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U.S. Department of Homeland Security
20 Mass Ave. N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

H5

[redacted]

FILE: [redacted] Office: LOS ANGELES, CA Date: NOV 1 8 2010

IN RE: [redacted]

APPLICATION: 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 APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Michael Rhew

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, CA. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted and the appeal sustained.

The applicant is a native and citizen of the Philippines who was found to be 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 having procured admission into the United States by fraud or willful misrepresentation in 1992. The applicant is the beneficiary of an approved Immigrant Worker Petition and is the daughter of two U.S. citizen parents. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The record indicates that on August 13, 2004, the applicant signed a sworn statement stating that in 1992 she entered the United States using a passport and visa bearing the name, '[redacted]'.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (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 provides, in pertinent part:

> (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.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's parents are the only qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the

United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the

aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself,

particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293. We also note that in this case, the applicant's parents face the prospect of permanent separation from their daughter.

In a decision dated November 19, 2004, the district director concluded that the assertions provided in the affidavits of the applicant's parents and the evidence in the record did not support a finding that the applicant's parents would experience extreme hardship as a result of the applicant's inadmissibility. The application was denied accordingly.

In a Notice of Appeal to the AAO, (Form I-290B), dated December 14, 2004, counsel asserts that the director erred in applying the extreme hardship standard retroactively to an alleged misrepresentation that occurred prior to the enactment of IIRAIRA, when the mere presence of qualifying relatives would have made the applicant eligible for a waiver of inadmissibility. Counsel also asserts that the applicant's waiver application warranted an approval because she satisfied all of the extreme hardship factors in *Matter of Cervantes* and that the applicant's identity misrepresentation was not material, therefore the applicant does not require a waiver.

In a decision dated November 21, 2006, the AAO found counsel's assertion regarding and error in retroactively applying section 212(i) of the Act to the applicant's case to be unfounded. The AAO noted that 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. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999). The AAO noted further that if an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment and conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. *Matter of George and Lopez-Alvarez*, 11 I&N Dec. 419 (BIA 1965); *Matter of Leveque*, 12 I&N Dec. 633 (BIA 1968).

The AAO also found that counsel's assertions regarding the applicant's misrepresentation of her identity as not being material were unfounded. The AAO noted that the applicant misrepresented her identity to immigration officials in order to procure the benefit of entry to the United States. In such an instance, the inspecting officer must make material inquiries such as whether the applicant possesses valid entry documents that were lawfully issued to her, and whether any United States government agencies possess information that has a bearing on the applicant's admissibility, such as records of criminal activity or prior immigration violations. When the applicant misrepresented her identity, she cut off these material inquires. Specifically, the inspecting officer was unable to determine whether the applicant was the true owner of the passport and visa, whether she possessed valid entry documents of her own, or whether the United States possessed information that has a bearing on the applicant's eligibility for entry.

In his initial appeal counsel suggested that the applicant's misrepresentation was not material if she would have been eligible for a visa on the true facts of her case. The AAO noted that whether the applicant would have been issued a visa through legal means is not relevant to determining whether her misrepresentation was material under the present facts. The applicant made a willful misrepresentation in order to gain admission to the United States, not to gain a visa. Had she revealed her true identity to

the inspecting officer, she would have been refused admission due to her lack of valid entry documents. Thus, the AAO found that the applicant had misrepresented her identity to gain a benefit under the Act for which she was not eligible, and that such a misrepresentation was material.

In regards to extreme hardship, counsel stated in his initial appeal, that the applicant's parents were 76 and 78 years old, making relocation to the Philippines more difficult. Counsel stated that the applicant's parents had 401K plans that they would lose if they relocated to the Philippines, that they had been residing in the U.S for over twenty years, and that all of their family resided in the United States. Counsel asserted that the medical care in the Philippines was inadequate and the applicant's parents would not receive proper care if they relocated. In support of this assertion counsel submitted a Consular Information Sheet for the Philippines which stated that the medical facilities did not meet the standards if the United States. The AAO then found that because of the applicant's parents' strong family ties to the United States, length of residence in the United States, sub-standard medical facilities in the Philippines and their advanced age they would suffer extreme hardship as a result of relocating to the Philippines.

However, the AAO did not find that the applicant's parents would suffer extreme hardship as a result of separation. In his brief on appeal, counsel stated that the applicant helped to care for her elderly parents and meet their financial needs. The record included medical documentation to show that in 2004 the applicant's mother had problems breathing and was rushed to the hospital, further tests were ordered, but a follow-up report was not submitted. Counsel asserted that the applicant was the only person available to care for her parents and that the applicant's sister was unable to care for her parents because she must have a hysterectomy. We noted our understanding that a hysterectomy was a very serious medical procedure, but that the applicant did not show that it was not permanently debilitating or that the applicant's sister would be unable to care for the applicant's parents once she recovered from her operation.[1] In addition, the AAO notes that none of the medical documentation supported a finding that the applicant's parents required the daily care of the applicant to maintain their wellbeing. The doctor's note that was submitted stated that the applicant's parents were in "fairly good health". *Dr.* [redacted] *Letter*, dated October 13, 2004.

In addition to assertions made about the applicant's parents' need for care, counsel stated that the applicant's parents are emotionally distraught and unhappy over the thought of being separated from their daughter and her never being able to come to the United States. Counsel submitted a psychological evaluation from Dr. [redacted]. Dr. [redacted] concluded that the applicant's parents would suffer exceptional and extremely unusual hardship. She suggested that the applicant and her parents could benefit from treatment from their physicians and a therapist on how to deal with stress. The record did not include any documentation showing that follow-up treatment was given to the applicant's parents. The AAO then noted that although the input of any mental health professional is respected and valuable, the submitted report was based on a single interview between the applicant's parents and the psychologist. Thus, the record failed to reflect an ongoing relationship with the

[1] The AAO notes that in his motion counsel asserts that the applicant's sister also suffers from breast cancer. However, the medical documentation submitted regarding the applicant's sister having breast cancer is from 1991. The record is not clear as to the current status of the applicant's sister.

applicant's parents or any history of treatment. Moreover, the conclusions reached in the submitted report, being based on a single self-reporting interview, did not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering Dr. [redacted] findings speculative and diminishing the report's value in determining extreme hardship.

Finally, the applicant's parents stated in their joint affidavit that it was an extreme hardship for them to contemplate a permanent physical separation from their daughter. They stated that they would not be able to visit their daughter in the Philippines because they would not be able to afford a plane ticket. Counsel submitted the mother's social security statement to support this assertion. The AAO noted that the record indicated that the applicant's father was still working as an operating room technician and the record lacked documentation showing that the applicant's parents could not receive financial help from their other children in order to visit the Philippines.

With his motion counsel submits a statement from the applicant's parents and extensive medical records for the applicant's parents. In their statement, the applicant's parents states that they are 83 and 82 years old and they live with the applicant in a one floor house because it is too difficult for them to climb stairs. They state that they both have serious medical problems needing medication, regular check-ups, treatment, and a special diet. The applicant's mother lists her medical problems as: high blood pressure, high cholesterol, emphysema, osteoporosis, and heart problems, noting that she has triple bypass surgery on January 6, 2009. The applicant's father lists his medical problems as: high blood pressure, high cholesterol, and high urine protein. He states that he is borderline diabetic and monitored for kidney disease and prostate problems. Both of the parents states that they cannot go anywhere without the applicant's assistance and that they need help with walking. They state that they also need help monitoring their medications and that the applicant cooks all of their meals.

In a letter dated August 27, 2010 the applicant's parents' doctor, Dr. [redacted], states that the applicant's parents require close home supervision and care to maintain their health. He also lists the parents' medical problems. In addition, the AAO notes that medical records submitted also support the assertions regarding the applicants' parents' health.

The AAO now finds that the applicant's parents will experience extreme hardship as a result of being separated from the applicant. The suffering that will be experienced by the applicant's parents surpasses the hardship typically encountered in instances of separation because of their reliance on the applicant to maintain their health and everyday well being. The documentation submitted indicates that the applicant's parents are advanced in age, suffer from various medical conditions, and require at home care. In addition, if the applicant were to separate from her parents and return to the Philippines this separation would likely be a permanent separation due to the applicant's parents' medical condition and the unlikely event that they would be able to travel to the Philippines. The AAO has carefully considered the facts of this particular case and finds that the potential hardship to the applicant's parents rises to the level of extreme hardship. The AAO therefore concludes that the applicant has established that her parents would suffer extreme hardship if her waiver of inadmissibility is denied.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The adverse factor in the present case is the applicant's immigration violation. The favorable factors in the present case are the applicant's family ties to the United States, including a U.S. citizen child; extreme hardship to her U.S. citizen parents if she were to be denied a waiver of inadmissibility; the applicant's lack of a criminal record or offense; and, as indicated by her parents the applicant's attributes as a good daughter.

The AAO finds that the immigration violation committed by the applicant is serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the motion is granted and the appeal sustained.

ORDER: The motion is granted and the appeal is sustained.