

Identifying information to
prevent identity information
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529



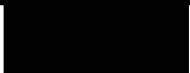
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H4



FILE:



Office: LIMA, PERU

Date:

OCT 24 2008

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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Officer-in-Charge, Lima, Peru, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed. The application will be denied.

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)(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. Ms. [REDACTED] sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the Officer-in-Charge denied, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the Officer-in-Charge, dated June 6, 2006.*

The AAO will first address the finding of inadmissibility.

Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.²

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* DOS Cable, note 1. *See also* *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).

[REDACTED] entered the United States from Mexico without inspection on June 17, 2001, and voluntarily departed from the country on October 1, 2005. From her arrival to her departure date, [REDACTED] accrued four years of unlawful presence, and when she voluntarily departed from the country, she triggered the ten-year-bar. The Officer-in-Charge's finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II), is correct.

The AAO will now address the finding that the grant of a waiver of inadmissibility is not warranted.

Section 212(a)(9)(B) of the Act provides that:

¹ Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-060539 (April 4, 1998).

² *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

- (v) Waiver. – The Attorney General [now Secretary, 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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant and to his or her child is not a consideration under section 212(a)(9)(B)(v) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is [REDACTED] the applicant’s naturalized citizen spouse. Thus, any hardship to [REDACTED]’s son will be considered only to the extent that it results in hardship to [REDACTED]. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

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 (BIA) 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. 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).

In *Perez*, the Court of Appeals defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation, *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), and states that “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991).

Applying *Cervantes-Gonzalez* here, extreme hardship to [REDACTED] must be established in the event that he joins his wife, and alternatively, that he remains in the United States without her. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The claim is made on appeal that [REDACTED]'s son has severe asthma and requires care twice a month and cannot live with [REDACTED] in the United States without the applicant's assistance. The record contains two letters by [REDACTED], M.D., regarding [REDACTED]'s son. Ms. [REDACTED]'s letter dated June 15, 2006, states that the [REDACTED] son, who was born on March 7, 2004, had pneumonia twice, and is under her care for asthma; she indicates that he requires nebulized steroids and bronchodilators and that she regards his asthma as a serious medical condition requiring regular evaluation and bi-monthly care. The medical records by [REDACTED] dated July 19, 2004 and July 13, 2004, reflect that the [REDACTED] son will need an in-home hand-held nebulizer because his "ability to breathe is severely impaired." Medical records show that on December 30, 2004, the applicant's son had difficulty breathing and was seen in the emergency department, and diagnosed with early pneumonia. The AAO notes that the [REDACTED] son is presently living with his mother in Peru, that [REDACTED] claims her son was hospitalized in Peru, and that her husband now holds a second job to pay for those expenses, which would have been covered by her husband's medical insurance if their son had been in the United States. The record contains medical records, invoices, and a letter by Mr. [REDACTED] in support of this claim; however, these documents are not translated into the English language. The regulation under 8 C.F.R. § 103.2(b)(3) states that "[a]ny document containing foreign language submitted to U.S. Citizenship and Immigration Services shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." Without the English language translation of these documents, they carry no weight in the hardship assessment. Similarly, the undated and unsigned letter in the record stating that the applicant and her husband were informed to remove their son from his current apartment due to rain damage and mold will be given little weight because its author is unknown.

The AAO acknowledges that it has been held that "the family and relationship between family members is of paramount importance" and that "separation of family members from one another is a serious matter requiring close and careful scrutiny. *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987), citing *Bastidas v. INS*, 609 F.2d 101 (3rd Cir. 1979).

In light of Mr. [REDACTED]'s son's asthma, which his son's treating physician considers a serious medical condition, the AAO finds that the situation of Mr. [REDACTED], if he remains in the United States and is separated from his wife, who is needed to provide emotional and physical care of their son, rises to the level of extreme hardship as required by the Act. The record before the AAO is sufficient to show that the emotional hardship of separation, which will continue to be endured by Mr. [REDACTED], is unusual or beyond that which is normally to be expected upon removal. See *Hassan and Perez, supra*. Thus, the applicant has established extreme hardship to her husband if he were to remain in the United States without her.

It is claimed that Mr. [REDACTED]'s son was hospitalized in Peru and that Mr. [REDACTED] holds a second job to pay for those expenses, which would have been covered by Mr. [REDACTED]'s medical insurance if the [REDACTED] son were treated in the United States. The record, however, contains no documentation of the hospitalization of Mr. [REDACTED]'s son, of health insurance in the United States, or of Mr. [REDACTED]'s second job. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The assertion is made on appeal that *In re Monreal-Aguinag*, 23 I&N Dec. 56 (BIA 2001), conveys that a child with a serious health condition would experience extreme and exceptionally unusual hardship if forced to follow a removed parent to a foreign country. The AAO disagrees with that interpretation of the case because the decision does not discuss the health of a child.

On appeal the claim is made that the applicant's husband would experience extreme hardship if he were unable to obtain employment in Peru. But no documentation has been presented to show that Mr. [REDACTED] would be unable to obtain employment in Peru. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On appeal it is stated that the decisions in *Santana-Figueroa v. INS*, 644 F.2d 1354 (9th Cir. 1995), *Tukhowinich v. INS*, 64 F.3d 460 (9th Cir. 1995), and *Matter of U*, 5 I&N Dec. 413 (BIA 1953), support a finding of extreme hardship where an alien would find it virtually impossible to obtain employment or support his family. Those cases are distinguishable from the one presented here because the applicant here has not provided any documentation demonstrating inability to obtain employment.

Mr. [REDACTED]'s declaration conveys that he wishes for his son to know their family members who live in the United States as legal permanent residents and U.S. citizens and with whom he has a close relationship. *Contreras-Buenfil v. INS*, 712 D.2d 401, 403 (9th Cir. 1983), is cited on appeal to indicate that "[t]he most important single [hardship] factor may be the separation of the alien from family living in the United States." But the AAO finds that separation of Mr. [REDACTED] from his family members in the United States is not sufficient to establish extreme hardship to him because in *Dill v. INS*, 773 F.2d 25 (3rd Cir. 1985), the Third Circuit affirmed the finding of no extreme hardship to the petitioner or to the couple that raised her on account of separation, as the petitioner "is an adult who can establish her own life and need not depend primarily on her parents for emotional support in the same way as a young child."

The claim is made on appeal that the applicant's husband and child have assimilated and adapted to the American lifestyle, that her husband has never lived in Peru, and that *Urbina-Osejo v. INS*, 124 F.3d 1314, 1318 (9th Cir. 1997), conveys that acculturation must be considered in determining hardship. The AAO recognizes that Mr. [REDACTED] adjustment to the culture and environment in Peru will be difficult, but these difficulties will be mitigated by the moral support of his wife and in-laws, which are his family ties to Peru.

Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to Mr. [REDACTED] in the event that he were to join his wife to live in Peru.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in removal has not been met so as to warrant a finding of extreme hardship to a qualifying family member for purposes of relief under 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

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 remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed. The application will be denied.

ORDER: The appeal is dismissed. The application is denied.