



U.S. Department of Justice
Immigration and Naturalization Service

119

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



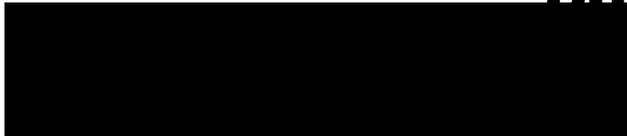
File: [REDACTED] Office: MANILA, PHILIPPINES

Date: JAN 25 2001

IN RE: Applicant: [REDACTED]

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)

IN BEHALF OF APPLICANT:



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identification data deleted to
prevent clearly unwarranted
invasion of personal privacy.

INSTRUCTIONS:

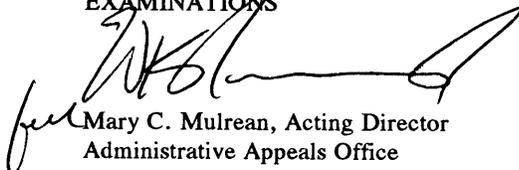
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Assistant Officer in Charge, Manila, Philippines, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The applicant is a native and citizen of the Philippines who was found by a consular officer to be inadmissible to the United States under § 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 a period of one year or more. The applicant married a United States citizen in 1998 and is the beneficiary of an approved petition for alien relative. He seeks the above waiver in order to travel to the United States to reside with his spouse and child.

The assistant officer in charge concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the application accordingly.

On appeal, counsel argues that a review of case law as cited in Matter of Shaughnessy, 12 I&N Dec 810(BIA 1968), Matter of Ngai, 19 I&N Dec. 245 (Comm. 1984), and Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999) supports the grant of a waiver in this case. Counsel also asserts that the assistant officer in charge failed to consider all of the hardships, individually and cumulatively, presented to establish extreme hardship and failed to specify what negative factors outweigh the favorable in the exercise of discretion to deny the waiver request.

The record reflects that the applicant entered the United States without inspection in 1989 and remained unlawfully until his departure to the Philippines in November 1999. Evidence of the exact date of the applicant's departure from the United States is not present in the record.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are ineligible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(9) ALIENS PREVIOUSLY REMOVED.-

(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 from the United States, is inadmissible.

(v) WAIVER.-The Attorney General 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 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. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Section 212(a)(9)(B) of the Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974); United States v. Schooner Peggy, 1 Cranch 103, 110 (1801); Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

After reviewing the IIRIRA amendments to the Act relating to fraud, misrepresentation and unlawful presence in the United States, and after noting the increased penalties Congress has placed on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar in some instances, eliminating children as a consideration in determining the presence of extreme hardship, and providing a ground inadmissibility for unlawful presence (entry without inspection) after April 1, 1997, it is concluded that Congress has placed a high priority on reducing and/or stopping fraud, misrepresentation and unlawful presence of aliens in the United States.

The Board has held that extreme hardship is not a definable term of fixed and inflexible meaning, and that the elements to establish extreme hardship are dependent upon the facts and circumstances of each case. These factors should be viewed in light of the Board's statement that a restrictive view of extreme hardship is not mandated either by the Supreme Court or by its own case law. See Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996).

It is noted that the requirements to establish extreme hardship in the present waiver proceedings under § 212(a)(9)(B)(v) of the Act do not include a showing of hardship to the alien as did former

cases involving suspension of deportation or present cases involving battered spouses. Present waiver proceedings require a showing of extreme hardship to the citizen or lawfully resident spouse or parent of such alien. This requirement is identical to the extreme hardship requirement stipulated in the amended fraud waiver proceedings under § 212(i) of the Act, 8 U.S.C. 1182(i). Therefore, it is deemed to be more appropriate to apply the meaning of the term "extreme hardship" as it is used in fraud waiver proceedings than to apply the meaning as it was used in former suspension of deportation cases.

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board recently stipulated that the factors deemed relevant in determining whether an alien has established "extreme hardship" in waiver proceedings under § 212(i) of the Act include, but are not limited to, the following: (1) the presence of a lawful permanent resident or United States citizen spouse or parent in this country; (2) the qualifying relative's family ties outside the United States; (3) 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; (4) the financial impact of departure from this country; (5) and finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

On appeal, counsel asserts that the applicant's wife has lived her entire life in the United States, her immediate family members with whom she is very close all reside here, she does not speak Tagalog and has no family ties in the Philippines; it would be professionally and financially detrimental for the applicant's wife to quit her employment as a public school teacher and relocate to the Philippines; and that the applicant's wife suffers from a medical condition for which she is covered by medical insurance and is undergoing treatment in the United States.

Counsel has established that the medical problems of the applicant's spouse are exacerbated by the stress of separation from her husband and that the applicant's spouse would suffer social, financial, professional and medical detriment if she were to relocate to the Philippines. Based on the foregoing, it is concluded that the applicant has shown that his United States citizen wife would suffer hardship that reaches the level of extreme as envisioned by Congress if the applicant is not allowed to travel to the United States to reside.

The grant or denial of the above waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Attorney General and pursuant to such terms, conditions, and procedures as (s)he may by regulations prescribe.

The unfavorable factors in this matter include the applicant's

procuring entry without inspection in 1989 and remaining unlawfully in the United States for several years. The favorable factors include the existence of an approved petition for alien relative, the absence of a criminal record, and the extreme hardship to the applicant's United States citizen spouse.

It is concluded that the favorable factors outweigh the unfavorable factors in this matter and that the applicant's waiver request warrants the favorable exercise of the Attorney General's discretion in the interest of family unity.

In proceedings for application for waiver of grounds of inadmissibility under § 212(h), the burden of proving eligibility remains entirely with the applicant. Matter of Ngai, 19 I&N Dec. 245 (Comm. 1984). Here, the applicant has met that burden. Accordingly, the decision of the officer in charge will be withdrawn, and the waiver application will be approved.

ORDER: The appeal is sustained. The decision of the assistant district director is withdrawn and the application is approved.