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



**U.S. Citizenship
and Immigration
Services**

#3

FILE:

Office: LIMA, PERU

Date:

MAR 30 2009

IN RE:

Applicant:

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:

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.

A handwritten signature in black ink that reads "Michael Shumway".

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge (OIC), 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 Uruguay 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 record reflects that the applicant is the spouse of a United States citizen and that he is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his United States citizen spouse and stepchildren.

The OIC found that the applicant failed to establish that extreme hardship would be imposed on his spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Officer in Charge*, dated December 18, 2006.

On appeal, the applicant, through counsel, asserts that “[t]he denial was in error.” *Addendum to I-290B*, filed January 16, 2007. Counsel contends that the OIC “failed to consider the significant evidence of the various forms of extreme hardship that [the applicant’s wife] is suffering and will continue to suffer if she is forced to live separated from her husband.” *Id.*

The record includes, but is not limited to, counsel’s brief; affidavits from the applicant’s spouse; a letter from the applicant’s disabled stepson; numerous letters of recommendations from friends and family; a psychological evaluation by [REDACTED]; a letter from [REDACTED], regarding the applicant’s stepson’s psychological condition; and the applicant’s marriage certificate. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

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.

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(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 [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 indicates that the applicant entered the United States without inspection on January 28, 2001. On January 29, 2001, a Notice to Appear (NTA) was issued against the applicant. On January 30, 2001, the applicant was convicted of illegal entry and was sentenced to three (3) days in jail (time served). On July 11, 2001, an immigration judge ordered the applicant removed from the United States. On August 3, 2001, the applicant, through counsel, filed an appeal with the Board of Immigration Appeals (Board). On November 25, 2002, the Board dismissed the applicant's appeal. On January 16, 2003, a Warrant of Removal/Deportation (Form I-205) was issued against the applicant. On July 25, 2003, the applicant's United States citizen wife filed a Form I-130 on behalf of the applicant. On December 21, 2005, the applicant's Form I-130 was approved. On December 30, 2005, the applicant was removed from the United States. On September 7, 2006, the applicant filed a Form I-601 and an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). On December 18, 2006, the OIC denied the applicant's Form I-601, finding the applicant accrued more than 365 days of unlawful presence and he failed to demonstrate extreme hardship to his United States citizen spouse if she decided to remain in the United States.

The applicant accrued unlawful presence from January 28, 2001 until December 30, 2005, the date the applicant was removed from the United States. The applicant is attempting to seek admission into the United States within 10 years of his December 30, 2005 removal from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

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 citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant himself experiences upon removal is irrelevant to a section 212(a)(9)(B)(v) waiver proceeding. 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).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 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.

Counsel claims that the applicant's wife is suffering extreme hardship by being separated from the applicant. [REDACTED] states she has seen the applicant's wife "a number of times over the past 22 years for short periods of time...[and] [s]ince [the applicant's] deportation, [the applicant's wife] is

experiencing considerable anxiety, including episodes of heart racing.” *Psychological evaluation by J. [REDACTED]*, dated January 22, 2007.

Counsel states the applicant’s wife’s son “has suffered from serious neurological problems since he was five years old. He has seizures and requires anti-convulsant treatment. Both the seizures and medication severely retarded his development, and he has serious learning disabilities.” *Appeal Brief*, page 4, dated February 5, 2007. [REDACTED] states the applicant’s stepson “has severe learning disabilities and has been in special educational programs because of this. These will likely permanently affect his educational and vocational plans.” *Letter from [REDACTED]* dated May 16, 2003. Counsel states the applicant’s stepson is “unable to hold a job, drive a car, or live independently in any way. He will live with [the applicant’s wife] for the rest of his life.” *Appeal Brief, supra* at 5. The applicant’s wife claims she “cannot move to Uruguay due to the serious neurological and mental health issues of [her] son.” *Supplemental Affidavit of [REDACTED]* dated January 23, 2007. The applicant’s wife states “[t]he most difficult part about taking care of [her son] is his rage” and she depended on the applicant to help her with her son. *Id.* The applicant’s wife explains how when her son would get angry, the applicant would intervene and was able to defuse the situation. *Id.* However, now that the applicant is not in the home, the applicant’s wife states that she is fearful of her son’s anger and she cannot control him. *Id.* The applicant’s wife states her son is “receiving ongoing therapy for his rage outbursts.... [Her son] made a lot more progress when [the applicant] lived with [them], since [the applicant] was always there to guide him and help him with his anger.” *Id.* The applicant’s mother-in-law states her grandson’s “episodes of violence are more frequent and frightening for [the applicant’s wife]” since the applicant was removed from the United States. *See letter from [REDACTED]*, dated January 20, 2007. The applicant’s stepson states the applicant is like the stepfather he never had because he is always there for him and has never let him down. *See letter from [REDACTED]* undated. Ms. [REDACTED] states the applicant “is deeply caring and committed to [the applicant’s wife’s son].” *Psychological evaluation by [REDACTED] supra.* [REDACTED] states the applicant’s stepson has suffered “great hardship and distress” since the applicant was removed from the United States. *Letter from [REDACTED]*, dated January 23, 2007.

The applicant’s wife states she is suffering financial hardship without the applicant. *See Supplemental Affidavit of [REDACTED], supra.* The applicant’s wife states that “[a]fter [the applicant] was deported, [she] had to leave [her] job at an interior design company and return to the real estate business full-time so that [she] could be based at home with [her son]. Unfortunately, within a few short weeks of this career change, the real estate market took a sharp downturn, leaving [her] virtually unemployed.” *Id.* The applicant’s wife states that before the applicant was removed from the United States, they were planning to start their own business that could employ her son and “possibly other young adults with similar cognitive issues.” *Id.*

The AAO finds that counsel has established that the applicant’s wife is dependent upon the applicant and would experience extreme hardship if she were to remain in the United States without him or join him in Uruguay.

The AAO finds that the applicant meets the requirements for a waiver of his grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, in that the applicant’s spouse is suffering extreme emotional and psychological hardship as a result of her separation from the applicant. The record establishes that the

applicant's spouse's mental and emotional problems have been exacerbated since the applicant departed the United States and they would be further exacerbated if she joins the applicant in Uruguay, separated from her family. Combined with the increased financial and familial burdens that the applicant's spouse has faced since the applicant departed the United States, the cumulative hardship in this case is beyond that which is normally experienced in cases of removal. Accordingly, the AAO finds that the applicant has established that his United States citizen wife would suffer extreme hardship if his waiver of inadmissibility application were denied.

The favorable factors presented by the applicant are the extreme hardship to his United States citizen wife and stepson, who depend on him for emotional and financial support; the applicant's work history in the United States; positive character references; the applicant's history of paying his federal income taxes; and no criminal record apart from his immigration violation.

The unfavorable factors include the applicant's entry into the United States without inspection, and periods of unauthorized presence and employment.

While the AAO does not condone his actions, the applicant has established that the favorable factors in his application outweigh the unfavorable factors. In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.