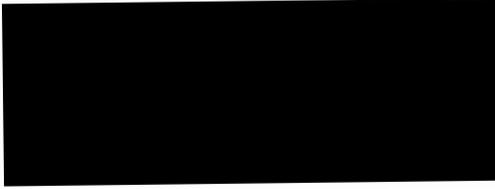




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



H4

FILE:



Office:



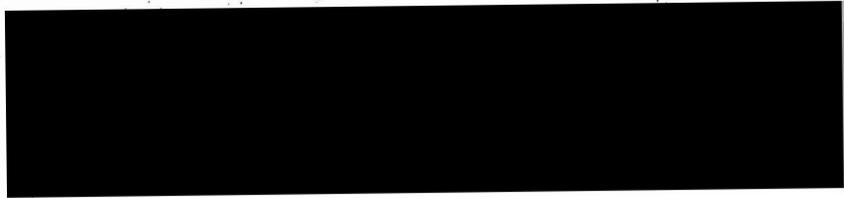
Date: JUL 17 2006

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(6)(C) and 212(a)(9)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1182(a)(6)(C) and (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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting 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 Peru who was found to be inadmissible to the United States pursuant to section 212(a)(C)(6)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(C)(6)(i), for procuring a fraudulent Alien Registration Card and fraudulent Social Security card in order to work in the United States, and 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(i) of the Act, 8 U.S.C. § 1182(i) and 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 to join his wife [REDACTED] and their three children, all of whom are Lawful Permanent Residents (LPR).

The OIC concluded that [REDACTED] had failed to establish that extreme hardship would be imposed on his qualifying relative [REDACTED] and denied the Application for Waiver of Ground of Inadmissibility (Form I-601) accordingly. *Decision of the OIC*, dated October 26, 2004.

On appeal, counsel for [REDACTED] and [REDACTED] noted that the standard for determining extreme hardship to a qualifying relative, in this case a Lawful Permanent Resident spouse, is the same for both grounds of inadmissibility applicable to [REDACTED] and that [REDACTED] and [REDACTED] have met this standard. In support of this statement, counsel submitted a brief, dated December 6, 2004, that addressed all of the factors to be considered in the determination of extreme hardship, as set forth in *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999). Documents attached to the brief included: (1) an affidavit by [REDACTED] affirming her marriage to [REDACTED] in 1983, her extensive family ties in the United States and lack of family in Peru, her depression during the prior year when her husband was denied a waiver of inadmissibility, the emotional and financial support she receives from her extended family in the United States, and lack of job opportunities in Peru, for women in general and for her in particular, given her limited education; (2) an affidavit by [REDACTED] mother, a U.S. citizen, confirming the depression suffered by [REDACTED] and stating that [REDACTED] and her children live with her and benefit from having the family support available in the United States; (3) a psychiatric intake and evaluation form for [REDACTED], dated November 11, 2004, documenting depression and attempted suicide; (4) a doctor's letter stating that [REDACTED] was admitted to the Connecticut Mental Health Center inpatient unit and diagnosed with "adjustment disorder (depressive type)," and noting that symptoms were related to recent news regarding her husband's inability to move to the United States and that, given the level of family support available to [REDACTED] in the United States, "it was imperative for [REDACTED] to join her [in the United States] and not vice-versa"; (5) a United Nations report on implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) noting that women in Peru have limited access to work due to "centuries of ingrained historical and cultural conditions that have led to a generic divide in the workplace and to an unequal distribution of resources between men and women." (Committee on the Elimination of Discrimination against Women, "Consideration of reports submitted by States parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women," CEDAW/C/PER/5, March 6, 2001); (6) a report by the United Nations Office of the High Commissioner for Human Rights noting that according to a report

submitted by Peru to the Committee on the Elimination of Discrimination against Women, “81 per cent of all women are unemployed or underemployed (“Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Peru, May 31, 1995); and (7) a letter from [REDACTED] employer attesting to her employment as a “maintenance person” for approximately 20 hours per week. See *Appellant’s Brief*, received by the AAO December 10, 2004. Also in the record were statements from [REDACTED] and [REDACTED] regarding the financial difficulties facing the family in Peru and the importance of allowing [REDACTED] to come to the United States to provide economic and emotional support to his wife and family. See *Application for Waiver of Ground of Inadmissibility (Form I-601)*, dated April 6, 2004.

Section 212(a)(6)(C)(i) of the Act provides:

In general.—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.

Section 212(i) of the Act provides:

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

The OIC in Lima found [REDACTED] inadmissible under section 212(a)(6)(C)(i) of the Act because “[h]e sought and obtained employment in violation of federal law. He procured a fraudulent Alien Registration Card as well as a fraudulent Social Security Card in order to derive these [sic] benefits.” *Decision of the OIC*, dated October 26, 2004. These actions, however, are not grounds for inadmissibility under section 212(a)(6)(C)(i) of the Act. The BIA has made it clear that “working in the United States is not ‘a benefit provided under this Act,’” and that the use or possession of a fraudulent document is not the equivalent of fraud or misrepresentation under section 212(a)(6)(C)(i) of the Act. See *Cervantes-Gonzalez, supra* at 571 [REDACTED] and [REDACTED] concurring) (clarifying that the benefit sought by the respondent was the right to travel with a U.S. passport and that the decision of the majority “may be misinterpreted as suggesting that using the fraudulent passport to obtain employment is obtaining a benefit under the Act”). In his concurring opinion, [REDACTED] adds, “It is long settled that inadmissibility for immigration fraud does not ensue from the mere purchase of fraudulent documents, absent an attempt to fraudulently use the document for immigration purposes.” *Id.*, citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975); *Matter of Sarkissian*, 10 I&N Dec. 109 (BIA 1962); *Matter of Box 10* I&N Dec. 87 (BIA 1962); *Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991); *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992).

The record reflects that [REDACTED] admitted that he “bought [a] fake green card and SSN” after he entered the United States in 1999. *Interview Notes from Visa Interview*, Lima, Peru, November 14, 2003. These actions, though unlawful, were not for the purpose of procuring “a visa, other documentation, or admission

into the United States or other benefit provided under [the INA].” As [REDACTED] is not inadmissible under section 212(a)(6)(C)(i) of the Act, a waiver of this ground of inadmissibility is not required. However, as discussed below, [REDACTED] inadmissible under section 212(a)(9)(B) of the Act, and his waiver application remains relevant.

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 he entered the United States with a tourist visa in approximately January or February 1999 and remained unlawfully in the United States until he returned to Peru in October 2003, thus remaining unlawfully present for more than one year. In applying for an immigrant visa [REDACTED] is seeking admission within 10 years of his 2003 departure from the United States. He is, therefore, inadmissible to the United States under section 212(a)(9)(B)(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 his departure.

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 himself experiences upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. Neither the U.S. citizen mother of [REDACTED] nor the [REDACTED] three LPR children are qualifying relatives. Thus, hardship suffered by them will be considered

only insofar as it results in hardship to a qualifying relative in the application, in this case, [REDACTED] wife, who is an LPR.

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*, *supra* at 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 LPRs 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. The age of the qualifying relative may be an additional relevant factor. *See Matter of Pilch*, 21 I&N 627, 630 (BIA 1996). 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] who is 49 years old, and [REDACTED] who is 48 years old, have been married for 23 years. They have three sons who have been LPRs since December 2003, when they and their mother moved together to the United States. [REDACTED] and their sons reside with her mother, a U.S. citizen, and father, an LPR, in Hartford Connecticut. Seven siblings (one U.S. citizen, five LPRs, one applicant for adjustment), and 24 nieces and nephews and 5 five grand-nieces and nephews (eight U.S. citizens and 21 LPRs) live in close proximity, and no relatives, other than her husband and a sister who is in the process of obtaining an immigrant visa, remain in Peru. *See Appellant’s Brief and Exhibits.* [REDACTED] works part time for a janitorial company, but states that her extended family provides crucial financial and emotional support for her and her children. Though she became extremely depressed when she found out that her husband had been denied a waiver of inadmissibility, and sought treatment for this condition (*see Id.*, and discussion of medical report and doctor’s letter, *supra*), she does not want to be separated from her elderly parents and all of her other family members by returning to Peru. *Appellant’s Brief and Exhibits, supra.* In addition to the emotional hardship she would suffer if she chose to return to Peru, [REDACTED] contends that she would suffer extreme financial and emotional hardship whether she remained in the United States without the applicant or traveled to Peru in order to reside with the applicant. The record reflects that, given conditions in Peru, it has been impossible for [REDACTED] to provide financial support for his family, neither [REDACTED] nor [REDACTED] have marketable job skills, and United Nations reports, though somewhat outdated, confirm the lack of job opportunities in Peru, for women in general and for [REDACTED] in

particular, given her limited education. *Supra.* Counsel has submitted medical documentation to show that [REDACTED] is severely depressed, in fact suicidal, as a result of separation from her husband. It appears that this condition would be alleviated were the couple to reunite, whether in the United States or Peru. *Id.*

Considering the relevant facts of this case in the aggregate leads to the conclusion that [REDACTED] would suffer extreme hardship were she to join her husband in Peru or remain in the United States without him. She and her husband are approaching 50 and have been married for over 20 years. Separation is extremely difficult, emotionally and psychologically for [REDACTED]. Indeed, her attempts at suicide and her medical diagnosis of "adjustment disorder (depressive type)" on account of the separation leads to a conclusion that [REDACTED] will suffer continued emotional instability and depression in the United States if her husband is not allowed to join her. Living in the United States and supporting her children without the additional income her husband could provide if he were able to work in the United States has also been extremely difficult for her. Though she has managed to find employment in the United States, her prospects in Peru are poor. Her lack of work opportunity, given her age and minimal education as well as conditions in Peru, especially for women, means that she would most likely be unemployed were she to return to Peru. Separation from all of her close relatives, including elderly parents, who currently provide much needed financial and emotional support, would also be the result of a return to Peru. Though any one of these factors may not amount to extreme hardship, a finding of extreme emotional 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 Peru if her husband 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-González* factors, cited above, supports a finding that [REDACTED] faces extreme hardship if the applicant is refused admission.

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 he now seeks a waiver. The favorable and mitigating factors in the present case are the extreme hardship to his wife if he were refused admission, his otherwise clean background, and his wife's significant family ties to U.S. citizens or LPRs 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.