

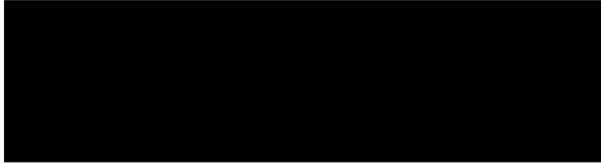
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office  
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**U.S. Citizenship  
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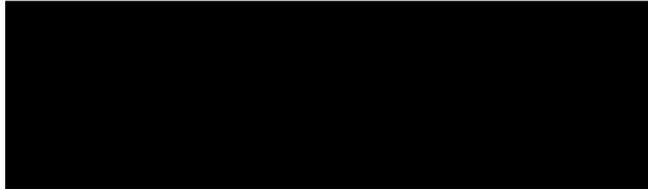
OFFICE: LIMA, PERU

FILE: 

IN RE: 

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:

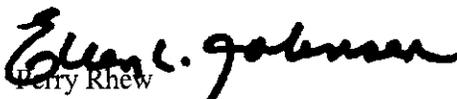


INSTRUCTIONS:

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,

  
Terry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Lima, Peru and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 admission within ten years of his last departure. He is the spouse of a U.S. citizen, and the father and stepfather of U.S. citizens. The applicant seeks a waiver under 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.

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated August 27, 2008.

On appeal, counsel asserts that United States Citizenship and Immigration Services (USCIS) erred in finding that the financial and psychiatric impacts of the applicant's inadmissibility did not establish that his spouse would experience extreme hardship. *Form I-290B, Notice of Appeal or Motion*, dated September 24, 2008.

The record of proceeding includes, but is not limited to, the following evidence: counsel's brief; psychological testing results relating to the applicant's spouse; and evidence submitted in support of the applicant's prior waiver applications. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9)(B) states 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 record reflects that the applicant entered the United States without inspection on December 23, 1994 and remained until December 3, 2003, when he departed for an immigrant visa interview at the U.S. embassy in Lima. Based on this history, the applicant accrued unlawful presence from April 1,

1997, the effective date of the unlawful presence provisions under the Act, until his December 2003 departure from the United States. As he accrued unlawful presence in excess of one year and is seeking immigrant admission within ten years of his 2003 departure, the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act and must seek a 212(a)(9)(B)(v) waiver of inadmissibility.

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. Accordingly, in this proceeding, hardship to the applicant or his children will be considered only insofar as it results in hardship to the applicant's spouse. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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 (BIA) 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 BIA 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 BIA 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 BIA 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 BIA 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 BIA 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.

The AAO now turns to the question of whether the applicant in the present case has established that a qualifying relative would experience extreme hardship as a result of his inadmissibility.

On appeal, counsel contends that the record establishes that the applicant’s spouse would suffer extreme hardship if she relocates to Peru. Counsel asserts that the applicant’s spouse suffers from psychological problems that continue to be ameliorated only through medication. In support of this

assertion, counsel references a July 13, 2006 psychological evaluation of the applicant's spouse, which, he states, concluded that moving to Peru would only create further isolation and withdrawal on the part of the applicant's spouse, as she would have to live in a country where she has no personal relationships. Counsel further reports that the evaluation indicated that the absence of appropriate mental health resources in Peru would result in the interruption or loss of the applicant's spouse's psychological treatment. Counsel also states that by moving to Peru, the applicant's spouse would be cutting her community ties and would lose the mental health professionals with whom she has close relationships and on whom she relies to monitor and treat her mental health problems. The record, however, does not support counsel's claims.

Counsel references a July 13, 2006 psychological evaluation of the applicant's spouse that was submitted for the record on September 8, 2006 and which, he states, establishes that the applicant's spouse suffers from severe clinical psychological disorders, suicidal ideation, diabetes and financial distress. Although the AAO notes that the Field Office Director's decision also makes reference to a psychological evaluation, the AAO does not find the record to contain a written psychological evaluation of the applicant's spouse, only copies of ASR/18-59 – Syndrome Scale Scores for Women Aged 36-59; ASR/18-59 – Internalizing, Externalizing, Total Problems, Critical Items, Substance Use & Other Problems for Women Aged 36-59; and ASR/18-59 – DSM-Oriented Scales for Women Aged 36-59 reporting the results of testing conducted on the applicant's spouse by psychologist Dr. [REDACTED] on or around June 26, 2006. We also note that the record includes a copy of test results for the Beck Depression Inventory II and Beck Anxiety Inventory, but that the subject of these tests and the individual who conducted them are not identified. While counsel's brief offers a synopsis of the evaluation's findings, the assertions of counsel without supporting documentation are not sufficient to meet the burden of proof in this proceeding. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As the record does not contain the referenced psychological evaluation of the applicant's spouse, the AAO is unable to determine that it reaches the conclusions counsel reports on appeal.

However, even if the record did include the 2006 evaluation referenced by counsel, it would not be sufficient to demonstrate the status of the applicant's spouse's mental health at the time of the appeal. The AAO observes that the appeal was filed more than two years after the psychological evaluation was conducted and that the applicant has not supplemented the record with updated medical or psychological reports that would indicate the conclusions reached by the psychologist continue to be valid. Neither has he submitted country conditions materials on healthcare in Peru to establish that his spouse would be unable to obtain adequate treatment there for any medical condition she might have. Accordingly, the record does not establish that the applicant's spouse would suffer extreme hardship upon relocation as a result of mental health problems. Further, as counsel does not indicate any additional hardship factors that would affect the applicant's spouse if she moved to Peru, the AAO must conclude that the applicant has failed to demonstrate that his spouse would experience extreme hardship if she joined him in Peru.

On appeal, counsel asserts that the applicant's spouse suffers from several psychological problems and that she needs the applicant to support her emotionally and financially as she "battles her psychological condition." Counsel contends that the applicant's spouse has become so mentally distressed over her inability to cope financially and emotionally that she has had suicidal thoughts. He states that she takes Paxil to deal with her depression and suicidal ideation. Counsel also asserts that the applicant's spouse's family history of sexual abuse and death makes her more susceptible to higher levels of psychological problems than other women in her age group. Counsel claims that the applicant's spouse is now facing new concerns as her son has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), which has been exacerbated by his separation from his stepfather. He reports that separation has resulted in the applicant's stepson developing nervous tics and speech problems, and that he cries inconsolably. Counsel further asserts that the applicant's spouse is suffering financially in his absence and that she is bankrupt and homeless, and has had to move in with her sister. He contends that bankruptcy and homelessness constitute extreme hardship.

While the AAO notes counsel's claims, we, again, find them to be insufficiently supported by the record. As previously noted, the record does not contain sufficient documentation to establish the current state of the applicant's spouse's mental health or that she requires medical treatment. The record also fails to offer proof that the applicant's stepson has been diagnosed with ADHD or that his condition has worsened as a result of his separation from the applicant. Although counsel indicates that this diagnosis was provided by the previously discussed 2006 psychological evaluation, that evaluation is not found in the record. Moreover, it is unclear from counsel's brief whether the psychologist who conducted the 2006 evaluation of the applicant's spouse was informed of this diagnosis by the applicant's spouse or reviewed an actual report on the applicant's stepson provided by another healthcare professional. Based on a review of the record, the only medical documentation relating to the applicant's stepson is a December 7, 2004 statement from the [REDACTED] that indicates the applicant's stepson began therapy in 2002 and in 2004 continued to require mental health services to deal with temper tantrums, noncompliance with rules at home, conflicts with adults at home, and a continued depressed, anxious and irritable mood. Accordingly, the record does not establish that the applicant's stepson has ADHD or demonstrate the impact of this condition on his mother, the only qualifying relative. Further, as approximately four years elapsed between the issuance of the statement on the mental health needs of the applicant's stepson and the filing of the instant appeal, the AAO finds the statement issued by the [REDACTED] to offer insufficient proof that he continues to require mental health therapy for behavioral problems.

The record also lacks documentation that establishes the applicant's spouse is bankrupt or homeless. In a December 28, 2004 statement, the applicant's spouse asserted that she was living with her sister because she could not pay her rent but that her sister had asked to leave and she had no where to go. She also stated that in the applicant's absence she had been unable to pay their bills and had numerous creditors, which was documented by copies of overdue bills and collection notices. The AAO notes, however, that the applicant has submitted no evidence to demonstrate his spouse's financial situation subsequent to 2004. We find no documentation in the record that relates to the applicant's spouse's income or her financial obligations at the time the appeal was filed and are,

therefore, unable to determine the extent of any financial hardship the applicant's spouse may currently be experiencing. Based on the record before us, the AAO finds that the applicant has failed to demonstrate that his spouse would experience extreme hardship if his waiver application is denied and she remains in the United States without him.

The record does not contain sufficient evidence to establish the applicant's eligibility for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act. Having found him statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for an application for a waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval 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 will be dismissed.