U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE [redacted] Office: SAN FRANCISCO, CA Date: FEB 2 2001

IN RE: Applicant: [redacted]

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

IN BEHALF OF APPLICANT:

[redacted]

PUBLIC COPY

identification data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen and reconsider. The motion will be granted and the order dismissing the appeal will be affirmed.

The applicant is a native and citizen of the Philippines who was found to be inadmissible to the United States under § 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 into the United States by fraud or willful misrepresentation in December 1995. The applicant divorced his first wife in August 1996 and married a naturalized United States citizen in December 1996. He is the beneficiary of an approved petition for alien relative and seeks the above waiver in order to remain in the United States and reside with his spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly.

On appeal, counsel argued that the Service erred in failing to find the presence of extreme hardship and that the applicant's wife would experience such hardship whether she remained in the United States alone or accompanied the applicant to the Philippines. Counsel indicated that the applicant's wife would suffer economic hardship because the couple rely on their joint income to support themselves. Counsel stated that the applicant's wife has no close ties remaining in the Philippines and that it would be detrimental for her to accompany her husband there because she would have to give up her employment and health benefits in the United States. Counsel submitted documentation that, as of December 9, 1999, the applicant was 30 weeks pregnant with the presence of trisomy 21 in the fetus. Counsel asserted that this is associated with Down's Syndrome where "mental retardation is present in 100% of the cases." Counsel also submitted a psychological report which reflected that the applicant's wife would suffer emotional hardship if her husband were not allowed to remain in the United States.

On appeal, the Associate Commissioner found that the applicant had established that his spouse would suffer extreme hardship but denied his request for a waiver as a matter of discretion based on a weighing of the favorable and unfavorable factors present in the case.

On motion, counsel argues that the Associate Commissioner erred in denying the application as a matter of discretion despite a finding of extreme hardship to a qualifying relative. Counsel also argues that in stating that the applicant had committed a felonious act, the Associate Commissioner in effect treated the applicant's underlying fraud as a conviction. And, counsel asserts that the

birth of the couple's child in January 2000 is an important intervening factor to be considered in granting the applicant's request. It should be noted that, fortunately, no documentation has been submitted that the child was in fact born with Down's syndrome.

The record reflects that the applicant procured a Philippine seaman's book in another person's name and containing a U.S. nonimmigrant visa. The applicant then used that documentation to procure admission into the United States on December 17, 1995 by fraud or willful misrepresentation.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

> (6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-
>
> (C) MISREPRESENTATION.-
>
> (i) IN GENERAL.-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) ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

> (1) The Attorney General **may, in the discretion of the Attorney General**, 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 Attorney General 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.
>
> (2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Sections 212(a)(6)(C) and 212(i) of the Act were amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. 104-208, 110 Stat. 3009. There is no longer any alternative provision for waiver of a § 212(a)(6)(C)(i) violation due to passage of time. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally

considered. See Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997).

If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George and Lopez-Alvarez, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

On motion, counsel asserts that once extreme hardship has been established, an applicant should be considered entitled to a waiver. However, the grant or denial of a waiver request does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Attorney General and pursuant to such terms, conditions, and procedures as she may by regulations prescribe.

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from § 212(a)(6)(C) of the Act is dependent **first** upon a showing that the bar imposes an extreme hardship on a qualifying family member. **Although extreme hardship is a requirement for § 212(i) relief, once established, it is but one favorable discretionary factor to be considered.** See Matter of Mendez, 21 I&N Dec. 296 (BIA 1996).

The record reflects that the applicant knowingly obtained a Philippine seaman's book in an assumed name and used that document to gain admission into the United States in 1995 - an action which is defined as under 18 U.S.C. 1546(a) as a felony. Although counsel asserts that the dismissal of the applicant's appeal in effect treated the applicant's underlying fraud as a conviction, this is not the case. The seriousness of the applicant's actions were, however, properly considered in weighing whether the applicant warrants a favorable exercise of discretion.

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board of Immigration Appeals (BIA) held that the underlying fraud or misrepresentation may be considered as an adverse factor in adjudicating a § 212(i) waiver application in the exercise of discretion. Matter of Tijam, Interim Decision 3372 (BIA 1998), followed. The Board declined to follow the policy set forth by the Commissioner in Matter of Alonso, 17 I&N Dec. 292 (Comm. 1979); Matter of Da Silva, 17 I&N Dec. 288 (Comm. 1979), and noted that the United States Supreme Court ruled in INS v. Yueh-Shaio Yang, 519 U.S. 26 (1996), that the Attorney General has the authority to consider **any and all** negative factors, including the respondent's initial fraud.

After reviewing the amendments to the Act and to other statutes regarding fraud and misrepresentation from 1957 to the present time, and after noting the increased penalties Congress has placed

on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar and eliminating children as a consideration in determining the presence of extreme hardship, it is concluded that Congress has placed a high priority on reducing and/or stopping fraud and misrepresentation related to immigration and other matters.

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in Matter of Tijam, supra, need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter entered the United States in December 1995 by fraud and married his spouse in December 1996. He now seeks relief based on that after-acquired equity. Counsel states that the reference to "after-acquired equity" pertains to an equity acquired after a deportation order has been issued and that the applicant in the present matter is not under any type of proceedings.

As previously indicated, the United States Supreme Court ruled in INS v. Yueh-Shaio Yang, that the Attorney General has the authority to consider any and all negative factors in deciding whether or not to grant a favorable exercise of discretion. The Associate Commissioner does not deem it improper to give less weight in a discretionary matter to an alien's marriage which was entered into in the United States following a fraudulent entry and after a period of unlawful residence in the United States as opposed to a marriage entered into abroad followed by a fraudulent entry.

In the latter scenario the alien who marries abroad legitimately gains an equity or family tie which may result in his or her obtaining an immigrant visa and entering the United States lawfully even though the alien may fraudulently enter the United States after the marriage and before obtaining the visa. Whereas in the former scenario the alien who marries after he or she fraudulently enters the United States and resides without Service authorization does gain an after-acquired equity or family tie that he or she was not entitled to without the perpetration of the fraud.

Notwithstanding that the decision in Carnalla-Muñoz v. INS related to an alien in removal or deportation proceedings, the alien's equity was gained subsequent to a violation of an immigration law, and when considering an issue as a matter of discretion an equity gained contrary to law should receive less weight than an equity gained through legal and legitimate means.

The favorable factors in this matter include the applicant's marriage and hardship to a qualifying relative. The unfavorable factors include his procuring admission into the United States by fraud and his lengthy unauthorized presence in the United States.

The applicant's actions in this matter cannot be condoned. His equity (marriage) gained after procuring admission into the United States by fraud or willful misrepresentation is given minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

In proceedings for application for waiver of grounds of inadmissibility under § 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the order dismissing the appeal will be affirmed.

ORDER: The Associate Commissioner's order of June 9, 2000 dismissing the appeal is affirmed. The application is denied.