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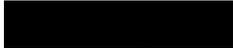
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FILE:



Office: BANGKOK, THAILAND

Date: SEP 23 2005

IN RE:



APPLICATION:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 Acting District Director, Bangkok, Thailand and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Thailand who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude (misappropriation). The record indicates that the applicant has a U.S. citizen fiancé. The applicant seeks a waiver of inadmissibility in order to reside with her fiancé in the United States.

The acting district director found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen fiancé. The application was denied accordingly. *Decision of the Acting District Director*, dated June 11, 2003.

On appeal, the applicant's fiancé states that the denial was made without all of the available facts, a fifteen year span between the event and visa application is unrealistic and inappropriate due to his age and the additional medical and psychological proof and personal statement demonstrate extreme hardship. *Form I-290B*, dated July 4, 2003.

The record contains letters from the applicant's fiancé, therapist, doctor and psychologist. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act, 8 U.S.C. § 1182(h) provides, in pertinent part, that:

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if-

- (1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that ---
  - (i) [T]he activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
  - (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

- (iii) the alien has been rehabilitated; or
- (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien.

The applicant's fiancé contends that a fifteen year span between the event and visa application is unrealistic and inappropriate due to his age. He states that exclusion of the applicant on the basis that 15 years have not elapsed from the time of the act is unreasonable because of the applicant's fact pattern before committing her crime and because of his old age. *Letter from Applicant's Fiancé*, dated July 4, 2003. The applicant's fiancé states that the applicant was in a physically and sexually abusive relationship when she misappropriated money. *See id.* The AAO notes that the applicant misappropriated money on seven different occasions spanning over six months. *District Court Record*, dated January 23, 1998. Although the AAO is sympathetic to the applicant's prior abusive relationship and the difficulty facing the applicant's fiancé, it does not have the jurisdiction to change her criminal conviction nor to ignore section 212(h)(1)(A)(i) of the Act. This section of the act does not have any exceptions nor discretionary components to the required waiting time and this can only be changed through legislation.

However, the applicant's fiancé is eligible to file a waiver under section 212(h)(1)(B) of the Act. Although, section 212(h)(1)(B) of the Act does not specify fiancés of U.S. citizens as qualifying relatives for purposes of an extreme hardship waiver, if an alien seeking a K nonimmigrant visa is inadmissible, the alien can seek a waiver based on 8 C.F.R. § 212.7(a), which provides, in pertinent part:

- (a) *General*—(1) *Filing procedure*—(i) *Immigrant visa or K nonimmigrant visa applicant.* An applicant for an immigrant visa or “K” nonimmigrant visa who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision.

In determining that a fiancé is equivalent to a spouse for purposes of the extreme hardship statute, the AAO relies on 22 C.F.R. § 41.81 which provides:

§ 41.81 Fiancé(e) or spouse of a U.S. citizen and derivative children.

- (a) Fiance (e). An alien is classifiable as a nonimmigrant fiancé(e) under INA 101(a)(15)(K)(i) when all of the following requirements are met:

...

(3) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, *including the requirements of paragraph (d)* of this section.

...

(d) *Eligibility as an immigrant required.* The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under paragraphs (a), (b) or (c) of this section *as if the alien were an applicant for an immigrant visa*, except that the alien must be exempt from the vaccination requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

The applicant's fiancé asserts that the AAO should look at a combination of events, circumstances and the results that the interpretation of extreme hardship will cause. *Letter from Applicant's Fiance.* The applicant's fiancé emphasizes that discretion is required in this case. *Id.*

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included the presence of lawful permanent resident or United States citizen family ties to 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.

Therefore, an analysis under this case is appropriate in regard to the applicant's fiancé. The applicant's fiancé indicates that he has children and grandchildren although their legal status is not mentioned in the record. The record does not indicate that the applicant's fiancé has any family ties outside of the United States other than the applicant. No evidence of the country conditions were provided other than a few statements from the applicant's fiancé, one referring to Thailand as a place, "...where a zillion people live...stewing in a toxic haze." *Id.* at 3. The record does not indicate any other ties between the applicant's fiancé and Thailand. The applicant's fiancé does not speak the relevant foreign language. *See id.* The applicant's fiancé refers to the financial impact of departure by stating that he will lose 25 years of Medicare benefits. *Id.* However, no documentation has been submitted to verify this point.

Lastly, the applicant's fiancé submits letters regarding his health conditions. A licensed family therapist diagnosed the applicant's fiancé with depression and associated symptoms of anxiety. *Letter from Julie Lewis*, undated. The letter indicates that the applicant's fiancé has been a patient of the therapist from February 2003, however, the letter is not dated in order for the AAO to know the length of treatment. Furthermore, there is no mention of any treatment for the applicant's fiancé.

The record also includes two letters from the physician of the applicant's fiancé. The first letter states that the applicant's fiancé is manifesting signs of depression, that his condition has worsened from the time of a previous letter and his worsened condition is directly related to the immigration case. *See Letter from Gary Knaus, M.D.*, dated July 1, 2003. The physician also stated that he has known the applicant's fiancé for 25 years and this is a departure from his usual state of health. *Id.* The same physician submitted another letter stating that the applicant's fiancé sustained a myocardial infarction and this requires a new medical regimen of drug therapy, exercise and stress modification. *Letter from Gary Knaus, M.D.*, dated May 17, 2004. The physician states that the applicant's fiancé is having life altering stress related to the applicant's immigration case. *Id.* Lastly, the physician advises against having the applicant's fiancé travel due to his age and health condition. *Id.* The AAO finds these statements to be convincing based on the ongoing nature of the doctor-patient relationship.

Based on the totality of the record, extreme hardship has been shown to the applicant's fiancé in the event that he relocates to Thailand or in the event that he remains in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

*See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The main adverse factor in the present case is the applicant's conviction for misappropriation. This conviction is mitigated by the relatively short, suspended sentence given to the applicant.

The favorable factors for the applicant include the presence of her U.S. citizen fiancé and the extreme hardship to him if she is denied admission, the lack of any additional criminal activity, a history of stable employment and a lack of any immigration violations.

The AAO finds that the crime committed by the applicant is serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.