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U.S. Department of Justice
Immigration and Naturalization Service

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

[Redacted]

File: [Redacted]

Office: SAN FRANCISCO, CA

Date: JAN 31 2003

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:

[Redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 that 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, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained, the decision of the district director will be withdrawn and the application will be approved.

The applicant is a native and citizen of the Philippines who was found to be inadmissible to the United States under section 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. The applicant is married to a United States citizen and her mother is a lawful permanent resident. She is the beneficiary of an approved petition for alien relative filed on her behalf by her spouse and she seeks the above waiver in order to remain in the United States and adjust her status to that of a lawful permanent resident.

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 asserts that the district director's decision erroneously concluded that the U.S. citizen spouse's depressive disorder could not be deemed a factor constituting extreme hardship as the onset or cause of the condition preceded the applicant's request for a waiver. Counsel states that this is an impermissible requirement tantamount to requiring a cancer patient to show that his disease is on account of the prospective removal of the immediate family member. Counsel also asserts that the district director misconstrued the claim of loss of income and financial hardship by finding that the U.S. citizen spouse's income exceeds the poverty guidelines. Counsel states that a claim of extreme hardship of a financial nature does not require the U.S. citizen to be rendered destitute, rather, precedent decisions require an individualized, cumulative evaluation of the particular factors and that loss of a profession and economic loss are to be considered. And, finally, counsel asserts that the district director erroneously referred to the fraud for which a waiver is sought in discounting any hardship to the mother of the applicant, thereby contradicting Matter of Da Silva, 17 I&N Dec. (Comm. 1979).

The record reflects that the applicant procured admission into the United States on July 26, 1996 by presenting a passport and U.S. nonimmigrant visa belonging to another person.

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 section 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 Cervantes-Gonzalez, 21 I&N Dec. 560 (BIA 1999).

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 section 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 section 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 Board has held that extreme hardship is not a definable term of fixed and inflexible meaning, and that the elements to establish extreme hardship are dependent upon the facts and circumstances of each case. These factors should be viewed in light of the Board's statement that a restrictive view of extreme hardship is not mandated either by the Supreme Court or by its own case law. See Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996).

In Matter of Cervantes-Gonzalez, *supra*, the Board of Immigration Appeals (BIA) stipulated that the factors deemed relevant in determining whether an alien has established extreme hardship pursuant to section 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.

The record reflects that the applicant and her spouse were married in October 1998. They have a child together born in 1999 and the spouse has an eighteen-year-old son from a prior marriage who lives with the couple. Their household also includes the applicant's mother who is a lawful permanent resident of the United States. The applicant is a registered nurse and her spouse is a self-employed attorney.

On appeal, counsel submits a brief asserting that if the applicant is removed from the United States, her spouse will be unable to reestablish his business in the Philippines because it is dependent

on long-established good will, and because he is unlicensed to practice law in that county. He does not speak Tagalog and has never resided abroad. In addition, based on health and financial constraints, it would be impossible for him to retrain as an attorney in another country. The spouse earns considerably less than the applicant and relies on her for dental and medical coverage. If the spouse accompanies the applicant to the Philippines, he will lose his medical coverage, will have to pay for his medications and treatment, will be unable to comply with his court-ordered alimony and child support payments for his ex-wife and son, and will be separated from his son.

Counsel further states that the applicant's spouse suffers from diabetes, hypertension, and depression. He is currently under a physician's care for these conditions and relies upon prescription drugs to control them, as well as on a particular lifestyle regimen, including a modified diet and reduced levels of stress. As a self-employed individual with a pre-existing medical condition, it would be difficult for the spouse to replace the medical plan benefits that he and his children receive through the applicant's employment. If the spouse remains in the United States and the applicant is removed, he will lose the applicant's emotional and professional support and will incur additional stress and financial responsibilities as the single parent of a young child.

The record reflects that the applicant has established the presence of a qualifying relationship; that her spouse has strong ties to the United States and no such ties to the Philippines; that it would be financially detrimental for her spouse to quit his employment in the United States and relocate to the Philippines; and that the spouse suffers from medical conditions for which he requires care and treatment that is currently available to him through medical benefits provided by the applicant's employment. Based on the foregoing, it is concluded that the applicant has shown that the qualifying relative would suffer extreme hardship over and above the normal disruptions involved in the removal of a family member.

The grant or denial of the above waiver 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 he may by regulations prescribe.

The favorable factors include the applicant's family ties, the absence of a criminal record, and hardship to the qualifying relative. The sole unfavorable factor in this matter is the applicant's having procured admission into the United States by fraud or willful misrepresentation more than six years ago. Although the applicant's actions in this matter cannot be condoned, the favorable factors in this matter outweigh the unfavorable one.

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 now met that burden. Accordingly, the appeal will be sustained. The decision of the district director will be withdrawn and the application will be approved.

ORDER: The appeal is sustained. The decision of the district director is withdrawn and the application is approved.