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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[REDACTED]

112

FILE: [REDACTED]

Office: LOS ANGELES DISTRICT OFFICE

Date: **JAN 28 2005**

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of the Philippines who was found inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(6)(C)(i). The record reflects that the applicant is the son of a U.S. citizen father and mother. He seeks a waiver of inadmissibility in order to remain in the United States and adjust his status to that of a lawful permanent resident under INA § 245, 8 U.S.C. § 1255, as the beneficiary of an approved relative petition filed on his behalf by his U.S. citizen father.

The district director found that the applicant failed to establish extreme hardship to his U.S. citizen father as required for a waiver of inadmissibility and denied the application accordingly.

Section 212(a)(6)(C)(i) of the Act provides:

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.

8 U.S.C. § 1182(a)(6)(C)(i). The district director based the finding of inadmissibility under this section on the applicant's imputed immigrant intent at the time of his admission as a nonimmigrant visitor for pleasure on May 20, 1989, with authorization to remain until November 19, 1989. *Decision of the District Director* (October 24, 2003) at 2. The district director indicated that the applicant "knew at the time of [his] application] for the tourist visa that [his] intent was to remain in the United States. [He] didn't disclose the fact that [his] intent was to remain in the United States with [his] family to the Immigration Officer and not to visit. Moreover, records show that [he] applied for an Immigration [sic] benefit for which [he] was not eligible, just four months after [his] admission into the United States as a visitor. This shows willful misrepresentation of material facts." *Id.*

The record reflects that the applicant's U.S. citizen sister filed a relative petition on his behalf on January 30, 1989, which was approved on February 21, 1989, when there were no immigrant visa numbers available for the applicant's preference category. The applicant applied for a nonimmigrant visitor visa, which was issued on April 20, 1989. The applicant travelled to the United States and was admitted as a nonimmigrant visitor for pleasure on May 20, 1989. The applicant's father then petitioned for him, on September 11, 1989, when his father was a lawful permanent resident. The petition was approved on October 18, 1989, when there were no immigrant visa numbers available for the applicant's preference category. The record contains a copy, submitted by the applicant, of a receipt for a legalization application, which he filed on September 29, 1989. The receipt indicates that he was granted employment authorization in connection with the legalization application as of March 29, 1990. The applicant's father became a U.S. citizen in 1994, changing the relative petition filed on the applicant's behalf to an immediate relative petition. The applicant filed an application for adjustment of status to that of lawful permanent resident on July 24, 1995, and an application for waiver of inadmissibility on October 23, 1996. For reasons that are unclear on the record, he filed another waiver application on May 12, 2003.

The AAO notes that the applicant bears the burden of establishing that he is not inadmissible under the provisions of the Immigration and Nationality Act. INA § 291, 8 U.S.C. § 1361. The AAO finds that the record is sufficient to support the district director's finding that the applicant maintained an immigrant intent at the time of his admission as a nonimmigrant on May 20, 1989. There is no evidence on the record to show that the applicant intended to return to the Philippines in accordance with his nonimmigrant admission. To the contrary, the facts at the time of the admission and his actions after admission seem to indicate that the applicant never intended to depart the United States once he gained admission. The misrepresentation of his intent at the time of entry was material to his admissibility as a nonimmigrant in that he would not have been admitted as a nonimmigrant if the immigration inspector knew that the applicant intended to remain permanently in the United States and eventually adjust status to that of a lawful permanent resident pursuant to the approved relative petition filed by his sister when an immigrant visa became available. Therefore, the district director had sufficient evidence to find that the applicant committed a willful, material misrepresentation in order to procure admission to the United States and is therefore inadmissible to the United States under INA § 212(a)(6)(C)(i).

Counsel contends that case law and Operating Instructions of the former Immigration and Naturalization Service (INS) (now U.S. Citizenship and Immigration Services (CIS)) hold that adjustment applications should not be denied on the basis of immigrant intent at the time of entry as a nonimmigrant, where the applicant has "substantial equities" in his favor. Counsel also contends that the District Director erroneously considered the fact of the applicant's submission of an application for legalization, in that the use of legalization records is constrained by statute and regulation.

First, the AAO turns to the legalization information alluded to in the district director's decision below. Section 245A of the INA, which governs applications for legalization pursuant to the 1986 Immigration Reform and Control Act (IRCA), provides, in pertinent part:

(5) Confidentiality of information.—

(A) In general.—Except as provided in this paragraph, neither the Attorney General [now Secretary of Homeland Security], nor any other official or employee of the Department of Justice [now Department of Homeland Security], or bureau or agency thereof, may—

(i) use the information furnished by the applicant pursuant to an application filed under this section for any purpose other than to make a determination on the application, for enforcement of [criminal prosecution for fraud], or for the preparation of reports to Congress under section 404 of [IRCA].

INA § 245A(c)(5)(A)(i), 8 U.S.C. § 1255a(c)(5)(A)(i).

The record reflects that the record of proceedings related to the applicant's legalization case are properly segregated from the primary alien file and physically located in a different alien file jacket, which was not forwarded to the AAO on this appeal, and which will not be requested in accordance with the above statutory provision. The additional alien file number ("A-number"), established for the legalization proceedings, is noted in a few places in the instant alien file by immigration officials, simply as a note indicating the existence of an additional A-number, and the legalization A-number was noted by the applicant in response to a request for his A-number on one or more immigration forms before the A-number used in these proceedings

was established and known to the applicant. In short, no records belonging to the former INS or CIS that are part of the proceedings on the applicant's request for legalization are contained in the file. It appears that the sole legalization-related evidence on which the district director in part based his inadmissibility decision was provided by the applicant in connection with his application for adjustment of status and the instant waiver application. The applicant at least twice submitted copies of the acknowledgement of receipt/interview notice related to his legalization application in support of explanations of his claimed immigration status in connection with his applications for adjustment and waiver. He stated in a letter attached to one copy of the notice submitted along with Supplement A to Form I-485¹, "I was able to obtain work authorization from the INS . . . before my visitor visa (B2) expired in November 1989. . . . Since that case/application is still pending, and in the absence of legal advise [sic], I am unable to determine with certainty my present immigration status. . . ." *Letter of Ramon Apostol* (June 16, 1995) (emphasis in original). On his waiver application the applicant states, "In 1989, I applied for an immigration benefit for which I was not eligible." Form I-601, *Application for Waiver of Ground of Excludability* (filed May 12, 2003). Attached to that form is a letter stating, "In 1989, I applied for an immigration benefit for which I was not eligible, at the same time looking for other remedies to extend my stay legally. In the process I was granted employment authorization. I never submitted any false documents and through it all I was represented by a lawyer, making me believe that I was not violating the law." Another copy of the legalization notice, photocopied together with his Form I-94, *Alien Arrival/Departure Record* appears to have been submitted with the applicant's Form I-485, *Application to Register Permanent Residence or Adjust Status*.

The statutory restriction on use of legalization case-related information cited above applies to "the information furnished by the applicant pursuant to an application filed under this section." INA § 245A(c)(5)(A)(i) (emphasis added). See also 8 C.F.R. 245a.21(b) ("No information furnished pursuant to an application for permanent resident status under this Subpart B shall be used . . .") The question is whether the copy of the applicant's legalization application acknowledgement of receipt/interview notice and the applicant's related statements constitute information furnished by the applicant pursuant to an application to adjust status under INA § 245A. The AAO concludes it does not. The record reflects that the district director did not consult or consider any of the applicant's legalization-related records other than the copy of the notice and related statements the applicant himself provided in connection with his application for adjustment as the beneficiary of an immigrant relative petition under INA § 245. Because the applicant submitted the information in support of a separate application, the material became part of the record of proceedings on the § 245 adjustment application, independent of his records relating to his application under INA § 245A. Therefore, it was not improper for the district director to take the evidence into account in evaluating the totality of the circumstances reflecting the applicant's intent when he was admitted to the United States as a nonimmigrant.

Counsel also contends that CIS Operating Instruction 243.5 and case law dictate a finding in favor of the applicant. OI 243.5 provides, in pertinent part:

Notwithstanding . . . preconceived intent to remain permanently at the time of entry as a nonimmigrant, an adjustment application should not be denied in the exercise of discretion where substantial equities are present in the case.

¹ This form was required for applications for benefits under former section 245(i) of the Act, which permitted certain aliens to apply to adjust status in the United States despite having entered without inspection or being otherwise barred from adjustment under section 245(c).

Operating Instruction 243.5(b). We note that the BIA has held, "Operations Instructions generally do not have the force of law. They furnish only general guidance for Service employees and do not confer substantive rights or provide procedures upon which an alien may rely." *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 264 (BIA 1990), *remanded on other grounds*, (Attorney General 1991) (citations omitted). This particular Operating Instruction appears to derive from cases cited by counsel, *Matter of Ibrahim*, 18 I&N Dec. 55 (BIA 1981) and *Matter of Cavazos*, 17 I&N Dec. 215 (BIA 1980). The BIA in *Ibrahim* confirmed and limited the holding of *Cavazos* that, where there are significant equities present, the adjustment of an alien based on an approved immediate relative petition should not be denied as a matter of discretion where the sole adverse factor is the alien's "preconceived intent" to immigrate when admitted as a nonimmigrant. Neither *Ibrahim* nor *Cavazos* involves an alien charged with fraud under the Act. The question in both cases was the authority of the Attorney General to grant or deny adjustment of status to an otherwise qualified alien as a matter of discretion. In the instant case, the applicant has been charged with fraud and is therefore inadmissible. Discretion to grant or deny adjustment or a waiver of inadmissibility may only be exercised after the applicant has established statutory eligibility for a waiver. The matter on appeal is not one of discretion, but of statutory eligibility. *Ibrahim* and *Cavazos* are therefore inapplicable to the instant case until after statutory eligibility has been established, when CIS will determine whether the applicant is eligible for a favorable exercise of discretion. The first question on appeal thus remains whether the applicant is statutorily qualified for a waiver under INA § 212(i), which provides, in pertinent part:

(i) (1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien . . ."

8 U.S.C. § 1182(i)(1). A section 212(i) waiver is therefore dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the alien herself is not a permissible consideration under the statute. The qualifying relatives for whose benefit the waiver may be granted in this case are the applicant's U.S. citizen father and mother.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact 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.

Matter of O-J-O, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted). Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The record reflects that the applicant's father [REDACTED] is a 76-year-old naturalized citizen born in the Philippines. He immigrated to the United States and was admitted as a lawful permanent resident in 1989. He became a U.S. citizen in 1994. He married the applicant's mother in 1951 in the Philippines. He is listed as a dependent on his daughter's (the applicant's sister's) U.S. tax returns for 2000, 2001, and 2002. The record contains some of [REDACTED]'s medical records, many of which are illegible handwritten notes of medical personnel. To the extent the notes or other documents are illegible or not comprehensible by lay personnel, they are not accorded weight in this proceeding, as this body does not possess medical expertise to analyze the significance of such medical documents or decipher medical acronyms, abbreviations, charts, lab test results, or ultrasounds. The record reflects that [REDACTED] was seen by a doctor for shoulder pain, but x-rays showed "no significant abnormality." *Kaiser Permanente Diagnostic Imaging* (June 11, 2003). He was also seen for abdominal pain in late 2002. He has been diagnosed with diabetes, high blood pressure, high cholesterol, and "mild chronic prostatitis." Counsel asserts that he also has chronic obstructive pulmonary disease, but the medical documentation submitted does not appear to mention such a diagnosis. A review of all the medical documentation on the record reveals that there is insufficient legible and understandable evidence to make an accurate assessment of the health of the applicant's father or the impact of the departure of the applicant on his health. The AAO also notes the statement of the applicant's father on the record that his health and that of his wife are "fairly stable." The applicant's mother is a 75-year-old naturalized citizen born in the Philippines. Although M [REDACTED] indicates that she "has her share of health problems," there is no supporting evidence of them in the record. [REDACTED] indicates that, although his daughter "contributes significantly to our support," the applicant is in a better position now to "look after our welfare and provide us with our basic needs."

While CIS is not insensitive to the family's situation, the record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's mother or father faces extreme hardship if the applicant is refused admission. Rather, the record demonstrates that they will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States. Congress provided for a waiver of inadmissibility, but under limited circumstances. In limiting the availability of the waiver to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial

difficulties alone do not establish extreme hardship). “[O]nly in cases of great actual or prospective injury . . . will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO finds that the applicant failed to establish extreme hardship to a qualifying relative as required under INA § 212(i), 8 U.S.C. § 1186(i).

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.