidence that the consular officer made this finding. Further, there is no evidence in the record before the AAO that this inadmissibility applies to this applicant. Therefore, the AAO will only address the applicant's inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act in this decision.

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.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to the applicant's spouse must be established in the event that she accompanies the applicant to Brazil or in the event that she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The applicant's spouse states that she will experience hardship if she relocates to Brazil. She states that she has considered the prospect of moving to Brazil to be with her husband. However, she states that she is the primary caretaker of her school age son, who does not speak Portuguese and who she believes would not receive the same level of education in Brazil as that which he would receive in the United States. *Affidavit from* [REDACTED], dated February 3, 2007. As such, the applicant's spouse indicates that the hardships experienced by her son if she were to move to Brazil would cause her hardship. She further states that she only speaks very limited Portuguese and that, therefore, it would be almost impossible for her to find a job in Brazil. *Id.*

The AAO notes that court decisions have found extreme hardship in cases where the language capabilities of the children were not sufficient for them to have an adequate transition to daily life in the applicant's country of origin. For example, *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American life style, The BIA found that uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the circuit court stated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether "extreme hardship" has been shown. In *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Ninth Circuit found the BIA abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

In this case, the applicant's step-son is not a qualifying family member. Though the applicant's spouse has stated that she does not believe that moving to Brazil would be good for her son, she has

not indicated how his moving there would cause or otherwise contribute to her extreme hardship. As the applicant's spouse does not speak Portuguese, she has indicated that it would be very difficult for her to obtain work or to reside generally in Brazil. However, she not stated whether the applicant would be able to obtain employment in Brazil nor has she submitted country conditions that support her statement that life would be difficult for her in Brazil. Therefore, based on the evidence in the record, the AAO cannot conclude that the applicant has established that his spouse would experience extreme hardship if she were to relocate to Brazil to reside with him.

The applicant's spouse asserts that she will experience extreme hardship if she remains in the United States separated from the applicant. She states that while the applicant was residing with her, he worked both a part-time and a full time job and contributed financially to their household. *Affidavit from* [REDACTED] paragraph 14, dated December 12, 2005. She further submits evidence that after the applicant returned to Brazil, her income for the year 2006 was 8,831.48. *Affidavit from* [REDACTED] dated February 3, 2007; *Forms W-2 issued to* [REDACTED] *in 2006; Unsigned 2006 Form 1040 for* [REDACTED]. Though the applicant's spouse indicates that this is much less than her income when her spouse resided with her, she has not provided evidence of their combined salaries. However, the AAO notes that the current poverty guidelines indicate that a minimum income for a family of two is \$14,570.² The applicant's spouse's income as noted in the record is currently below that level. The applicant's spouse has stated that after her husband's waiver was denied, she has determined that she is no longer able to remain in Arizona and she will be moving back to Connecticut to reside with her daughter, who lives in low-income housing.

The applicant's spouse also asserts that the applicant was a positive influence on her children and that they are suffering without him. She states that the emotional toll taken on her son is further exacerbated because his biological father had a history of both violence and drug and alcohol abuse. *Affidavit from* [REDACTED], dated February 3, 2007. Though the applicant's step-son is not a qualifying family member, his emotional hardship does impact the applicant's spouse, who is a qualifying family member, therefore, it is discussed here.

The applicant's spouse states that she was in an abusive relationship with her children's biological father for 16 years. *Letter from* [REDACTED], dated March 16, 2006. She asserts that he had a serious drug problem and that he does not help her with her children in any way. *Id.* The applicant's spouse also states that she has been diagnosed with battered women's syndrome as a result of abuse she suffered in a prior marriage. *Affidavit from* [REDACTED] dated February 3, 2007. It is noted that though the applicant's spouse has stated that she has been diagnosed with battered women's syndrome, she has not submitted any evidence of either this diagnosis or previous or ongoing counseling as a result of this diagnosis.

As was previously noted, though the applicant's wife has made assertions of both her financial and emotional hardships if she remains in the United States, and though she has stated that it would be

² The 2009 HHS Poverty Guidelines. Published by the United States Department of Health and Human Services. Found at: <http://aspe.hhs.gov/POVERTY/09poverty.shtml> Accessed March 5, 2009.

difficult for both her and her son to reside in Brazil she has not submitted sufficient evidence to prove that the hardships she would experience would rise to the level of extreme hardship.

U.S. court decisions have repeatedly 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. The AAO recognizes that the applicant's wife will endure hardship as a result of separation from the applicant. However, in this case, the evidence submitted both with the original Form I-601 and on appeal does not establish that her situation, if she remains in the United States, rises to the level of extreme hardship such that it can be distinguished from the hardships that are typical to individuals separated as a result of deportation or exclusion.

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) 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.