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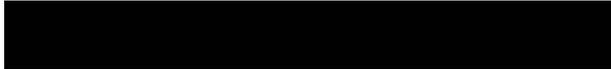
FILE:

Office: HARLINGEN, TX

Date:

APR 14 2008

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the
Immigration and Nationality Act (INA), 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Harlingen, Texas and the matter is now before the Administrative Appeals Office (AAO) 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 pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. The applicant is married to a U.S. citizen and has at least four U.S. citizen children. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his family.

The district director found the applicant to have been convicted of the offenses of second degree sodomy, acting in a manner to injure a child and having sexual contact with an individual under 17 years of age who is incapable of consent, crimes involving moral turpitude. The district director concluded that the applicant was inadmissible to the United States under section 212(a)(A)(i)(I) of the Act. He also found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative were he to be removed from the United States and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *District Director's Decision*, August 15, 2006.

On appeal, the applicant's spouse submits a letter describing the hardships she and her children would suffer were the applicant to be removed from the United States. She contends that he did not commit the acts for which he was arrested. *Spouse's letter*, dated September 7, 2006.

The record reflects that, on August 20, 1991, the applicant pled guilty to sexual abuse in the second degree under section 130.60 of the New York State Consolidated Laws. On October 1, 1991, he was sentenced to three years probation. *See Certificate of Disposition Number: 62171, Criminal Court of the City of New York, County of Queen; FBI Identification Record*. The language of the New York statute under which the applicant was convicted states:

§ 130.60 Sexual abuse in the second degree

A person is guilty of sexual abuse in the second degree when he subjects another person to sexual contact and when such other person is:

1. Incapable of consent by reason of some factor other than being less than seventeen years old; or
2. Less than fourteen years old.

Sexual abuse in the second degree is a class A misdemeanor.

The AAO notes that sexual offenses against minors are considered to be crimes involving moral turpitude and that the applicant has been convicted of a crime involving moral turpitude. *See Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966); *Matter of C--*, 5 I&N Dec. 65 (BIA 1953). His conviction, however, does not bar his admission to the United States under section 212(a)(2)(A) of the Act.

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

(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.

However, section 212(a)(2)(A)(i)(I) of Act may not be applied to individuals who have committed only one crime and whose conviction falls within the parameters set by section 212(a)(2)(a)(ii) of the Act:

- (ii) Exception.

Clause (i)(I) shall not apply to an alien who committed only one crime if-

- (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The record establishes that the applicant was convicted of a single crime. Although the district director correctly noted that the applicant was charged with three separate offenses at the time of his arrest, he erred in finding the applicant to have been convicted on each of the charges brought against him. The record of conviction clearly demonstrates that the applicant pled guilty to the single offense of sexual abuse in the second degree, a class A misdemeanor, under section 130.60 of the New York State Consolidated Laws for which the maximum penalty is one year of imprisonment. *See* section 70.15, New York State Consolidated Laws. He was not sentenced to a term of imprisonment, but to three years probation. Therefore, as the applicant has committed only one crime for which the maximum penalty did not exceed one year and was not sentenced to a term of imprisonment in excess of six months, he is eligible for the exemption provided by section 212(a)(2)(ii) of the Act and is not inadmissible to the United States on that basis.

The AAO notes, however, that the applicant entered the United States on July 15, 1984 on a B-2 nonimmigrant visa using the name [REDACTED], rather than [REDACTED]. The applicant has submitted a statement in which he explains that the surname he used at the time of his admission was that of his grandfather and was assumed solely to carry on his grandfather's name. In support of this claim, he submits an amended Filipino birth certificate issued in the name of [REDACTED]

Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), states, in pertinent part, that:

- (i) 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.

The issue before the AAO is, therefore, whether the record establishes that the applicant's use of the name [REDACTED] at the time of his 1984 nonimmigrant admission constitutes the willful misrepresentation of a material fact under section 212(a)(6)(C)(i) of the Act. The AAO notes that the burden of proof in this

proceeding, unlike that in a removal hearing, is on the applicant to establish his admissibility to the United States, as indicated in section 291 of the Act, 8 U.S.C. § 1362:

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this chapter, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not inadmissible under any provision of this chapter

The AAO acknowledges that an alien's entry into the United States as a nonimmigrant under a false identity does not necessarily constitute a material misrepresentation within the meaning of section 212(a)(6)(C)(i) of the Act. In *Matter of Gilikevorkian*, 14 I&N Dec. 454 (BIA 1973), the Board of Immigration Appeals (BIA) found that:

An alien's entry into the United States as a nonimmigrant under a false identity did not constitute a material misrepresentation within the meaning of section 212(a)(19) [now section 212(a)(6)(C)(i)] of the Immigration and Nationality Act where he had adopted the false identity for a legitimate reason (to obtain employment) and had used it for a prolonged period of time prior to his entry into this country.

The cases have distinguished between a false identity used to facilitate entry into the United States and one used for other reasons. In *Matter of Sarkissian*, supra, on which the immigration judge relied, there was no indication that the alien used the false identity for any purpose other than to obtain a visa to enter the United States. Where a person uses a false identity long before, and for reasons unrelated to, obtaining admission to the United States, and over a long period of time, misrepresentation as to identity made when applying to enter the United States has been held not to be material, *U.S. ex rel. Leibowitz v. Schlotfeldt*, 94 F.2d 263 (C.A. 7, 1938)

The Attorney General has established the test that a misrepresentation is material if (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which might have resulted in a decision to exclude the alien, *Matter of S-- and B- - C--*, 9 I.&N. Dec 436 (BIA 1961). Inasmuch as the respondent's use of the false identity was for a legitimate reason and was for a prolonged period prior to entry, a line of relevant inquiry was not cut off. Inquiry would have revealed no information damaging to the respondent so as this record indicates. No ground of excludability would have been uncovered. (Citations omitted).

The applicant claims that prior to arriving in the United States in 1984, he assumed the name [REDACTED] his grandfather's surname, but that he did not petition to change his name because his parents were able to amend his birth certificate to effect the name change. While the AAO notes the birth certificate in the record issued in the name of [REDACTED] it finds no evidence that establishes [REDACTED] as the surname of the applicant's grandfather or that the applicant ever used the name of [REDACTED] in The Philippines prior to his departure for the United States. It also notes that the record does not indicate that the applicant, having used the name of [REDACTED] upon admission to the United States ever used it again, e.g., his 1987 marriage certificate lists the name of [REDACTED]. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the record does not establish either that the applicant's use of the name [REDACTED] was for a legitimate reason or that he used it for a prolonged period of time prior to entry.

In that the applicant has not demonstrated that the identity under which he entered the United States in 1984 "had become his by continued use," *Matter of Gilikevorkian, supra.*, his use of the name [REDACTED] to enter the United States must be viewed as a material misrepresentation for the purposes of section 212(a)(6)(C)(i) of the Act. The AAO finds that, as the applicant has failed to prove that he had previously acquired the identity of [REDACTED], he was excludable on the true facts at the time of his admission since he did not have valid entry documents, i.e., entry documents issued in the name of [REDACTED]. Accordingly, he has failed to establish admissibility under section 212(a)(6)(C)(i) of the Act and must apply for a waiver of inadmissibility under section 212(i) of the Act, which provides that:

- (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the Attorney General [Secretary], 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 [Secretary] 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.

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. In the present case, the qualifying relative is [REDACTED], the applicant's spouse. Hardship experienced by the applicant or his children as a result of separation will not be considered in this waiver proceeding, except as it affects [REDACTED]. 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 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 age of the qualifying relative may be an additional relevant factor. *See Matter of Pilch*, 21 I&N 627, 630 (BIA 1996). In examining whether extreme hardship has been established, 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).

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS*, *supra*, held further that 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.

The record includes two statements in support of the applicant's claim that [REDACTED] would suffer extreme hardship if he were to be removed from the United States: an undated statement from the applicant and a September 7, 2006 letter from [REDACTED]

The first part of the extreme hardship analysis requires the applicant to establish extreme hardship to his spouse in the event that she relocates to The Philippines. In her statement, [REDACTED] states that she and the applicant cannot take their children to The Philippines because of safety issues. She notes that she and the applicant have heard a great deal about the kidnapping of individuals for ransom, particularly American and foreign-born children. She also states that what she would earn as a nurse in The Philippines would be unlikely to pay for the family's food.

Although the AAO acknowledges [REDACTED] claims of hardship if she relocates to The Philippines, it finds the record to offer no documentary evidence that would support them. Going on record without supporting documentary evidence will not meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, *supra*. Moreover, as previously noted, [REDACTED] s children are not qualifying relatives in this proceeding and the record does not establish how the harm claimed in relation to them would affect their mother. Accordingly, the applicant has not established that [REDACTED] would suffer extreme hardship if she were to accompany him to The Philippines.

The second part of the analysis requires the applicant to establish extreme hardship in the event that Ms. [REDACTED] remains in the United States following his removal. In his statement, the applicant reports that he and [REDACTED] work very hard to prepare their children for the future and that, if he is removed from the United States, he and [REDACTED] will sustain a major financial and emotional impact. He contends that [REDACTED] will not "make it" if she is left on her own, that she requires his help financially and his assistance to raise their children. [REDACTED] n's letter indicates her belief that, without the applicant, she and her five children will suffer extreme hardship. Losing the applicant, [REDACTED] states, will affect her

children's well-being. She reports that she and the applicant are the only caretakers for their children and that he works during the daytime and she at night. She asserts that she and the applicant cannot afford the luxury of a child care facility.

The AAO again finds no documentation in the record that would support the applicant's claims that Ms. [REDACTED] would not be able to survive if he were removed from the United States. There is no financial documentation to indicate that the applicant's removal would constitute extreme financial hardship for Ms. [REDACTED] or any evidence to establish its emotional impact on his wife. Although [REDACTED] states that she and the applicant share childcare responsibilities and that, if her husband is removed, they cannot afford to place their children in a child care facility, the record does not provide any financial documentation that demonstrates that this is the case. As previously noted, the applicant's and [REDACTED]'s claims, in the absence of documentary evidence, are not sufficient to meet his burden of proof in this proceeding. *See Matter of Soffici, supra.* The AAO also notes that the record does not establish, nor does the applicant claim, that he would be unable to obtain employment upon return to The Philippines that would allow him to assist [REDACTED] in meeting their financial obligations.

When reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors cited above, the record does not support a finding that [REDACTED] would face extreme hardship if the applicant were removed and she remained in the United States. Rather, the record demonstrates that she would experience the distress and difficulties normally associated with the removal of a spouse. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection, and emotional and social interdependence. While separation nearly always results in considerable hardship to the individuals and families involved, the Congress, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," did not intend that a waiver be granted in every case where a qualifying relationship and, thus, familial and emotional bonds exist. The point made in this and prior AAO decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(i) of the Act, be above and beyond the normal, expected hardship involved in such cases.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's removal from the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

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

ORDER: The appeal is dismissed.