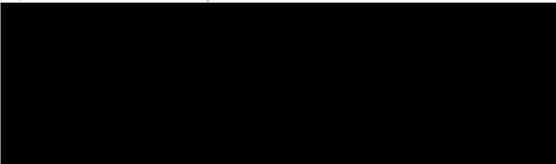


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U.S. Department of Homeland Security
20 Mass, Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE:



Office: BANGKOK DISTRICT OFFICE

Date:

NOV 01 2004

IN RE:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(9)(B)(v)

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, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

DISCUSSION: The waiver application was denied by the District Director, Bangkok. 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. The applicant was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II). The record reflects that the applicant is the spouse of a U.S. citizen and mother of a U.S. citizen child. She seeks a waiver of inadmissibility in order to return to the United States to reside with her husband and child.

The district director found that the applicant had failed to establish extreme hardship to her U.S. citizen spouse and denied the application accordingly. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212 of the Act lists the classes of aliens who are ineligible to receive visas and ineligible for admission to the United States. Unless a particular ground is statutorily excluded from applicability, grounds of inadmissibility apply to all applicants for nonimmigrant or immigrant visas and other applicants for admission.¹ Section 212(a)(9)(B)(v) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.—

(i) In general.—Any alien (other than an alien lawfully admitted for permanent residence) who—

...

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

...

(v) Waiver.—The Attorney General [now Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a U.S. 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 such immigrant would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

(ii) Construction of unlawful presence.—For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the

¹ For example, certain grounds of inadmissibility, such as likelihood to become a public charge, are inapplicable to refugees applying for adjustment to lawful permanent resident status. INA § 209, 8 U.S.C. § 1159.

alien is *present in the United States after the expiration of the period of stay authorized by the Attorney General* or is present in the United States without being admitted or paroled.

8 U.S.C. § 1182(a)(9)(B) (emphasis added).

In the present application, the record indicates that the applicant was admitted to the United States on October 1, 1999, as the fiancée of a U.S. citizen for the purposes of concluding a valid marriage with the petitioner within 90 days, pursuant to INA § 101(a)(15)(K)(i), 8 U.S.C. § 1101(a)(15)(K)(i). She was authorized to remain until December 30, 1999. She failed to marry the petitioner, yet remained in the United States after the expiration of her authorized period of stay. She married her current husband (Mr. [REDACTED]) on February 19, 2000. The couple had a son on December 14, 2000. She departed the United States on or about September 25, 2001, with the intent of pursuing an immigrant visa from overseas. Mr. [REDACTED] filed a Form I-129F, *Petition for Alien Fiancé(e)*, on her behalf, which was approved on July 27, 2002. She subsequently applied for an immigrant visa on or about March 2003. On April 11, 2003, the applicant was informed that she had been found inadmissible for unlawful presence of over one year and seeking readmission within 10 years.

Contrary to the contentions of the applicant, her marriage to a U.S. citizen on February 19, 2000 did not act to convert her status from unlawful to lawful. The applicant therefore accrued unlawful presence in the United States from December 31, 1999, the day after her nonimmigrant visa expired, until her departure from the United States on September 25, 2001, or a period of over one year and nine months. The applicant is seeking admission to the United States within 10 years of her 2001 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.²

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to 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 relative in this case is the applicant's spouse.

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. 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

² In response to the applicant's contentions that there was no indication of potential inadmissibility based on unlawful presence on the Form DS-230, *Application for Immigrant Visa and Alien Registration*, the AAO notes that Item 30 of this form instructs that each applicant must state whether or not he is "excludable" based on listed characteristics. Item 30(h) reads, in pertinent part: "[a]n alien . . . who was previously unlawfully present in the United States . . . for more than one year or an aggregate of one year within the last 10 years." As stated above, the marriage of the applicant to a U.S. citizen did not change her status to lawful.

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 AAO notes that the record contains references addressed to the hardship that the applicant's child would suffer if the applicant were refused admission. Section 212(a)(9)(B)(v) of the Act provides that a waiver of inadmissibility is applicable solely where the applicant establishes extreme hardship as to his or her U.S. citizen or lawful permanent resident spouse or parent. Congress excluded from consideration extreme hardship to an applicant's child. In the present case, the applicant's spouse is the only qualifying relative under the statute for which the hardship determination is permissible, and hardship to the applicant's child will not be considered.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited *supra*, does not support a finding that Mr. [REDACTED] faces extreme hardship if he remains in the United States and the applicant is refused admission. Rather, the record demonstrates that he will face no greater hardship than the unfortunate, but commonly expected, disruptions, inconveniences, and difficulties arising whenever a spouse is refused admission to the United States. The record reflects the understandable emotional distress that Mr. [REDACTED] is experiencing due to the separation from his wife. However, 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).

Further, the record is silent as to the hardship the applicant's spouse would face if he relocated to the Philippines to avoid separation from the applicant and his child. Therefore, it appears that the applicant's spouse faces, as all spouses facing deportation or refusal of admission of a spouse, the decision of whether to remain in the United States or relocate to avoid separation. The BIA has held, "[t]he mere election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed." *See Matter of Mansour*, 11 I&N Dec. 306, 307 (BIA 1965).

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. "[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). The record is devoid of evidence that the applicant's husband will experience hardship rising to the level of "extreme" as contemplated by statute and case law.

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v).

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) 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.