U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-N-E-S

DATE: SEPT. 1, 2015

APPEAL OF LOS ANGELES FIELD OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF INADMISSIBILITY

The Applicant, a native and citizen of the Philippines, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (INA, or the Act) § 212(i), 8 U.S.C. § 1182(i). The Field Office Director, Los Angeles, California denied the application. The matter is now before us on appeal. The appeal will be dismissed.

The Applicant was found to be inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or material misrepresentation. The Applicant is the beneficiary of an approved Form I-130, Petition for Alien Relative, filed on his behalf by his U.S. citizen spouse. The Applicant seeks a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his U.S. citizen spouse.

On appeal the Applicant, through counsel, states that he received ineffective assistance of counsel from an individual who, unbeknownst to him, was not eligible to practice law in the State of California. The Applicant also submits new evidence and states that the new evidence demonstrates that his spouse will suffer extreme hardship if his waiver application is not approved.

The record includes, but is not limited to: a declaration and letter from the Applicant's spouse a psychological assessment of the Applicant's spouse; medical records for the Applicant's spouse; biographical information for the applicant, his spouse, and their two children; documentation concerning the individual who previously represented the applicant; medical information for the applicant's sister; and country-conditions information for the Philippines. The entire record was reviewed and considered in rendering a decision on the appeal.

As an initial matter, on appeal, the Applicant states that he received ineffective assistance of counsel because an individual, who unbeknownst to him was not licensed to practice law in the State of California, prepared his Form I-601, Application for Waiver of Grounds of Inadmissibility. The Applicant states that this individual's preparation of his Form I-601 prejudiced his case, as the individual stated that in addition to his U.S. citizen spouse, that the Applicant's U.S. lawful permanent resident sister was also his qualifying relative under the Act. The Applicant, through

counsel, also states that the individual submitted "incorrect and severely deficient supporting evidence" resulting in the denial of his application.

In *Matter of Lozada*, the Board of Immigration Appeals (BIA or Board) held that to establish ineffective assistance of counsel as a basis for a motion to reopen or reconsider, one must (1) provide an affidavit attesting to the relevant facts, including a detailed description of the agreement with former counsel, (2) establish that former counsel has been informed of the allegations and provided with an opportunity to respond, and (3) indicate whether a complaint has been filed with the appropriate disciplinary authority, and if not, why not. 19 I&N Dec. 637, 639 (BIA 1988). Here, the Applicant has shown that he made efforts to comply with the evidentiary requirements for making a claim of ineffective assistance of counsel. The Applicant, through counsel, submits an affidavit attesting to the facts of his agreement with former counsel and a copy of a letter sent to former counsel requesting an explanation for the errors that occurred in his case. The Applicant explains, with respect to the third *Lozada* requirement, that no complaint was filed with the California Bar Association, as the individual had already been disbarred. *See Correa–Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013) (to comply with *Matter of Lozada* the motion "should reflect" whether a bar complaint has been filed, but "probative evidence" that a complaint has been filed is not required).The U.S. Department of Justice, Executive Office for Immigration Review also issued a final order of discipline for the Applicant's former counsel, dated September 13, 2006, indefinitely suspending him from practice before the Board, immigration courts, and the Department of Homeland Security.

The record, however, does not establish that ineffective assistance of counsel prejudiced the adjudication of the Applicant's Form I-601. *See Matter of Assaad*, 23 I&N Dec. 553, 561-62 (BIA 2003) (requiring prejudice stemming from prior counsel's actions in addition to compliance with the procedural requirements set forth in *Matter of Lozada*, 19 I&N Dec. at 639); *see also Correa-Rivera v. Holder*, 706 F.3d at 1133 (to prevail on an ineffective assistance of counsel claim prejudice must be established). The Field Office Director instructed the Applicant, in a letter dated January 31, 2014, that he needed to submit a Form I-601, and she also stated that the record appeared to show that his qualifying relative is his U.S. citizen spouse. On Form I-601, Part 2, Information About Relative Through Whom Applicant Claims Eligibility, the Applicant listed his spouse. He listed his sister and children under Part 3, Information About Applicant's Other Relatives in the United States. Moreover, the Applicant submitted documentation with his Form I-601 to show extreme hardship to his spouse. The Field Office Director's decision is based on the evidence concerning the Applicant's spouse, not his sister. In Part 1, Information About Applicant, the Applicant stated that his spouse and his sister would experience extreme hardship if he were to leave the United States. He also mentioned his children, although the Applicant's sister and children are not qualifying relatives under the Act. Including additional individuals who are not qualifying relatives under the Act, where a qualifying relative is also included, should not prejudice the Applicant's case, and here it appears that the inclusion of his sister and children did not prejudice his case.

The Applicant has new representation and filed a timely appeal. His Form I-601 will accordingly be given *de novo* consideration. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

(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.

The Field Office Director found the applicant to be inadmissible under section 212(a)(6)(C)(i) of the Act, as the Applicant procured admission to the United States on March 16, 1997, using a passport from the Philippines and U.S. visa in the name of another individual. On appeal, the Applicant does not contest his inadmissibility under section 212(a)(6)(C)(i) of the Act for having procured admission to the United States through fraud or willful misrepresentation of a material fact.

Section 212(i) of the Act provides a waiver for fraud and material misrepresentation. That section, in pertinent part, states that:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the [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 [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 a U.S. lawful permanent resident or U.S. citizen spouse or parent of the applicant. The record indicates that the Applicant's qualifying relative is his U.S. citizen spouse. In order to qualify for this waiver, the Applicant must first prove that the refusal of his admission to the United States would result in extreme hardship to his spouse. The applicant's U.S. citizen stepson, U.S. citizen daughter, and U.S. lawful permanent resident sister are not qualifying relatives under the Act. Hardship to the Applicant or the Applicant's other relatives other than his spouse will not be separately considered, except as it is shown to affect the Applicant's spouse. If extreme hardship to a qualifying relative is established, the Applicant is statutorily eligible for a waiver, and U.S. Citizenship and Immigration Services then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (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. 627, 632-33 (BIA 1996); *Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido,* 138 F.3d 1292, 1293 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai,* 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

This matter arises within the jurisdiction of the Ninth Circuit Court of Appeals. That court has stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[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 at 1293. *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.

On appeal, the Applicant states that his U.S. citizen spouse will suffer extreme hardship if she were to be separated from the Applicant. The couple has been married for 9 years and in addition to their daughter, age [redacted] they raise the Applicant's spouse's [redacted] year-old son from her previous marriage. The Applicant's spouse states that her son does not have contact with his biological father and that although she shares joint legal custody with him and he was ordered to pay child support, she has not received child support since March 2014. As a result, the Applicant's spouse states that she relies on the Applicant to serve as a father figure to her son, and he does so.

The Applicant's spouse states that she was very depressed in her first marriage and attempted suicide due to the verbal and emotional abuse that she suffered in that relationship and the stress that she underwent seeking a divorce from her ex-husband, in particular due to cultural factors, her physically demanding job and the exhaustion she felt. The Applicant's spouse states that she started feeling depressed again in August 2014. The Applicant's spouse states that she worries that the Applicant will not be able to find employment in the Philippines because many graduate nurses are unemployed in that country. She is worried that she would have to financially support him in the Philippines, adding to her financial burden and worries. She states that she would also worry about his safety due to the high incidence of kidnapping in the Philippines of individuals who are known to have relatives in the United States. She also wants her children to know their father. She says she would not be able to afford to visit the Applicant with her meager income. She also states that in the Applicant's absence she would need to obtain babysitters to care for their young children and take them to and from school. She states that she also would not have time to drive the Applicant's sister to and from doctor's appointments. She says that thoughts of how she would manage without the Applicant make her depressed.

In support of these statements, the record contains a psychological evaluation of the Applicant's spouse dated October 21, 2014. The psychological evaluator diagnoses the Applicant's spouse with adjustment disorder with anxiety, stating that "the enormous strain of being separated from one's spouse constitutes a powerful hardship on this client." The evaluator also finds that the Applicant's spouse suffers from a mild to moderate level of depression that could become more serious in the face of continued stress. The evaluator concludes that "the other hardships on top of this one culminate in the client being potentially and actually subjected to extreme and unusual hardship." Although the evaluator appears from the record to be qualified to make conclusions concerning the Applicant's spouse's mental health, it is not the evaluator's role to make conclusions concerning the extreme hardship standard at 212(i) of the Act. We will take the evaluator's conclusions concerning the Applicant's spouse's mental health into consideration with the other evidence of record, in the aggregate, in determining whether the record demonstrates that the Applicant's spouse will suffer extreme hardship under the Act.

The Applicant's spouse states that she went to see a psychologist so that she could be medicated for her depression, and she also discovered that her body mass index was high enough that she is considered obese. The Applicant's spouse states that she was told that she was in danger of developing diabetes and a heart attack as a result of her weight, and she states that this depressed her to the point where she was having thoughts of suicide, although the psychological assessment of the Applicant's spouse on October 21, 2014 states that the Applicant's spouse was not having suicidal ideation at that time. The Applicant's spouse states that she was prescribed medication for her depression and is also practicing meditation. The record confirms that the Applicant's spouse was seen for a doctor's office visit on November 4, 2014. The Applicant submits an "After Visit Summary," indicating that his spouse's health problems were "depression, unspecified" and "obesity."

In her declaration, the Applicant's spouse states that she is working three jobs and relies on the Applicant, who she states has one job, to care for the children and take them to and from school. The record does not contain recent documentation to show that the Applicant's spouse has three different employers. Documentation from 2012 indicates that the Applicant's spouse received three W-2 forms from different employers, but two of those forms indicated wages of about $2,500. It is not clear from the record for how long her additional employment lasted or whether it was temporary. In addition, the psychological assessment of the Applicant's spouse indicates that the Applicant's spouse has one job and that she relies on the Applicant's income; specifically, according to her psychological assessment, she stated that surviving without the Applicant's income would cause her hardship.

The most recent documentation in the record concerning the employment and income of the Applicant and his spouse is the couple's 2012 Form 1040, Individual Income Tax Return and the corresponding W-2 forms, showing that the Applicant earned $28,242 and his spouse earned $24,687.98 that year. The Applicant submits no documentation of the couple's expenses. Although the Applicant's spouse's assertions are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. *See Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Given the contradictory and limited information concerning the Applicant and his spouse's income and expenses, the record is unclear about the degree of financial hardship that the Applicant's spouse would experience in his absence. The record also is unclear about who is responsible for childcare or if other family members are available to help with childcare in the Applicant's absence. We will, however, consider the limited information available in the record to the extent that it shows that the Applicant was the family's primary breadwinner in 2012.

The Applicant's spouse also states that the Applicant takes care of his sister, who has cancer, and that she would be responsible for taking care of the Applicant's sister in his absence. The record does not establish that the Applicant's sister currently suffers from any medical condition. The most recent medical records concerning his sister date back to 2006. Moreover, no documentation shows

that the Applicant's sister resides with him and that his spouse would be the only person to care for her in his absence. The Applicant's sister's medical records provide an address for his sister that differs from the Applicant's. The medical records also indicate that the Applicant's sister was married and has an adult son, in addition to her brother and five sisters.

Given the incomplete and contradictory evidence concerning Applicant's spouse's income and expenses, the lack of specific evidence concerning the Applicant's spouse's obligations in terms of providing care to the Applicant's sister, and her present needs and condition, we are unable to find that the emotional hardship to the Applicant's spouse, alone, amounts to extreme hardship. We recognize the impact of separation on families, but the evidence in the record, when considered in the aggregate, does not indicate that the hardship is beyond that which is normally experienced by families dealing with removal or inadmissibility. *See Matter of O-J-O-*, 21 I&N Dec. at 383.

The Applicant's spouse states that she would not relocate to the Philippines; however, the Applicant on appeal, through counsel, states that his spouse would lose her healthcare coverage were she to relocate to the Philippines, that she requires mental healthcare, and that insurance in the Philippines does not cover mental healthcare. The Applicant, through counsel, also states that healthcare for his spouse's obesity would not be covered by health insurance in the Philippines. No documentation in the record supports these assertions or shows that the Applicant or his spouse would not be able to afford healthcare in the Philippines. Without supporting evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate, are relevant factors in establishing extreme hardship. The evidence on the record is insufficient to establish, however, that the applicant's spouse's depression and obesity could not be treated in the Philippines.

The Applicant provides corroborating evidence, in the form of articles and reports, for his assertion that there is high unemployment in the nursing field in the Philippines and that he and his spouse may have difficulty finding work there in that field. The country-conditions information he submits, moreover, shows that kidnapping in the Philippines is motivated by financial gain and that individuals are targeted based on their perceived wealth. It is not clear from the record that the Applicant and his spouse would be perceived as being wealthy because they previously resided in the United States. The information submitted also indicates that the majority of kidnappings occur in the southern Philippines. Although the Applicant and his spouse may have difficulty obtaining employment in the Philippines, the other hardship described, such as adapting to life in a different country where the standard of living is lower, do not amount to extreme hardship. The Applicant's spouse is a native of the Philippines, has family in that country, and it is not clear from the record that she would be unable to take her son from her previous marriage with her to the Philippines. As a result we cannot determine that the Applicant has met his burden to show that his spouse would suffer extreme hardship upon relocation. Again, the Applicant bears the burden of proof in these proceedings and he has not met his burden of establishing that his spouse would suffer extreme hardship were she to be separated from the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relative, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship as required under section 212(i) of the Act. As the applicant has not established extreme hardship to a qualifying family member, no purpose would be served in determining whether he merits a waiver as a matter of discretion.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of MATTER OF A-N-E-S*, ID# 10765 (AAO Sept. 1, 2015)