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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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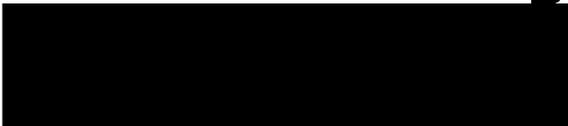
File: [Redacted] Office: LOS ANGELES, CA

Date: MAY 15 2001

IN RE: Applicant: [Redacted]

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

IN BEHALF OF APPLICANT:



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

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

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 1990. In 1995, the applicant married a native of the Philippines who naturalized as a United States citizen in 1992. The applicant's mother is also a naturalized United States citizen and her father is a lawful permanent resident. The applicant 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 her spouse, child and parents.

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 states that the applicant is statutorily eligible and deserving of a favorable exercise of discretion to grant the request and that the Service abused its discretion in denying the request by completely ignoring and performing only a cursory examination of relevant factors in determining extreme hardship. Counsel asserts that the applicant has demonstrated that her spouse and parents would suffer extreme hardship if she is not allowed to remain in the United States and that the Service erroneously applied or ignored precedent decisions in denying the request. Counsel concludes by stating that the applicant committed one act of fraud when entering the United States and has not committed any further frauds or acts of moral turpitude.

The record reflects that the applicant procured a Philippine passport in the name of Gena Z. De Vera and used that passport to obtain admission into the United States as a visitor for pleasure on October 28, 1990. The applicant then remained longer than authorized and obtained employment in September 1991 without Service permission.

Section 212(a) of the Act states:

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) of the Act states:

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).

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.

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).

Both the district director and counsel have cited case law relating to the issue of "extreme hardship" as that term is applied in matters involving suspension of deportation under § 244 of the Act, 8 U.S.C. 1254, prior to its amendment by IIRIRA, recodification under § 240A of the Act, 8 U.S.C. 1230A, and redesignation as "cancellation of removal." Matter of Piltch, 21 I&N Dec. 627 (BIA 1996); Matter of Anderson, 16 I&N Dec. 596 (BIA 1978).

In Matter of Marin, 16 I&N Dec. 581 (BIA 1978), the Board stated that, for the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. See also Matter of Mendez, supra. In those matters, the alien was seeking relief from removal. In the matter at hand, the alien is seeking relief from inadmissibility. It is more suitable to use case law references relating to the application of the term "extreme hardship" as found in case law relating to waivers of grounds inadmissibility under § 212(h) of the Act than in case law relating to cancellation of removal.

The Associate Commissioner does not suggest that the term "extreme hardship" has two different meanings. However, application of that term in what was formerly called exclusion and deportation proceedings is different. In the former exclusion proceedings the burden of proof was on the alien. In the former deportation proceedings, the burden of proof was on the government. Under the IIRIRA amendments the process is basically the same. The alien must prove admissibility, and the government must prove deportability. Hypothetically, some aliens who are ineligible for a § 212(i) waiver due to fewer qualifying elements, may be able to establish their eligibility in subsequent cancellation of removal proceedings, which would lessen the impact of a denial of such waiver.

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board of Immigration Appeals (BIA) stipulated that the factors deemed relevant in determining whether an alien has established extreme hardship pursuant to § 212(i) of the Act include, but are not limited to, the following: 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 finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

In Matter of Cervantes-Gonzalez, the Board also 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.

To recapitulate, the applicant obtained a Philippine passport in an assumed name and used that document to gain admission into the United States by fraud in 1990. She remained longer than authorized and subsequently obtained employment without Service authorization while in unlawful status.

On appeal, counsel submits a brief, documentation to establish the immigration status of the applicant's qualifying relatives, statements from the applicant's qualifying relatives concerning hardship, evidence of the spouse's employment and the couple's financial investments, and medical records relating to the applicant, her child and qualifying relatives.

The record and information supplied reflects that the applicant's spouse immigrated to the United States in 1984 and naturalized as a United States citizen in 1992. He is the family's main source of financial support, has a portfolio of financial resources and no known medical problems. He states that the applicant plays a significant role in his life, supporting and caring for him and the couple's daughter. He states that the applicant's removal from the United States would force him to make a choice of remaining in the United States or relocating to the Philippines which would require him to give up his employment, career dreams and plans in life for his family.

There are no laws that require the applicant's spouse to leave the United States and live abroad. Further, the common results of deportation are insufficient to prove extreme hardship. See Hassan v. INS, 927 F.2d 465 (9th Cir. 1991). The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported.

See Shooshtary v. INS, 39 F.3d 1049 (9th Cir. 1994). In Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

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, Interim Decision 3372 (BIA 1998), 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 1990 by fraud and married her spouse in 1995. She now seeks relief based on that after-acquired equity. However, as previously noted, a consideration of the Attorney General's discretion is applicable only after extreme hardship has been established.

The record and information supplied on appeal also reflects that the applicant's naturalized United States citizen mother has hypertension and asthma and that her daughter is allergic to eggs, chicken and peanuts. No documentation or evidence as to the specific nature and extent or diagnosis and prognosis of the mother and daughter's medical problems has been submitted. While unfortunate, their medical conditions are not indicated to be rare or life-threatening and there is no indication that the applicant's presence is integral to their recuperation or treatment.

A review of the documentation in the record, when considered in its totality, fails to establish the existence of hardship to the applicant's spouse, mother or father caused by separation that reaches the level of extreme as envisioned by Congress if the applicant is not allowed to remain in the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.