

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services



tlc

DATE: **JUN 28 2011** Office: LIMA, PERU



IN RE: Applicant:



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

ON BEHALF OF APPLICANT:



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 Acting Field Office Director, Lima, Peru. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Peru. She was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of her last departure. She is married to a United States citizen. She 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).

The Acting Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on March 17, 2009.

On appeal, counsel for the applicant asserts the Acting Field Office Director failed to properly consider the evidence in the record, failed to accord evidence appropriate weight and failed to consider the hardship factors in aggregate. *Form I-290B*, received on April 16, 2009.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(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 record indicates that the applicant entered the United States without inspection in May 2000 and remained until she departed in September 2008. As the applicant resided unlawfully in the United States for over a year and is now seeking admission within ten years of her last departure from the United States, she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The record includes, but is not limited to, counsel's brief; statements from the applicant's spouse; copies of job advertisements from Peru; medical records pertaining to the applicant's spouse; a psychological evaluation from [REDACTED]; statements from the applicant's children; statements from friends and family of the applicant and her spouse; a statement from [REDACTED]; copies of tax returns for the applicant's spouse; statements from the applicant's employer; copy of an award to the applicant's spouse from his employer; copy of records showing medical

coverage for the applicant's spouse; copy of a translated medical consult from Peru; photographs of the applicant and her spouse; and documents filed in relation to the applicant's Form I-130.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

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 an applicant or applicant's 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-Morales*, 21 I&N Dec. 296, 301 (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.

Counsel for the applicant asserts the applicants' spouse would experience economic, physical and emotional hardships upon relocation. *Supplemental Brief in Support of Appeal*, dated October 12, 2010. She asserts that the applicant's spouse suffers from several medical conditions, is at high risk of heart attack, stroke or embolisms, and takes six prescriptions to control his condition, including Metformin, [REDACTED] and Actos. She asserts that he would lose his medical coverage for his medications and treatment if he had to quit his job to relocate to Peru, that he would be unable to find treatment for his medical condition and depression if he relocated to Peru and that he would not be able to afford the medications he needs to control his conditions in Peru. She explains that he has resided in the United States for the last 18 years, would be unable to find employment in Peru due to “rampant age discrimination” and that he no longer has any ties to Peru.

The applicant's spouse has submitted a statement making the same assertions discussed by counsel.

A review of the record reveals sufficient documentation to indicate that the applicant's spouse suffers from Diabetes Mellitus, hyperlipidemia, hypertriglyceridemia and HDL deficiency. *Statement of* [REDACTED] [REDACTED] dated September 17, 2008. The record also corroborates that he has been prescribed several medications to control his conditions and documents submitted into the record detail what these medications would cost in Peru. The record also contains documents from the applicant's spouse's employment which confirms that his medical coverage is provided through his employment, as well as a translated copy of a consultation for the cost of medical care from Peru. If the applicant's spouse were to relocate it would disrupt his continuity of care from the doctors who are familiar with his history and prognosis, a significant hardship impact. Further, the loss of the applicant's spouse's healthcare benefits provided by his employment represents another impact on him if he were to relocate, and based on the cost of the medications in Peru it could present a significant hardship impact on him to obtain coverage and the medications he needs to control his condition.

While the newspaper clippings selected to demonstrate age discrimination in Peru are not sufficient to establish the applicant's spouse would experience economic hardship, the fact that the applicant's spouse has resided in the United States for the last 18 years presents another hardship factor. His employment as a bus driver for mentally challenged patients and family members in the United States represent strong community ties.

When these hardship factors are considered in aggregate they establish that the applicant's spouse would experience uncommon hardships rising to the level of extreme. As such, the record establishes that a qualifying relative would experience extreme hardship upon relocation.

With regard to hardship upon separation, counsel asserts that the applicant's spouse would experience emotional and physical hardship if the applicant is not admitted. *Supplemental Brief in Support of Appeal*, dated October 12, 2006. Counsel explains that the applicant's spouse has several medical conditions which are compounded by depression related to the applicant's inadmissibility.

As noted above the record contains sufficient evidence to establish the medical conditions of the applicant's spouse and that the applicant's spouse is required to take a number of medications to control his condition. In addition, the statement from [REDACTED] indicates that the applicant provides assistance to her spouse in controlling his diet and taking his medications. *Statement of* [REDACTED] [REDACTED] dated September 17, 2008. Although there is nothing in the record to suggest that the applicant's spouse is incapable of providing his own care, based on the number of medical conditions, the multiple medications required, and the fact that the applicant assists in providing care, the AAO acknowledges that separation would result in some hardship to the applicant's spouse.

The record also contains a psychological evaluation of the applicant's spouse by [REDACTED] as well as a subsequent update from [REDACTED]. In her evaluation she concludes that the applicant's spouse is experiencing Major Depressive Disorder and Generalized Anxiety Disorder. The AAO will give due consideration to [REDACTED] evaluation.

Counsel has asserted that the applicant's spouse will also experience physical hardship at having to care for his step-child during the applicant's absence. While this is not typically considered a hardship factor, when considered in light of the applicant's spouse's medical condition and his emotional state, the impact of having to act as a single parent while employed full time is a hardship factor.

In this case, when the emotional, physical and medical hardships are considered in aggregate, they are sufficient to establish that the applicant's spouse will uncommon hardship rising to the level of extreme. As the applicant has established hardship to a qualifying relative, the AAO may now move to consider whether she warrants a waiver as a matter of discretion.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300 (Citations omitted).

The AAO finds that the unfavorable factors in this case include the applicant's unlawful presence and unlawful employment. The favorable factors in this case include the presence of the applicant's spouse, the presence of her children in the United States, the hardship her spouse would experience if she were not admitted and the lack of any criminal record during her residence in the United States. The favorable factors in this case outweigh the negative factors, therefore favorable

Page 7

discretion will be exercised. The director's decision will be withdrawn and the appeal will be sustained.

ORDER: The appeal is sustained.