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

U.S. Citizenship and Immigration Services

H5

[redacted]

DATE: OCT 1 2 2011 OFFICE: LIMA, PERU

FILE: [redacted]

IN RE: APPLICANT: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, 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 Peru who was last admitted to the United States on February 19, 2004 with a valid B-1/B-2 nonimmigrant visa. The applicant later stated under oath that during the February 2004 visit, she was unlawfully employed for three out of the four months she spent in the United States. She further admitted she worked within three weeks of entry. She was therefore found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or misrepresentation. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative and an approved Petition for Alien Fiancé. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her U.S. Citizen spouse.

The Field Office Director concluded the evidence submitted with the I-601 waiver application failed to establish that the difficulty the applicant's spouse would experience rose to the level of extreme hardship and denied the application accordingly. *See Decision of Field Office Director* dated June 12, 2009.

On appeal, counsel for the applicant contends the applicant's spouse suffers from medical, psychological, and financial difficulties due to the separation from the applicant, and that the applicant's spouse cannot live in Peru because of language difficulties and lack of suitable treatment for his medical conditions. *See brief in support of appeal,* August 11, 2009.

The record includes, but is not limited to, declarations from the applicant and her spouse, evidence of money transfers, identification documents, a psychological evaluation, a letter from the applicant's spouse's physician, copies of prescriptions, photographs, letters from family and employers, documentation on the applicant's parents-in-law's medical conditions, copies of income tax returns, evidence of the spouse's flights to Peru, evidence of correspondence between the applicant and her spouse, and articles on psoriasis and psoriatic arthritis. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

> (i) 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:

> (1) The [Secretary] may, in the discretion of the [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 [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.

In the present case, the record reflects that on February 19, 2004 the applicant entered the United States using a valid multiple-entry B-1/B-2 nonimmigrant visitor visa. The applicant later admitted she began working without authorization three weeks after entry. The applicant left the United States on June 21, 2004 and attempted to re-enter on September 1, 2004 using the same B-1/B-2 visa. During secondary inspection, the applicant admitted under oath she worked without authorization in the United States for three months, and for the September 1, 2004 visit she intended to attend school in the United States without proper authorization.

The Department of State's Foreign Affairs Manual [FAM] provides, in pertinent part:

> If an alien violates his or her nonimmigrant status in a manner described in 9 FAM 40.63 N4.7-1 within 30 days of entry, you may presume that the applicant misrepresented his or her intention in seeking a visa or entry.

DOS Foreign Affairs Manual, 9 FAM § 40.63 N4.7-2. The FAM lists "actively seeking unauthorized employment and, subsequently, becom[ing] engaged in such employment" as a qualifying violation of nonimmigrant status. *DOS Foreign Affairs Manual, 9 FAM § 40.63 N.4.7-1.* Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis to be persuasive. In this case, the applicant admitted engaging in unauthorized employment within three weeks of entry into the United States. The applicant is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for having willfully misrepresented a material fact, her intention in seeking entry, in order to procure admission into the United States. The applicant's qualifying relative is her U.S. Citizen spouse.

Section 212(i) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. 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).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang,* 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

In the brief, counsel asserts the applicant's spouse's would suffer extreme hardship in the form of medical, psychological, and financial difficulties if he remains separated from the applicant and if he relocates to Peru. *Brief in support of appeal,* August 11, 2009. Counsel explains the applicant's spouse "suffers from psoriasis and psoriatic arthritis... [t]he stress of being separated from her has already aggravated his psoriasis and led to insomnia and symptoms of depression." *Id.* In support, the applicant submits a letter from the spouse's physician. Therein, the physician "confirm[s] that after examining on 8/17/2009, he appears to be suffering from a life long condition of arthritis most like[ly] from the association of psoriasis... The attacks can come in waves and [are] exacerbated by various factors including psychological and physical stressors... Present treatment of psoriasis is with clobetasol propionate 0.05%." *Letter from* September 1, 2009. The applicant's spouse further asserts he attempted to get treatment in Peru, but the physician "told [him] of new drugs, which were very expensive that were available in the USA, but not in Peru... Basically all he could do was give [the applicant's spouse] a prescription for a compound topical cream that was similar to the one [he] had used in the past in the USA. [He] used that cream as prescribe[d] with little results." *Declaration of applicant's spouse,* undated.

The applicant's spouse confirms these conditions are impacted by stress and lack of sleep due to the applicant's immigration problems. *Declaration of applicant's spouse,* undated. The applicant's spouse claims he is "extremely depressed," and "has no hope for [his] future" as well as "trouble sleeping." *Id.* A psychologist verifies his "current depressive episode is likely exacerbated by his vulnerability to depression. He explained that he has struggled with depression for most of his life, first experiencing episodes of depression in early adolescence... He reported that the psoriasis has recently worsened because of the stress from being separated from his wife." *Psychological evaluation,* August 20, 2009. The psychologist reports the applicant's spouse "suffered a tragic loss in 2004 when his best friend passed away unexpectedly." *Id.* The psychologist concluded the applicant's spouse suffers from "Major Depressive Disorder, Recurrent, Moderate [and] Adjustment Disorder with Anxiety." *Id.* The applicant's spouse also claims his lack of Spanish language skills and the cultural differences in Peru made him feel "isolated" and lonely. *Declaration of applicant's spouse,* undated. The psychologist confirmed he "became more depressed while living in Peru, feeling as though without being able to live up to his potential vocationally, his 'dreams were destroyed.'" *Psychological evaluation,* August 20, 2009. Furthermore, the applicant's spouse contends he fears for the applicant's safety given an incident where in Peru she was robbed by a person in a taxicab. *Declaration of applicant's spouse,* undated. The applicant's spouse also discusses his concern over his parents' medical conditions, especially his mother's multiple sclerosis, and how living in his parents' house allows him to help his mother whenever needed. *Id.*

Counsel also contends the applicant's spouse suffers from financial hardship whether separated from the applicant or reunited with the applicant in Peru. Counsel explains the spouse "would continue to have to support two households and travel back and forth between the United States and Peru to visit his wife. has been doing this throughout the three years of his marriage already and this has already taken a substantial financial toll on him." *Brief in support of appeal,* August 11, 2009. In support, the applicant submits receipts from Western Union as

evidence of money transfers from the applicant's spouse to the applicant. *See Western Union receipts.* As evidence of the applicant's spouse's income, the applicant submits copies of Federal Income Tax returns from 2004 through 2008. The applicant's spouse adds he could not "see how [he] could work and earn more money" in Peru because of his lack of Spanish language skills. *Declaration of applicant's spouse,* undated. The applicant's spouse describes various places he has worked in the United States, including Starbucks, a movie set, and at Carraba's Italian Grill. *Declaration of applicant's spouse,* undated. The applicant submits a letter from Carraba's Italian Grill, confirming his employment and verifying his eligibility for health insurance coverage in January 2010. *Letter from* September 10, 2009.

The applicant has submitted sufficient evidence to show financial hardship to her spouse. Even though the applicant fails to provide any evidence regarding her own employment and earnings, the applicant's spouse's income for the years 2006, 2007, and 2008, as shown by his federal income tax returns, is inadequate to meet either 100% or 125% of the minimum income requirement for a household of two, or to pay for frequent trips to Peru. *See I-864P, Poverty Guidelines,* March 1, 2011, *see also 2006-2008 federal income tax returns.* The applicant's spouse saves money by living with his parents. *Declaration of applicant's spouse,* undated. Moreover, the applicant's spouse has tried to live in Peru, was not employed in Peru, and expresses a reasonable concern about whether, given his lack of Spanish language skills, he could be employed in Peru. *Id.* As such, the AAO finds the applicant has shown her spouse suffers from significant financial hardship either separated from the applicant or while in Peru.

The applicant has established her spouse suffers from psoriasis and psoriatic arthritis. The spouse's physician confirms "he appears to be suffering from a life long condition of arthritis most like[ly] from the association of psoriasis." *Letter from* , September 1, 2009. The physician also reveals the "[p]resent treatment of psoriasis is with clobetasol propionate 0.05%."[1] *Id.* The applicant's spouse explains that he tried to obtain treatment in Peru, but the treatment he was given was ineffective. *See declaration of applicant's spouse,* undated. Moreover, the applicant's spouse's physician indicates his medical condition is "exacerbated by various factors including psychological and physical stressors." *Letter from* September 1, 2009. The applicant's spouse explains the "condition worsened even more so while [l]iving with [the applicant] in Peru." *Declaration of applicant's spouse,* undated. The spouse claims the "stress and lack of sleep [d]ue to [their] current situation" have added to his suffering. *Id.* The psychologist confirms he "has a medical condition known as psoriatic arthritis which is exacerbated by stress." *Psychological evaluation,* August 20, 2009. There is sufficient evidence to show the applicant's spouse's medical condition has been aggravated by psychological factors due to the applicant's situation. Accordingly, the AAO finds the applicant has established her spouse suffers from significant hardship due to his medical conditions.

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[1] The record contains copies of medical records, including hand-written progress notes containing medical terminology and abbreviations that are not easily understood. The documents submitted were prepared for review by medical professionals and are otherwise illegible or indiscernible. As such these notes do not add substantive information to the physician's September 1, 2009 letter.

The psychological evaluation also indicates the applicant's spouse suffers from a "Major Depressive Disorder," an "Adjustment Disorder with Anxiety," and that he has "denied current suicidal or homicidal intent." *Id.* concludes: "His depression, anxiety, psoriasis and arthritis will likely worsen unless his psychosocial situation improves. It is the professional opinion of the evaluator that being separated from his wife will cause a severe emotional and medical hardship for him." *Id.* However, the psychologist also reports the applicant's spouse "has struggled with depression for most of his life, first experiencing episodes of depression in early adolescence." *Id.* Furthermore, the applicant's spouse was present when the applicant was robbed in Lima, and consequently worries about the applicant's safety. *Declaration of applicant's spouse,* undated. The AAO thus finds the applicant's spouse's overall psychological condition, which includes a lifelong history of depression, anxiety, concern about the applicant's safety, and the connection with his physical health, is a contributing factor to a finding of extreme hardship. In this case, the applicant has therefore established that, when individual factors are considered in the aggregate, her spouse would experience extreme hardship given their current separation.

There is also sufficient evidence to show the spouse would suffer extreme hardship upon relocation to Peru. The applicant's spouse has already attempted to live in Peru with his spouse. *Declaration of applicant's spouse,* undated. In his declaration, the spouse describes in detail the reasons why he was unable to continue living in Peru. Therein, the spouse states: "I lived with her [in Peru] for about 10 months... but it was in this time I found it to be extremely difficult for me emotionally not seeing my family in the U.S... Psychologically this was extremely difficult not being able to communicate my ideas and thoughts to anybody but Jessica... I felt very much isolated... My medical condition worsened extremely...Because of my lack of command for the Spanish [language] I did not see how I could work and earn more money if I continued to live there..." *Id.* Furthermore, the applicant indicates he worries about his mother, who has multiple sclerosis, and helps to take care of her when he lives with her. *Id.* The spouse's language skills, his prospects for employment, his lack of family and community ties in Peru, and lack of treatment for his medical condition are especially significant in light of the fact that the spouse has already tried to live in Peru. The AAO thus finds when all these factors are considered cumulatively, the applicant has established that her spouse would suffer extreme hardship upon relocation to Peru.

Considered in the aggregate, the applicant has established that the applicant's spouse would face extreme hardship if the applicant's waiver request is denied.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

> We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra,* is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

> The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and

circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors include the extreme hardship to the applicant's spouse, the applicant's lack of a criminal history, and some family ties in the United States. The unfavorable factors include the applicant's misrepresentation, her unlawful employment, and her attempt to attend school in the United States without proper authorization.

Although the applicant's violations of immigration law cannot be condoned, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

ORDER: The appeal is sustained.