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U.S. Citizenship
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Services

H4

[Redacted]

FILE: [Redacted] Office: LIMA, PERU

Date: MAY 30 2007

IN RE: [Redacted]

PETITION: 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 PETITIONER:

[Redacted]

EXHIBIT 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant, a citizen of Peru, was found inadmissible to the United States under 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. The applicant is the spouse of a United States citizen, and 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 return to the United States to join her husband.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on any qualifying relatives and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility.

On appeal, counsel contends that the applicant's husband, a United States citizen, would suffer extreme hardship if the applicant is refused admission into the United States. 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.

Regarding the applicant's grounds of inadmissibility, the record reflects that she entered the United States, without inspection, and with the assistance of smugglers, in July 2000. She admits to paying more

than \$5,000 in order to be smuggled into the United States. She departed the United States in April 2006. The instant Form I-601 was filed on July 13, 2006.

Accordingly, the OIC found the applicant inadmissible based upon the nearly six-year period of time that she was unlawfully present in the United States. As she had resided unlawfully in the United States for more than one year and then sought admission within ten years of her last departure, the OIC correctly found the applicant inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

Section 212(a)(9)(B)(v) of the Act provides that a waiver of section 212(a)(9)(B)(i)(II) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Congress specifically does not mention extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant herself a permissible consideration under the statute. In the present case, the applicant's husband is the only qualifying relative, and hardship to the applicant or her son cannot be considered, except as it may affect the applicant's husband.

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, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court of Appeals for the Ninth Circuit defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Ninth Circuit emphasized that the common results of deportation are insufficient to prove extreme hardship. The United States Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

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 alien 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. In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted), the BIA held that:

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.

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion favorably to the applicant. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The record reflects that the applicant's husband is a fifty-five-year-old citizen of the United States. He and the applicant were married on December 12, 2004, after a 19-month courtship.

The record contains affidavits from the applicant, her husband, and her husband's medical services providers.

In a July 11, 2006 affidavit, the applicant states her great love for her husband; describes their courtship and marriage; states that she married her husband for love and not immigration benefits; and states that she misses her husband and is anxious to re-join her husband in the United States.

In his undated affidavit submitted with the Form I-601, the applicant's husband stated that he and the applicant have grown very close; stated that he loves and cares for the applicant's son as though he were his own son; stated that he and the applicant have shared both good times and bad times in their marriage; stated that he cannot relocate to Peru, as he would suffer a decline in his standard of living; and stated that this applicant is a dedicated and loving person.

On appeal, the applicant's husband submitted an updated affidavit, dated January 4, 2007, in which he stated that, at the time the Form I-601 was filed, he did not properly register the seriousness of the family's situation or understand the burden of proof they were required to meet, as he was still recovering from a stroke he had recently suffered. Accordingly, he states, he wishes to submit further evidence regarding the hardship that he suffers as a result of the applicant's inadmissibility. He states that he suffered the aforementioned stroke in June 2005 and that his doctor tells him he is likely to suffer additional small strokes in the future; that although he was able to get to the hospital before his stroke had devastating consequences, that this was only because the applicant was present and able to call for help; that he is fearful of having another stroke and being unable to call for assistance; that he is presently on medication but suffers from bouts of forgetfulness; that he suffers from stress and that his doctor worries that this stress could lead to another stroke; that his doctor wants him to avoid all stressful situations; and that he cannot move to Peru due his condition and a son from his first marriage.

The record also contains a December 18, 2006 letter from [REDACTED] who has been the applicant's husband's doctor since 1991. [REDACTED] verifies that the applicant's husband suffered a stroke in June 2005, that he still experiences forgetfulness and loss of concentration, and that he has been taking aspirin and zocor since that time. [REDACTED] states that the applicant's husband is like to have recurrent stroke episodes if subjected to stress and, accordingly, was advised to reduce his number of hours worked weekly. He states that the stress of separation from his wife has been detrimental to the applicant's husband's health and overall well-being, and recommends that the waiver application be granted. Copies of medical records documenting the applicant's husband's medical condition were also submitted with [REDACTED]'s letter.

The record also contains a December 20, 2006 neuropsychological evaluation from [REDACTED] Psy.D., Q.M.E. [REDACTED] states that separation from the applicant "has worsened his state of depression and has left him helpless and vulnerable when dealing with the cognitive and physical sequelae that his stroke has caused." [REDACTED] states that he concurs with [REDACTED] that the applicant's husband's emotional problems (i.e., separation from the applicant) are significantly affecting his functional capacity,

and that as long as he is separated from his wife and her son, the stress resulting from this separation will continue to affect his well-being. He recommends that the waiver application be approved.

The AAO notes that [REDACTED] conclusions were reached after only two meetings with the applicant's husband and that there appears to be no ongoing doctor-patient relationship between the two. Therefore, his conclusions do not reflect the insight and elaboration commensurate with an established relationship. However, the AAO also notes that the conclusions reached in this letter are consistent with the conclusions of [REDACTED], with whom the applicant's husband has had an ongoing relationship since 1991, as well as with the other evidence of record.

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).

In addition, the Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United States," and that, "[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." (Citations omitted.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be considered in the assessment of hardship factors in the present case.

The AAO finds that the applicant's husband would face extreme hardship if the applicant is required to remain in Peru. If he remains in the United States without the applicant, he would face setbacks in his medical treatment, as attested by the doctor treating the husband's wife, as well as the neuropsychologist who evaluated him. He needs her assistance in managing his current condition, and her presence in the home will help to minimize the damage that could result from future stroke episode which, as indicated by his doctors, are distinct possibilities. The AAO also finds that he would face extreme hardship if she were to relocate to Peru. A citizen of the United States by birth, the applicant's husband would suffer a disruption of his current medical care as well as a reduced level of medical care if he were to move to Peru, and he would also leave a son from his first marriage behind if he were to depart the United States.

Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe.

The favorable factors in this matter are the extreme hardship the applicant's husband faces as a result of the applicant's inadmissibility, regardless of whether he joins her in Peru or remains in the United States without her, a United States citizen spouse, an approved I-130 petition, and apparent lack of a criminal record. The unfavorable factors in this matter are the applicant's nearly six-year period of unlawful presence in the United States, her initial illegal entry, and periods of unauthorized employment.

While the AAO does not condone her actions, the AAO finds that the hardship imposed on the applicant's husband as a result of her inadmissibility outweighs the unfavorable factor in this application. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i), the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the waiver application approved.

ORDER: The appeal is sustained. The waiver application is approved.