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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administration Appeals Office
Washington, DC 20529

U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: MANILA Date: APR 2 8 2009

IN RE: [redacted]

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); Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[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

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge, Manila, Philippines. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant filed a Form I-129F application for a "K-3" nonimmigrant visa as the spouse of a U.S. citizen who filed a relative petition on her behalf, pursuant to INA § 101(a)(15)(K)(ii). The officer-in-charge determined that the applicant was inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant was further found inadmissible under 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 for more than one year and seeking readmission within 10 years of her last departure. The applicant seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(h) of the Act in order to enter the United States and reside with her U.S. citizen husband.

The officer-in-charge found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Form I-601 application for a waiver accordingly. *Decision of the Offcer-in-Charge,* dated August 30, 2006.

On appeal, counsel for the applicant asserts that the officer-in-charge applied an erroneous legal standard, as the applicant qualifies for consideration under section 212(d)(3)(A) of the Act and she need not show extreme hardship to her husband. *Brief in Support of Appeal*, dated September 22, 2006. Counsel contends that the applicant has established eligibility for a waiver and the application should be approved. *Id.*

The record contains, in pertinent part, briefs from counsel; documentation in connection with the applicant's husband's medical care; reports on conditions in the Philippines; documentation in connection with the applicant's criminal conviction; documentation in connection with the applicant's prior proceedings in Immigration Court, including a removal order; a copy of the applicant's passport; statements from the applicant's husband and the applicant; copies of birth records for the applicant's stepchildren; a copy of the applicant's husband's passport; a letter from a psychologist regarding the applicant's husband; evidence of the applicant's husband's employment; letters in support of the application, and; copies of photographs of the applicant and her husband. 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 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.

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

(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.

. . .

Section 212(h) of the Act provides, in pertinent part, that:

(h) The Attorney General [now Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) [or] (B) . . . of subsection (a)(2)

. . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the
Attorney General [Secretary] that –

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
(iii) the alien has been rehabilitated; or

> (1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [now the Secretary of Homeland Security (Secretary)] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

The record reflects that the applicant entered the United States in B-2 status as a visitor for pleasure on or about March 23, 1990. She applied for an extension of her status, which was approved until March 23, 1991. The record does not reflect that she held a legal immigration status after March 23, 1991, yet she did not depart until June 30, 2002. Accordingly, the applicant accrued unlawful presence beginning on April 1, 1997, the date the unlawful presence provisions in the Act took effect, until June 30, 2002. This period totals over five years. She now seeks admission in K-3 status, pursuant to an approved Form I-130 relative petition filed by her husband on her behalf. She was deemed inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for having been unlawfully present for more than one year and seeking readmission within 10 years of her last departure.

The record further shows that on May 24, 2001, the applicant pleaded guilty to Misapplication of Bank Funds under 18 U.S.C. § 656, for which she was sentenced to time served, three years of supervised release, an assessment, and restitution. The applicant 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 a crime involving moral turpitude. There is ample legal precedent to show that the applicant's conviction under 18 U.S.C. § 656 constitutes a crime involving moral turpitude, as the record of conviction reflects that the applicant was ordered to pay restitution of $8,678.46 which suggests she misappropriated that amount of funds from a financial institution. *See Matter of Batten*, 11 I. & N. Dec. 271 (BIA 1965). She does not contest her inadmissibility on appeal.

Counsel asserts that the officer-in-charge applied an erroneous legal standard, as the applicant qualifies for consideration for a waiver of her inadmissibility under section 212(d)(3)(A) of the Act and she need not show extreme hardship to her husband. *Brief in Support of Appeal* at 3. However, upon review the officer-in-charge applied the correct standard as provided in sections 212(a)(9)(B)(v) and 212(h)(1)(B) of the Act.

If an applicant seeking a K nonimmigrant visa is inadmissible, the applicant's ability to seek a waiver of inadmissibility is governed by 8 C.F.R. § 212.7(a), which provides, in pertinent part:

> (a) *General*—(1) *Filing procedure*—(i) *Immigrant visa or K nonimmigrant visa applicant.* An applicant for an immigrant visa or "K" nonimmigrant visa who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision.

The applicant filed the waiver application on Form I-601 on March 29, 2006 with the American Consulate in Manila, Philippines. The Department of State forwarded the application to U.S. Citizenship and Immigration Services (USCIS,) which denied the application on August 30, 2006. The AAO must determine the appropriate standard to be applied to adjudication of the Form I-601.

Counsel contends that, because the underlying application is for a nonimmigrant visa, use of the "extreme hardship" standard contained in the statutory waiver provision applicable to immigrants is inappropriate. Counsel contends that the relevant statutory provision is section 212(d)(3) of the Act, which provides:

> (3) Except as provided in the subsection, an alien
>
> > (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) . . . may, after approval by the Attorney General [now Secretary of Homeland Security (DHS Secretary)] of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the [DHS Secretary] . . ..

Counsel cites the Department of State Foreign Affairs Manual (FAM) section 41.81 to show that applicants for K nonimmigrant status are eligible for consideration for waivers of inadmissibility under section 212(d)(3)(A) of the Act. Section 41.81 of the FAM provides as follows:

> Fiancé(e) or spouse of a U.S. citizen and derivative children.
>
> . . .
>
> (b) Spouse. An alien is classifiable as a nonimmigrant spouse under INA 101(a)(15)(K)(ii) when all of the following requirements are met:
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> > (1) The consular officer is satisfied that the alien is qualified under that provision and the consular officer has received a petition approved by the INS pursuant to INA 214(p)(1), that was filed by the U.S. citizen spouse of the alien in the United States.
> >
> > (4) The alien otherwise has met all applicable requirements in order to receive a nonimmigrant visa, *including the requirements of paragraph (d)* of this section.

> (d) *Eligibility as an immigrant required.* The consular officer, insofar as is practicable, must determine the eligibility of an alien to receive a nonimmigrant visa under paragraphs (a), (b) or (c) of this section *as if the alien were an applicant for an immigrant visa*, except that the alien must be exempt from the vaccination requirement of INA 212(a)(1) and the labor certification requirement of INA 212(a)(5).

22 C.F.R. § 41.81 (emphasis added) (amended by 66 Fed. Reg. 19393, Apr. 16, 2001). The related USCIS provision is 8 C.F.R. § 212.7(a)(1), specifically providing that K visa applicants shall file the same inadmissibility waiver as immigrant visa applicants. 8 C.F.R. § 212.7(a)(1)(66 Fed. Reg. 42587, Aug. 14, 2001). The supplemental information published in the Federal Register along with this amendment to 212.7(a)(1) stated:

> Although the new K-3/K-4 is a nonimmigrant classification, the alien spouse will still be required to meet certain State Department requirements and regulations as though they [sic] were applying for an immigrant visa. . . . Although entering as nonimmigrants, these aliens plan to ultimately stay in the United States permanently. . . . [A]pplicants for the new K-3/K-4 classification are subject to section 212(a)(9)(B) of the Act. . . . [I]n order to ensure that the K-3/K-4 nonimmigrants have the opportunity to apply for the same waiver provisions as do the K1/K-2's, 8 C.F.R. 212.7 is amended to include them.

66 Fed. Reg. 42587 (August 14, 2001). The requirement that the consular officer determine a K nonimmigrant visa applicant's eligibility as an immigrant "insofar as practicable," as stated in 22 C.F.R. § 41.81(d), is met by the provision in the USCIS regulation requiring the K nonimmigrant visa applicant to apply for a waiver under the provisions related to immigrant visas. If USCIS were to approve a Form I-601 waiver application, the K nonimmigrant would no longer be inadmissible, and so would not need the benefit of INA § 212(d)(3).

The visa and waiver application process established by regulation ensures that the Department of Homeland Security will not admit to the United States, even temporarily, an individual who is ineligible to fulfill the purpose of his or her admission. Further, the immigration process for eligible individuals is streamlined, in that, since under 8 C.F.R. § 212.7(a)(4) the waiver of inadmissibility is valid indefinitely, the alien's eventual application for adjustment of status will be adjudicated in the United States in light of the already-approved waiver of any identified inadmissibility grounds.

K-3 visa applicants intend to remain in the United States permanently. The Form I-601 process ensures that waivers for K-3 applicants will be scrutinized under the appropriate standard in recognition of their intent to immigrate to the United States, and also capitalizes on the existing immigrant waiver process to provide for consistency, transparency, and the opportunity for the applicant to be heard on the merits of the application.

Although 8 C.F.R. § 212.3, the USCIS regulation governing waivers under INA § 212(d)(3), does not explicitly preclude a K nonimmigrant visa applicant from seeking relief under INA § 212(d)(3), whether to grant this relief is a matter entrusted to the discretion of the Secretary of the Department of Homeland Security, upon the recommendation of the Secretary of State. The AAO concludes that 8 C.F.R. § 212.7(a)(1), by requiring the K nonimmigrant to seek a waiver on the same terms as an immigrant visa applicant, must be seen as precluding USCIS from exercising the discretion under INA § 212(d)(3) in the applicant's favor. The supplemental information cited above, 66 Fed. Reg. 42587, clearly supports this conclusion. Further, as an alternative ground for this decision, the AAO concludes that, even if 212.7(a)(1) does not actually *preclude* granting relief under INA § 212(d)(3) of the Act, it would not be an appropriate exercise of discretion to grant relief under INA § 212(d)(3) of the Act to an alien who does not intend his sojourn in the United States to be temporary.

Based on the foregoing, the officer-in-charge applied the correct standard in the present matter as provided in sections 212(a)(9)(B)(v) and 212(h)(1)(B) of the Act.

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. Section 212(h)(1)(B) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. Hardship the applicant experiences upon being found inadmissible is not a basis for a waiver under sections 212(a)(9)(B)(v) or 212(h)(1)(B) of the Act. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship. These factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; 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; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

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).

Regarding her inadmissibility under section 212(h)(1)(B) of the Act, it is noted that the applicant is not eligible to be considered for a waiver under the standard set in section 212(h)(1)(A) of the Act, as 15 years have not passed since she committed the conduct that led to her conviction. Section 212(h)(1)(A)(i) of the Act.

Counsel contends that the applicant's husband will experience extreme hardship if the applicant is prohibited from entering the United States. *Brief in Support of Appeal* at 10. Counsel notes that the applicant's husband is 69-years-old, and although he is presently in good health, he is at an age where health problems could develop. *Id.* at 12. Counsel asserts that the applicant's husband, at age 69, should not be compelled to relocate to a faraway place, adapt to a different culture, and learn a second language. *Id.* Counsel explains that the applicant's husband has suffered significant emotional hardship in the last few years, including the loss of his prior wife to cancer after 37 years of marriage. *Id.* Counsel states that the applicant's husband fell into depression after the death of his prior wife, and he smoked and drank heavily. *Id.* Counsel indicates that the applicant's husband was diagnosed as clinically depressed. *Id.* Counsel states that the applicant's husband began seeing a psychiatrist and taking medication. *Id.*

Counsel explains that the applicant met her husband in 2001 after an abusive relationship, and that they helped each other emotionally. *Id.* at 13. Counsel suggests that the applicant's husband has a propensity to develop renewed depression due to his previous experience with loss should he continue to be separated from the applicant. *Id.* at 13-14.

Counsel contends that conditions in the Philippines are poor, including overpopulation, violence, poverty, lack of health services, economic challenges, and political instability. *Id.* at 14-15. Counsel emphasizes the applicant's husband's lack of ties to the Philippines, including the facts that he does not speak Tagalog and he does not own property there. *Id.* at 16. Counsel notes that the applicant's husband's health coverage would terminate should he reside in the Philippines. *Id.*

Counsel states that the applicant's husband has two adult children and grandchildren in the United States, and that he would be compelled to forego regular contact with them should he relocate to the Philippines. *Id.* at 16-17. Conversely, counsel notes that the applicant's husband would endure significant hardship if he continues to be separated from the applicant. *Id.*

Counsel asserts that the applicant's husband has strong ties to the Miami area, as he serves on the board of his former company, he is active with his church, and he has many valued friendships. *Id.* at 18.

The applicant submitted a statement in which she noted that she presently works at the Cebu International Language Academy as a General Manager. *Statement from the Applicant*, dated February 28, 2006. The applicant expressed remorse for her criminal activity. *Id.* at 1. She explained that she and her husband met after each had experienced emotional difficulty, and that they supported each other. *Id.* at 2. She stated that her husband has ties to the United States, but none in the Philippines, thus he would experience hardship should he relocate there. *Id.*

The applicant's husband described his prior experiences, including the death of his prior wife due to lung cancer. *Statement from the Applicant's Husband*, dated October 10, 2005. He explained that a psychologist diagnosed him with severe depression for which he took medication and made lifestyle changes. *Id.* at 1. He provided that he had regular sessions with the psychologist. *Id.* The applicant's husband stated that he met the applicant and she helped him move on with his life. *Id.* at 2. He stated that he and the applicant resided with each other in the United States from January 2002 until June 2002,

and that they married in the Philippines in September 2003. *Id.* The applicant's husband expressed that he has a close relationship with his children and grandchildren in the United States, and he does not wish to be separated from them. *Id.* The applicant's husband indicated that he cannot relocate to the Philippines, as his entire life is in the United States. *Id.* He expressed that he would experience significant emotional hardship if he continues to be separated from the applicant. *Id.*

The applicant provided a letter from a psychologist, [redacted] who stated that he treated the applicant's husband beginning on April 21, 1989. *Statement from* [redacted], dated October 10, 2005. [redacted] indicated that the applicant's husband was suffering from Reactive Depression and Anxiety due to business stress. *Id.* at 1. [redacted] stated that the applicant's husband was treated on and off until August 25, 1994. [redacted] reported that the applicant's husband sought treatment after the death of his wife, and that he was diagnosed at that time with Reactive Depression and Panic Attacks. *Id.* [redacted] indicated that the applicant's husband was prescribed Zoloft, and he responded to therapy and medication. *Id.* [redacted] explained that the applicant's husband's recovery was speeded by his relationship with the applicant, and that the applicant provided love, comfort, and a sense of renewal. *Id.* He posited that the applicant's husband's recovery is deeply connected to the applicant. *Id.*

Upon review, the applicant has shown that her husband will experience extreme hardship should she be prohibited from entering the United States. The applicant's husband has a history of depression, for which he has sought medical treatment. He received treatment from April 1989 to August 1994 for depression and anxiety. He again received treatment after the death of his first wife in March 2003. As discussed above, [redacted] indicated that the applicant's presence in the United States is beneficial to her husband's mental health and recovery from the death of his first wife. The applicant's husband expressed that he is close with the applicant and that he does not wish to be separated from her. Given the applicant's husband's history of depression and years of treatment by a psychologist, the AAO finds that the applicant's husband's emotional hardship, should he be separated from the applicant, can be distinguished from that which is commonly expected when spouses are separated due to inadmissibility. This emotional hardship rises to the level of extreme hardship, as contemplated by sections 212(a)(9)(B)(v) and 212(h)(1)(B) of the Act. Thus, the applicant has shown that her husband will experience extreme hardship should she be prohibited from entering the United States and he remain without her.

The applicant's husband would face significant hardship should he depart the United States and relocate to the Philippines. The applicant's husband has significant ties to the United States, including two adult children and two grandchildren with whom he shares a close relationship. The applicant's husband is involved with his community through religious activities and serving on the board of a company he founded and operated for over 35 years. The record reflects that the applicant's husband has resided in the United States for a lengthy duration. The AAO acknowledges that relocating to the Philippines at age 69 after a life in the United States presents significant challenges for the applicant's husband, including adapting to a new culture and language, losing his connection to his current community, and enduring separation from his children and grandchildren in the United States. The applicant's husband suggested that he will not relocate to the Philippines due to such challenges. The AAO finds that the applicant's husband's hardship, should he relocate to the Philippines, can be distinguished from that which is ordinarily expected due to his documented history of depression and emotional health issues.

Accordingly, the applicant has shown that her husband will experience extreme hardship should he relocate to the Philippines to maintain family unity.

Based on the foregoing, the applicant has shown by a preponderance of the evidence that denial of the present waiver application will result in extreme hardship to her U.S. citizen husband. Sections 212(a)(9)(B)(v) and 212(h)(1)(B) of the Act.

In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver of inadmissibility does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez, supra,* at 12.

The negative factors in this case consist of the following:

The applicant pleaded guilty to Misapplication of Bank Funds under 18 U.S.C. § 656 on May 24, 2001. The applicant was in the United States without a legal status for over five years.

The positive factors in this case include:

The record does not reflect that the applicant has been convicted of more than one crime, or that she has engaged in criminal activity since 2001; the applicant has expressed remorse for her criminal activity, and explained that her judgment was impaired by an abusive relationship; the applicant does not appear to have a propensity to engage in further criminal activity; the applicant's U.S. citizen husband would experience extreme hardship if the applicant is prohibited from entering the United States; the applicant has supported her husband during an emotionally difficult period, and; the record reflects that the applicant has the inclination to work to meet her needs and contribute to the United States, as she assumed employment as a general manager for a language institute upon her return to the Philippines.

While the applicant's criminal activity and violation of U.S. immigration law cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden that she merits approval of her application.

ORDER: The appeal is sustained.