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U.S. Department of Homeland Security
20 Mass. Avenue, N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

[REDACTED]

42

FILE:

Office: LIMA, PERU

Date:

AUG 24 2006

IN RE:

APPLICATION: Application for Waiver of Ground of Inadmissibility under Section 212(a)(9)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. §1182(a)(9)(B)

ON BEHALF OF APPLICANT:

[REDACTED]

PHOTIC COPY

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, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, 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 sustained.

The applicant, [REDACTED] is a native and citizen of Argentina who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for being unlawfully present in the United States for one year or more. [REDACTED] 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 travel to the United States with her two children to join her husband, [REDACTED] who is a U.S. citizen.

The OIC concluded that [REDACTED] had failed to establish that extreme hardship would be imposed on her qualifying relative, her husband, and denied the Application for Waiver of Ground of Inadmissibility (Form I-601) accordingly. *Decision of the OIC*, dated February 9, 2006.

On appeal, counsel for the applicant asserted that the OIC erred in finding that [REDACTED] would not suffer extreme hardship if his wife and step-children were denied admission, and that substantial evidence was submitted to show that he would suffer severe emotional hardship due to separation from his wife. In support of these assertions, counsel submitted a brief, dated March 7, 2006, that addressed all of the factors to be considered in the determination of extreme hardship, as set forth in *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).¹

Documents in the record as attachments to counsel's brief or to [REDACTED] I-601, dated August 14, 2005 include: (1) a Statement by [REDACTED] in support of [REDACTED] I-601, describing the emotional and financial hardships that he will suffer if his wife and his step-children are denied visas, the depression, anxiety and feelings of guilt and loneliness he currently suffers due to separation from his wife; the stress associated with leaving his extended family in Utah; and the difficulty of making a decision to leave his elderly father, which would mean risking never seeing him again; (2) a letter from [REDACTED] employer, dated September 15, 2005, noting that the stress and uncertainty of [REDACTED] situation has negatively affected his work and compelled [REDACTED] to use the Employee Assistance Program, "a confidential counseling and referral service designed to help employees . . . deal with crisis situations which interfere with their job or personal life"; (3) a letter from [REDACTED] family doctor, dated August 4, 2005, confirming his treatment for anxiety and stress related to separation from his wife; (4) a Beck Scale Interpretive Report, based on tests administered in September 2005, that notes that [REDACTED] shows "elevated levels of depression, hopelessness, and anxiety"; (5) a letter from Licensed Clinical Associates, dated March 2, 2006, confirming [REDACTED] symptoms of "anxiety and depression . . . severe grief reactions and feelings of anxiety" and noting that [REDACTED] suffers from "feelings of guilt . . . for the unreasonable belief of having contributed to the loss of his wife and not being able to resolve the situation"; (6) a Confidential Psychological

¹ The AAO notes that *Matter of Anderson* remains relevant to a hardship determination; the factors enumerated in that case, however, have been modified in a more recent BIA decision, *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), which considered "extreme hardship" in the context of changes made to the law pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

Evaluation, based on four sessions with a clinical psychologist conducted in February and March 2006, in which [REDACTED] reported a pattern of depression and anxiety which began when his wife left for Argentina in June, 2003 [and] became exacerbated in July, 2005 when she was denied a visa to reenter the United States and told that she might have to wait ten years before reapplying . . .”; in the doctor’s opinion, “[t]he severe emotional trauma deriving from the separation from his wife has been compounded by Mr. [REDACTED] extreme concern over his father’s failing health. [During the time of the evaluation] his father was hospitalized and placed in the intensive care unit of a local hospital due to acute respiratory problems. . . . Mr. [REDACTED] who is prone to ruminations of regret, would have his depression and anxiety exacerbated as a result of separating from his father and his mother”; (7) a letter from the doctor who treats [REDACTED] father, dated August 4, 2005, noting that his father has dealt with “multiple significant health conditions for the past 2-3 years . . . [including] aortic stenosis and congestive heart failure, . . . carotid artery stenosis [for which he] is considering surgical treatment . . . [and] chronic pulmonary disease requiring oxygen therapy” and stating that it is imperative for [REDACTED] to remain in Utah to assist in his father’s care and that the father’s current medical conditions create a potential for stroke, “putting the patient in a situation where significant assistance from family members is necessary”; (8) letters from two couples attesting to Mrs. [REDACTED] good character and volunteer work with the Church of the Latter Day Saints in Utah and the circumstances of a serious traffic accident [REDACTED] was involved in 2002 and the extensive follow-up care that was needed; (9) financial records, including a September 2005 earnings statement for [REDACTED] indicating a salary of \$40,595 as of September 16, 2005; his mortgage statement; and Western Union Money Transfers from [REDACTED] to his wife in Argentina indicating regular payments (every two-four weeks) in the amount of \$100 - \$200 from December 2003 through August 2005; and (10) various reports on human rights and socio-economic indicators for Argentina, including by the U.S. Department of State and the United Nations Statistics Division. The entire record was reviewed and considered in rendering this decision.

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.

Regarding the OIC's finding that [REDACTED] is inadmissible pursuant to this section, the record reflects that she entered the United States under the Visa Waiver Program in January 2002 and returned to Peru on June 16, 2003; she thus overstayed her 90-day visa and remained unlawfully in the United States for more than one year. In applying for an immigrant visa [REDACTED] seeking admission within 10 years of her 2003 departure from the United States. She 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 one year or more and again seeking admission within 10 years of the date of her departure. Counsel for the applicant does not contest this finding.

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 herself experiences if she is denied admission is irrelevant to section 212(a)(9)(B)(v) waiver proceedings; hardship to her, therefore, will be considered only insofar as it results in hardship to a qualifying relative in the application, in this case, Mrs. [REDACTED] U.S. citizen husband.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

U.S. courts have stated, "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). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (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). Separation of family will therefore be given the appropriate weight in the assessment of hardship factors in the present case.

In examining whether extreme hardship has been established, the BIA has held:

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).

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).

The record in this case reflects that [REDACTED] was born in Ogden, Utah in October 1974 and has lived in or near Ogden his entire life. According to information he shared with the clinical psychologist, he is the youngest of four siblings and has maintained a close relationship with his family; his parents and two brothers reside in or near Ogden, and he has a network of family members and close friends in Utah whom he has known for over 20 years; he began work at the age of 17 to contribute to his family's finances, holding various jobs at a department store, a supermarket, as a telemarketer and salesman, and in his current job as a sales representative for a cellular phone company since October 2000. *See Confidential Psychological Evaluation*, March 7, 2006. [REDACTED] stated that he met his wife towards the end of 2002, they fell in love and became "inseparable" in 2003, and, after she returned to her small town in Argentina in 2003, he regretted not marrying her before she left. *Id.* After her departure, he visited her and her children, whom he has come to consider his own, several times, and they were married in Argentina in November 2003. Mrs. [REDACTED] was born in a small town in Argentina, has a secondary education, and currently resides in her hometown where she is unemployed and cares for her two children. *See I-601*. The record also shows that [REDACTED] father, who is approximately 80 years old, is extremely ill, and that [REDACTED] fears he will never see him again if he leaves the United States to join his wife in Argentina. *Id.*; *see also Statement by Mr. [REDACTED] in support of I-601*. Numerous affidavits in the record from doctors, including clinical psychologists and medical doctors, discussed in detail above, indicate that, since the time that his wife was denied a visa in July 2005, [REDACTED] has been diagnosed with and has suffered extreme depression and anxiety as a result of separation from his wife, feelings of guilt, and extreme anxiety related to his personal responsibility towards his father and the possibility of having to leave him and his family. The record also shows that [REDACTED] has been employed since October 2000 as Assistant Manager or Sales Representative at Cricket Comfortable Wireless, earning over \$40,000 in 2005; he pays a mortgage on his house; and he regularly wires money to Argentina to support his wife and step-children.

The AAO recognizes that [REDACTED] and his wife and step-children would suffer economic detriment and his wage-earning potential would be diminished if he moved to Argentina. On his current salary, he supports himself in the United States and his wife and her children in Argentina. If he moved to Argentina, giving up his current employment, their standard of living would be severely reduced, given his inability to use his sales and managerial skills in Argentina and poor job prospects there. In addition, he would lose his home, be uprooted from the only life he has known and be separated from close friends and family. He would also be forced to leave his elderly father who is in poor health. Doctors have recommended that he remain in the United States to help care for his father, and [REDACTED] does not want to leave him. His anxiety over this possibility has been well documented. To avoid these hardships, [REDACTED] could choose to remain in the

United States separated from his wife. However, based on evidence in the record, the stress, anxiety and depression that he currently suffers due to such separation would be exacerbated by such an arrangement.

Considering the relevant facts of this case in the aggregate leads to the conclusion that [REDACTED] would suffer extreme hardship were he to join his wife in Argentina or remain in the United States without her. Separation has been extremely difficult, emotionally and psychologically for [REDACTED]. Living in the United States apart from his wife has resulted in extreme anxiety and depression that has affected all aspects of his life, including his ability to work. His prospects in Argentina are poor, and if he gave up his life and work and home in the United States, he would not only suffer financial hardship, but the resultant separation from his ailing father would form the basis for further stress and anxiety. Such a move would also result in separation from his close relatives and friends and the emotional support they provide. Though any one of these factors may not amount to extreme hardship, a finding of extreme emotional, psychological, personal and financial hardship is the inevitable conclusion when viewed in the aggregate. A discounting of the extreme hardship [REDACTED] would face in either the United States or Argentina if his wife were refused admission is not appropriate. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission. 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 rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factor in the present case is [REDACTED] prior period of unlawful presence in the United States for which she now seeks a waiver. The favorable and mitigating factors in the present case are the extreme hardship to her husband if she were refused admission, her otherwise clean background, and her positive involvement in her church community during her brief time in the United States.

The AAO finds that, although the immigration violation committed by the applicant was serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.