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U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**

H3

PUBLIC COPY

FILE:

Office: MANILA

Date:

JUL 07 2006

IN RE:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 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, Chief
Administrative Appeals Office

DISCUSSION: The Acting Officer in Charge, Manila, the Philippines, denied the waiver application and it 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)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States. The applicant is married to a citizen of the United States and is the father of a U.S. citizen daughter. He seeks a waiver of inadmissibility in order to reside in the United States with his wife and daughter.

The acting officer in charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Acting Officer in Charge*, dated January 19, 2005.

The record shows that the applicant appeared at the U.S. Embassy in Manila, the Philippines, on October 22, 2004. The applicant testified that, in May or June, 1994, he entered the United States without inspection and remained in the United States until he returned to the Philippines on September 19, 2004 in order to attend his immigrant visa interview. The record reflects that, on April 27, 2003, the applicant married his U.S. citizen wife and on October 18, 2003, she filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On February 10, 2004, the Form I-130 was approved.

On October 22, 2004, the applicant filed the Form I-601 along with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his family members.

On appeal, the applicant contends that he is not inadmissible to the United States and that he has established his U.S. citizen spouse and daughter would suffer extreme hardship. *Applicant's Brief*, dated February 14, 2005. In support of these assertions, the applicant only submitted the above-referenced brief. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) 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 the 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 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The acting officer in charge based the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on the applicant's admitted unlawful presence in the United States for more than one year. The applicant contends that he is not inadmissible due to his **authorized stay in the United States** because he was "grandfathered" by virtue of his second marriage to [REDACTED] under section 245(i) of the Act, 8 U.S.C. § 1255(i). The applicant contends that he is eligible under the second version of section 245(i) of the Act due to his marriage to a U.S. citizen. Section 245(i) of the Act provides, in pertinent part:

(i)(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States--

(A) who--

(i) entered the United States without inspection

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section) of--

(i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000; may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence

....

and

(2) . . . the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if-

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

There is no evidence in the record that a petition for classification under section 204 of the Act or an application for a labor certification was filed on behalf of the applicant prior to April 30, 2001. Additionally, the applicant is not eligible to seek adjustment of status pursuant to section 245(i) of the Act because he is not currently present in the United States and has never filed an Application to Register Permanent Residence or Adjust Status (Form I-485). The AAO, therefore, finds that the applicant is not eligible to apply for adjustment of status pursuant to section 245(i) of the Act. The AAO notes that, even if the applicant were eligible to adjust status pursuant to section 245(i) of the Act, section 245(i) of the Act only waives section 212(a)(6)(A)(i) of the Act, as an alien who is present in the United States without admission or parole. Section 245(i) of the Act still requires an applicant for adjustment of status to be otherwise admissible to the United States.

The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until August 19, 2004, the date of his departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year. Pursuant to section 212(a)(9)(B)(i)(II), the applicant is barred from again seeking admission within ten years of the date of his departure.

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 the alien himself experiences upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings.

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 at 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 [REDACTED] is a native of the Philippines who became a lawful permanent resident in 1995 and a naturalized U.S. citizen in 2002. The applicant has a seven-year old daughter from a previous marriage who is a U.S. citizen by birth. The applicant has four other children who are citizens of the Philippines. The record reflects further that the applicant is in his 40's, [REDACTED] is in her 30's, and [REDACTED] and the applicant's children have no health concerns.

The applicant asserts that his children in the Philippines will suffer extreme hardship if he is not permitted to return to the United States because they relied on his income while he was in the United States and he would be unable to secure employment in the Philippines sufficient to support them. The applicant also asserts that his U.S. citizen daughter would suffer extreme hardship if she remained in the United States with her step-mother, [REDACTED] without the applicant. The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996), removed hardship to an alien's children as a factor in assessing hardship waivers under section 212(a)(9)(B)(v) of the Act. It is noted that Congress specifically did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. Thus, hardship to the applicant's children will not be considered in this decision, except as it may affect [REDACTED], the only qualifying relative.

The applicant asserts that [REDACTED] would suffer extreme hardship if she were to remain in the United States without him. In his affidavit, [REDACTED] states "my wife will suffer extreme hardship resulting from the separation for it was far from our minds when we decided to get married that our marriage will ultimately end up in physical separation." The applicant states that he has left his U.S. citizen daughter in the care of [REDACTED]

There are no financial documents in the record in regard to the applicant's and [REDACTED] incomes or the costs associated with [REDACTED] household. As such, there is no evidence in the record to suggest that [REDACTED] would be unable to support herself and the applicant's U.S. citizen daughter without the additional income of the applicant. There is no evidence to suggest that [REDACTED] or the applicant's U.S. citizen daughter suffer from a physical or mental illness that would cause [REDACTED] to suffer hardship beyond that commonly suffered by aliens and families upon deportation. While it is unfortunate that [REDACTED] would essentially become a single parent and professional childcare may involve an added expense and not equate to the care of a parent, this is not a hardship that is beyond those commonly suffered by aliens and families upon deportation.

The applicant does not assert that [REDACTED] would suffer extreme hardship if she returned to the Philippines in order to be with him. The AAO is, therefore, unable to find that [REDACTED] would experience hardship should she choose to join the applicant in the Philippines. Finally, the AAO notes that, as a U.S. citizen, the applicant's spouse is not required to reside outside of the United States as a result of denial of the applicant's waiver request.

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 spouse would face extreme hardship if the applicant were refused admission. Rather, the record demonstrates that [REDACTED] will face no greater hardship than the unfortunate, but expected disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior 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. 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 therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). 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 an 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.