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U.S. Citizenship and Immigration Services

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[redacted]

JUL 12 2007

FILE: [redacted] Office: LOS ANGELES (SANTA ANA) Date:

IN RE: [redacted]

PETITION: Application for Waiver of Grounds of Inadmissibility under section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF PETITIONER:

[redacted]

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.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The waiver application will be denied.

The applicant, a citizen of the Philippines, was found inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States and reside with his United States citizen mother.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on his mother, the qualifying relative, and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility.

On appeal, counsel first asserts that the director incorrectly applied the waiver provisions of the Act as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (IIRIRA). Rather, he asserts, the director should have applied the pre-IIRIRA waiver provisions of the Act, as the applicant's fraud or willful misrepresentation occurred prior to IIRIRA's passage. Counsel also contends that the applicant nonetheless still qualifies for a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i) as the applicant's United States citizen mother would suffer extreme hardship if the applicant were required to return to the Philippines. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(6)(C) of the Act states, in pertinent part, the following:

> (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.

Section 212(i) of the Act states, in pertinent part, the following:

> (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.

The AAO will first address counsel's contention that the director should have applied the pre-IIRIRA waiver provisions of the Act.

The record establishes that the applicant entered the United States on March 12, 1995 with a passport and visa issued to another person, prior to the passage of IIRIRA in 1996. As noted by counsel, the United States Supreme Court ruled in *Landgraf v USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed. 2d.

229 (1994) that there is a presumption against the retroactive application of statutes. Counsel contends that consideration of the conduct that led to the applicant being found inadmissible should be based upon the law that existed at the time of that conduct; in this case, the date he sought admission into the United States via fraud or willful misrepresentation.

The AAO disagrees. *Landgraf* held that a statute has a retroactive effect when:

> [I]t would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. *Landgraf* at 280.

In a case considering the retroactive application of IIRIRA provisions that made an INA § 212(c) waiver unavailable to the applicant, *INS v. St. Cyr,* 533 U.S. 289, 121 S. Ct. 2271 (2001), the United States Supreme Court stated the following:

> IIRIRA's elimination of § 212(c) relief for people who entered into plea agreements expecting that they would be eligible for such relief clearly attaches a new disability to past transactions or considerations. Plea agreements involve a *quid pro quo* between a criminal defendant and the government, and there is little doubt that alien defendants considering whether to enter into such agreements are acutely aware of their convictions' immigration consequences. The potential for unfairness to people like St. Cyr is significant and manifest. Now that prosecutors have received the benefit of plea agreements, facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would be contrary to considerations of fair notice, reasonable reliance, and settled expectations to hold that IIRIRA deprives them of any possibility of such relief. *St. Cyr* at 291.

The key to the reasoning in *St. Cyr* is the applicant's reliance upon the then-existing statute when he made the plea agreement. The record in the instant case does not include conduct influenced by reliance upon prior law. There is no indication that the applicant had any awareness at all about the relationship between his fraudulent entry into the United States and his inadmissibility or the availability of waiver relief.

Citing to *Matter of Soriano*, 21 I. & N. 516 (BIA, AG 1996) and *Landgraf,* the Board of Immigration Appeals in *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560 (BIA 1999) stated that a statute is not retroactive if:

> [I]t does not impair rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. More specifically, an intervening statute that either alters jurisdiction or affects prospective injunctive relief generally does not raise retroactivity concerns, and, thus, presumptively is to be applied in pending cases. [citation omitted]. Likewise, the Attorney General concluded [in *Soriano*] that the new provisions in section 212(c) applied to pending cases because the new legislation acted to withdraw her authority to grant prospective relief; it did not speak to the rights of the affected party. [citation omitted]. The effect was therefore to alter both jurisdiction and the availability of prospective relief to the alien. [citation omitted]. *Cervantes-Gonzalez* at 564.

The BIA held in *Cervantes-Gonzalez* that a request for an INA § 212(i) waiver of the Act is a request for prospective relief and, as such, its restrictions may be applied to conduct which predates passage of the current statute. Here, the instant I-601 was filed on or around May 13, 2005. Accordingly, the AAO will rely on *Cervantes-Gonzalez* here.

Having established the governing law, the first issue to be addressed is whether the applicant's return to the Philippines would impose extreme hardship on a qualifying family member. If extreme hardship is established, the AAO will then make an assessment as to whether it should exercise discretion.

As noted previously, the record establishes that the applicant entered the United States on March 12, 1995 using a passport issued to another person. Thus, the applicant entered the United States by making a willful misrepresentation of a material fact (his identity) in order to procure entry into the United States. Accordingly, the applicant is inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i) for attempting to enter the United States by making a willful misrepresentation of a material fact (her identity) in order to procure entry into the United States. The applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status, on February 26, 2003, and the instant Form I-601 was filed on May 13, 2005. Counsel contends that the applicant qualifies for a waiver of inadmissibility. Counsel contends that the applicant's forced return to the Philippines would inflict extreme hardship on his United States citizen mother.

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, in *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Court of Appeals for the Ninth Circuit defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Ninth Circuit emphasized that the common results of deportation are insufficient to prove extreme hardship. Additionally, the United States Supreme Court held in *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

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 United States 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 that:

> 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). In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (BIA)) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case. 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 contains documentation regarding the applicant's mother's health problems. The applicant's mother detailed her medical condition in an undated letter submitted on appeal. According to this letter, the applicant's mother suffered pneumonia in 1992 and 2005. She also has high blood pressure, mild osteoporosis, and high cholesterol. She takes medication for each of these conditions, as well as a cough suppressant and medicine for an upset stomach. She describes her dependence upon her son as follows:

> During these occasions, it was my son, [the applicant], who accompanied me in all my medical appointments, laboratory works, and buying my medication based on my prescriptions. During these critical condition or state of my health [sic], my son was always there to assist and support me that I so desperately need.
>
> I am attaching herewith my medical documents given to me by Kaiser Permanente, and prescriptions for my illnesses that will suffice that I am indeed in need of my son's assistance during this difficult condition of my life.

Additionally, counsel states in his appellate brief that the applicant's mother is "wholly dependent" upon the applicant, that the applicant is the only son his mother can depend upon right now, and that the applicant's mother is "in constant care" of the applicant.

As the only qualifying relative in this matter is the applicant's mother, the AAO must assess the hardship she would experience if the applicant were to return to the Philippines. The record reflects that the applicant's mother is a seventy-one-year-old citizen of the United States. While she states that she depends upon her son, the record does not demonstrate that there are no other family members who can assist her. The record does not mention whether she has a husband or any other family members who can assist her.[1] The applicant has not established that his mother must rely upon him to care for her, and has submitted no information to verify counsel's statement that his mother is "wholly dependent" upon her or that she is in his "constant care." Without documentary evidence to support the claim, the assertions of

[1] The AAO does note that the applicant's aunt and uncle, who own a 90% stake in the company that filed the applicant's Form I-140 and filed his Form I-864, Affidavit of Support, live in California and had an adjusted gross income of $185,135 in 2002.

counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS,* 794 F.2d 491, 497 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient."); *Shooshtary v. INS,* 39 F.3d 1049 (9th Cir. 1994) (stating, "the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances."); *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); *INS v. Jong Ha Wang,* 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

However, particularly in the Ninth Circuit, courts have recognized that, in certain cases, economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme. "Included among these are the personal hardships which flow naturally from an economic loss decreased health care, educational opportunities, and general material welfare." *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th cir. 1981) (citations omitted); *see also Santana-Figueroa v. INS*, 644 F.2d 1354, 1358 (9th cir. 1981) ("Economic loss often accompanies deportation. Even a significant reduction in standard of living is not, by itself, a basis for relief. . . . But deportation may also result in the loss of all that makes life possible. When an alien would be deprived of the means to survive, or condemned to exist in life-threatening squalor, the "economic" character of the hardship makes it no less severe.")

The Ninth Circuit Court of Appeals has stated that, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also that, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (BIA)) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case.

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 mother will face extreme hardship if the applicant returns to the Philippines. Particularly if she remains in the United States, the record demonstrates that she faces no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States or refused admission. Although CIS is not insensitive to her situation, the financial strain and emotional hardship she would face are common results of separation and do not rise to the level of "extreme" as contemplated by statute and case law.

In limiting the availability of the waiver to cases of "extreme hardship," Congress specifically provided that a waiver is not available in every case where a qualifying family relationship exists. As noted previously, United States 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 finds that the District Director properly denied this waiver application. In adjudicating this petition, the AAO finds that the record fails to demonstrate that the applicant's mother would suffer hardship beyond that normally expected upon the removal of a son. It also appears from the record that her medical problems are under control and that they do not threaten her life. Moreover, as noted previously, the applicant has not established that his mother has no one else upon whom she can rely.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that his United States citizen mother would suffer hardship that is unusual or beyond that normally expected upon removal of a son. As noted previously, the common results of deportation or exclusion are insufficient to prove extreme hardship; the emotional hardship caused by severing family and community ties and the financial hardship that results from separation are common results of deportation and do not constitute extreme hardship. "Extreme hardship" has been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

Finally, the AAO notes that counsel appellate brief draws attention to the fact that the director did not issue a request for evidence. However, it is not clear what remedy would be appropriate beyond the appeal process itself. The applicant has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the applicant the opportunity to again supplement the record with new evidence.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i), the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained not that burden. Accordingly, the AAO will not disturb the director's denial of the waiver application.

ORDER: The appeal is dismissed. The waiver application is denied.