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



U.S. Citizenship
and Immigration
Services

H6

DEC 07 2010

FILE: [REDACTED] Office: LIMA, PERU Date:

IN RE: Applicant: [REDACTED]

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:

[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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant 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 and seeking readmission within 10 years of her last departure from the United States. The record indicates that the applicant is married to a United States citizen and she is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 reside in the United States with her United States citizen husband and children.

The Officer-in-Charge found that the applicant failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Officer-in-Charge*, dated February 27, 2008.

On appeal, counsel states that the applicant has established that the applicant's spouse would suffer extreme hardship as a result of separation. Counsel submits a brief and additional evidence. *See, Form I-290B and attachments.*

The record includes a statement from the applicant's husband detailing the hardship claim; psychological evaluations describing the impact of the applicant's separation on the applicant's spouse and children, and on the applicant; letters from the applicant's spouse, employer and his coworkers; and, counsel's brief. *See statements from [REDACTED]; Psychological Evaluation Reports from [REDACTED], dated April 14, 2008, and from the Ministry of Health, Center of Health San Luis, Peru, dated April 22, 2008; and, Counsel's brief and attachments submitted with the appeal.* The entire record was reviewed and considered in arriving at a decision on the appeal.

In the present application, the record indicates that the applicant entered the United States in November 1999, without inspection, and remained in an unlawful status until May 19, 2007, when she departed for Peru. On October 14, 2005, the applicant's spouse filed a Form I-130 on behalf of the applicant. On October 13, 2006, the applicant's Form I-130 was approved. On June 15, 2007, the applicant filed a Form I-601. On February 27, 2008, the Officer-in-Charge denied the Form I-601, finding that the applicant accrued more than a year of unlawful presence and failed to demonstrate extreme hardship to her United States citizen spouse.

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.

The applicant accrued unlawful presence from November 1999, until May 19, 2007, the date the applicant departed the United States. The applicant is attempting to seek admission into the United States within 10 years of her May 19, 2007 departure from the United States. Counsel does not dispute that the applicant accrued more than one year of unlawful presence.

The AAO finds, therefore, that the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

The Attorney General [now Secretary of Homeland Security] 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 . . . 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 on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or her children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by

remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

In his statement, the applicant’s husband states his family needs the applicant in the United States because her absence causes emotional hardships and will negatively affect their young children. He states that he is now “seriously dispirited” since the applicant’s departure to Peru. The applicant also states that the applicant’s absence causes him financial hardship. It is noted, however, that the applicant

does not provide financial details to enable an assessment of the financial hardship caused by his wife's absence. In her psychological report, [REDACTED] states that "Financially, the immigration problem has been a severe drain on [the applicant's husband's] resources, adding to his anxiety." [REDACTED] also states that the applicant took a \$40,000 second mortgage and all but \$10,000 of it "has been consumed," and "The remaining possibilities are to use his 401K, which would have big tax and investment consequences, going into credit card debt, which is a black hole, or selling the house." [REDACTED], however, does not indicate how she derived that financial information and how she arrived at these financial consequences. Counsel also states that the applicant's "financial strain has been prevalent due to numerous phone calls and contact with his wife." However, counsel does not provide financial details to enable the AAO to assess the nature and extent of the financial hardship, if any, the applicant will suffer.

In her psychological assessment [REDACTED] noted that the applicant's spouse "came to be evaluated for stress resulting from a forced separation ... due to a protracted immigration," and states that the applicant's husband "is suffering now from a reactive depression caused by the year of separation from his little daughter and his wife, ... that "His depression is further deepened by uncertainty about whether [the applicant's] [immigration] status will have to remain the same for the next 10 years;" and concludes that the "[applicant's husband] qualifies for a diagnosis of Major Depression." It is noted that Dr. [REDACTED] recommends referral to a Psychopharmacologist "for antidepressants and sleep medication," and, "Supportive psychotherapy would be helpful ... in bearing the emotional stress of the lengthy separation ... and the anxiety of not knowing whether or when the immigration problem will be resolved." Letters from the applicant's co-workers state that they have noticed changes in the applicant's husband's behavior since the applicant's departure. A letter from [REDACTED], the applicant's spouse's former wife (with whom he shares joint custody of his son), states that because her former husband has had difficulty coping with the issues his present wife faces, his relationship with their son has deteriorated.

Counsel refers to a psychological report, dated April 22, 2008, from the Ministry of Health, Center of Health San Luis, Peru, and states that the applicant has been diagnosed as "suffering from both depression and hypertension, stemming from her separation from her husband;" and that "concerns about her health transfer into hardships on the part of her husband." Counsel also states that because of separation the applicant's husband is under added emotional stress because he has been unable to "provide a strong father and role model for his own son, [REDACTED]"

The AAO notes that the applicant's spouse will experience some emotional stress being separated from the applicant and his child. However, it has not been established that the emotional stress the applicant's spouse experiences is beyond that which would normally be experienced by families that are separated.

The AAO also notes that the applicant's children may experience some hardship because the applicant is in Peru; however, the applicant's children are not qualifying relatives for a waiver under section 212(a)(9)(B)(v) of the Act. The AAO does not find, in this case, that the impact of the applicant's separation from the family has had an impact on the children which has caused stress and emotional

hardship to the applicant's spouse beyond that which would normally be experienced as a result of separation.

The AAO finds, therefore, that in the aggregate, the level of hardship the applicant's spouse would suffer in the United States as a result of separation is not beyond what would normally be expected of families who are separated.

Counsel states that the applicant's spouse would suffer financial and emotional hardships if he joins the applicant in Peru. Counsel states that the applicant has been unemployed in Peru, and that due to the high rate of unemployment there, it is unlikely that the applicant will be able to secure suitable employment. Counsel also states that if the applicant's spouse is forced to leave his longstanding gainful employment in the United States, he, too, would risk being unemployed in Peru. However, the possibility of unemployment in Peru, by itself, does not establish extreme financial hardship. Counsel also states that the applicant's spouse cannot join his wife in Peru because he has joint custody of his son (from a prior marriage) with whom he has continuously maintained a relationship, and as he cannot leave the United States with the child, he would be forced to leave the child here. However, the applicant's spouse would not be prohibited from visiting his son in the United States if he relocates to Peru. Counsel expresses concern for the safety and well-being of the applicant's spouse and his family in Peru, and references the *U.S. Department of State Country Reports on Human Rights – Peru, 2007*, and points to deteriorating human rights conditions in Peru. However, counsel does not state how and why the applicant's spouse would be impacted by the country conditions there. The AAO finds, therefore, that the applicant does not establish that her U.S. Citizen husband will suffer extreme hardship if he joins her in Peru.

Accordingly, the AAO finds that the situation presented in this application does not rise to the level of extreme hardship. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he 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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.