



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

JUL 26 2013

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Lima, Peru. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is again before the AAO on motion. The motion is granted and the prior AAO decision is affirmed.

The applicant is a native and citizen of Peru who was found to be inadmissible to the United States under 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 ten years of his last departure from the United States. 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 live in the United States with his lawful permanent resident parents.

The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director*, dated June 13, 2011.

On appeal, the AAO concluded that the applicant's mother would not suffer extreme hardship, and dismissed the appeal accordingly. *See Decision of the Administrative Appeals Office*, dated December 31, 2012.

On motion, counsel asserts the applicant's mother has established she would suffer extreme hardship if the waiver was denied. *See Form I-290B, Notice of Appeal or Motion* (Form I-290B), filed January 29, 2013.

A motion to reopen must state new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

Counsel asserts that the evidence of the record at the time of the initial decision was sufficient to establish extreme hardship and submits new letters from the applicant's mother's doctors and pastor on motion. In support of the motion counsel submits an unpublished AAO decision, however, only published decisions by the AAO that are designated as precedent in accordance with the requirements discussed in 8 C.F.R. § 103.3(c) are binding on U.S. Citizenship and Immigration Services (USCIS) officers. Counsel has not submitted precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy based on the evidence of record at the time of the initial decision as required by 8 C.F.R. § 103.5(a)(3). As discussed below, the AAO decision was not incorrect based on the evidence in the record. The motion, therefore, does not meet the requirements of a motion to reconsider.

Counsel has not met the requirements of 8 C.F.R. § 103.5(a)(3), however, counsel has supplemented the record on motion with letters from the applicant's mother's doctors, psychotherapist, medical clinic and pastor. While counsel did not file a motion to reopen, the motion does meet the requirements of 8 C.F.R. § 103.5(a)(2), and the AAO will treat the motion before us as a motion to reopen. The motion will be granted and the application reopened.

The record has been supplemented on motion with: Form I-290B and counsel's brief, a previous non-precedent AAO decision, letters from the applicant's mother's doctors, medical clinic and pastor. The entire record was reviewed in rendering a decision on motion.

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

(i) [A]ny 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 in October 2001¹ and left the United States under an order of voluntary departure on September 16, 2007. Thus, the applicant is found to be inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the country for more than one year, and counsel does not contest the inadmissibility.

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

Waiver.-The [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 [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 first upon a showing that the bar imposes an extreme hardship on a qualifying family member, which

¹ The record reflects that in April 2007, when first apprehended, the applicant told Immigration and Customs Enforcement agents that he entered the United States in October 2002. Additional statements by the applicant indicate that he entered the United States in October 2001. The discrepancy in the date of his entry does not affect his inadmissibility for unlawful presence of more than one year.

includes the U.S. citizen or lawful permanent resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. In this case, the applicant's spouse is the only qualifying relative. 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).

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*, 22 I&N Dec. 560, 565 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or U.S. 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).

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 v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (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.

The applicant's 69-year-old, lawful permanent resident mother indicates that she requires the applicant for financial and emotional support. The applicant's mother states in a 2011 letter that the applicant's separation from her has affected her in an "emotionally negative way." A 2011 letter from her psychotherapist indicates she has major depressive disorder, short term memory problems, limitation with language capability and poor family support. A 2013 letter from the applicant's mother's psychiatrist and psychotherapist states she has been receiving mental health services since 2008, she would be "impacted" without her family's support, and she has been "able to sustain her need for family support" with direct and indirect communication and contact throughout her treatment. This letter suggests that the support from her family has improved from poor family support in 2011 to sustained family support, even without the applicant's presence. This letter further indicates that the applicant's mother does not require the applicant's assistance for long term, permanent care, as the doctors request that the applicant be granted a temporary visa to visit his mother "prior to her problems." The letter does not explain what these impending problems may be. While the letters submitted reflect the applicant's mother mental and emotional state, neither the letters nor other evidence in the record clearly and specifically delineates the negative emotional impact the applicant's absence has had on his mother.

Letters from the applicant's mother's doctor and pastor state that she suffers from multiple physical ailments that are worsening. These letters mention that if the applicant is granted entry to the United States, he would be able to assist her with such needs as taking her to doctors' appointments. Statements in the record also indicate that the applicant is needed to provide for the applicant's mother financially, due to the applicant's brother's need to leave his parents' household and support his own. Although the AAO acknowledges that the applicant may be of help to his mother for these needs, the record does not explain why the applicant in particular is required for his mother's care and support or why other family members, such as the applicant's father, would be unable to meet the applicant's mother needs as they apparently have been since the applicant's departure in 2007, nearly six years ago. The record does not contain any documentation corroborating the applicant's mother's financial hardship, nor is it explained why the applicant, who apparently is employed in Peru, cannot assist his mother financially. 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 AAO has considered in the aggregate all assertions of separation-related hardship, including the applicant's mother's physical and mental conditions, and financial and emotional challenges. The AAO finds that the evidence is not sufficient to demonstrate that the applicant's mother suffers from extreme hardship based on separation from the applicant.

Statements in the record as well as counsel's assertions indicate that the applicant's mother cannot relocate to Peru because of her age, illnesses, lack of family support in Peru, lack of familiarity with the custom and cultures due to her loss of memory, financial strain to other family members, the potential of her jeopardizing her permanent resident status in the United States, the lack of sufficient medical care in Peru, and her forced separation from her husband. The record lacks corroborating evidence regarding the assertions of financial hardship to the applicant's mother or father, the inadequacy of medical care in Peru, the unfamiliarity with customs and culture of Peru due to serious memory loss, and her husband's inability to relocate to Peru as to avoid separation. The AAO has considered cumulatively all assertions of relocation-related hardship, such as the applicant's mother's permanent residence status in the United States, her length of residence in the United States, her age, her illnesses and potential loss of adequate medical care and family support. Based on the evidence in the record, the AAO does not find that the applicant's mother would suffer extreme hardship were she to relocate to Peru to be with the applicant.

The AAO notes that the applicant's father is also a qualifying relative under section 212(a)(9)(B)(v) of the Act. However, no claim of extreme hardship to the father has been made.

In proceedings for application for waiver of grounds of inadmissibility the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

ORDER: The motion is granted and the prior AAO decision is affirmed.