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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: LOS ANGELES, CA

Date: **APR 29 2008**

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:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

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 on March 6, 1994. The applicant is married to a U.S. citizen and has a U.S. citizen mother. She seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The district director found that the record contained no evidence to support a finding that the applicant's spouse and/or parent would suffer extreme hardship as a result of the applicant's inadmissibility. The application was denied accordingly. *Decision of the District Director*, dated April 19, 2005.

On appeal, counsel asserts that the applicant is not inadmissible because her misrepresentation was not material. He also asserts that because the applicant's misrepresentation occurred in 1994, before the enactment of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), the applicant's waiver application should be adjudicated under pre-IIRIRA standards. Finally, counsel asserts that the applicant's qualifying relatives would suffer extreme hardship as a result of her inadmissibility and that fairness, justice and equity require that her waiver application be granted. *Counsel's Brief*, dated May 18, 2005.

The record indicates that on March 6, 1994, the applicant presented a Filipino passport and B-2 visitor's visa in an assumed name to gain entry into the United States. She is therefore, inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

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 that:

- (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 applicant entered the United States by making a willful misrepresentation of a material fact (her identity) in order to procure entry into the United States. The Supreme Court in, *Kungys v. United States*, 485 US 759 (1988) found that the test of whether concealments or misrepresentations are "material" is whether they can

be shown by clear, unequivocal, and convincing evidence to have been predictably capable of affecting, i.e., to have had a natural tendency to affect, the legacy Immigration and Naturalization Service's (now Citizenship and Immigration Services') decisions. In addition, Matter of S- and B-C-, 9 I&N Dec. 436 (BIA 1960; AG 1961) states that the elements of a material misrepresentation are as follows:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Based on this standard, the applicant's misrepresentation was material. 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. In the present matter, when the applicant misrepresented her identity, she cut off these inquiries. 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 had a bearing on the applicant's eligibility for entry.

Counsel suggests that the applicant's misrepresentation was not material if she would have been eligible for a B-2 visa had she applied. Yet, whether the applicant would have been issued a B-2 visa is not relevant to determining whether her misrepresentation at the time of entry 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 B-2 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 applicant sought to gain a benefit under the Act by misrepresenting her identity and that misrepresentation was material. Based on the foregoing, counsel's assertion that the applicant's misrepresentation was immaterial is not persuasive. The applicant has not established that she was erroneously deemed inadmissible.

Counsel also asserts that the applicant's waiver application should be adjudicated under pre-IIRIRA standards as the Supreme Court in *INS v. St. Cyr*, 533 U.S. 289 (2001) has held that IIRIRA should not be applied retroactively to conduct that took place prior to its effective date. However, while the AAO notes the findings in *INS v. St. Cyr*, it does not find them to be applicable to the current proceedings. In *INS v. St. Cyr*, the court held that IIRIRA's repeal of discretionary relief from removal under 212(c) of the Act could not be applied retroactively in cases where aliens, prior to the effective date of IIRIRA, had pled guilty or *nolo contendere* to crimes based on their understanding that in doing so, they would retain the ability to seek such relief. Moreover, in the absence of explicit statutory direction, an applicant's eligibility for relief 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). If an amendment makes the statute more restrictive after the application is filed, eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered under the 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).

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on the applicant's U.S. citizen or lawful permanent resident spouse and/or parent. Hardship the alien experiences due to separation is not considered in section 212(i) waiver proceedings unless it causes hardship to the applicant's spouse and/or parent.

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 applicant 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 U.S. 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.

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 his brief, counsel emphasizes the affect of family separation in the applicant's case. This matter arises in the Los Angeles district office, which is within the jurisdiction of the Ninth Circuit Court of Appeals. The Ninth Circuit 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 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to 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). In *Salcido*, the court remanded to the Board of Immigration Appeals (BIA) for failure to consider the factor of separation despite respondent's testimony that if she were deported her U.S. citizen children would remain in the United States in the care of her mother and spouse. *See also Babai v. INS*, 985 F.2d 252 (6th Cir. 1993) (failure to consider hardship to U.S. citizen child if he remained in the United States is reversible error). *Bastidas v. INS*, 609 F.2d 101, 105 (3rd Cir. 1979). Accordingly, the separation of family will be given appropriate weight in the assessment of hardship factors in the present case. Should extreme hardship be 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 AAO notes that extreme hardship to the applicant's spouse and/or mother must be established in the event that they reside in the Philippines or in the event that they reside in the United States, as they are not

required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

Counsel states that the applicant's mother and spouse will suffer extreme hardship as a result of the applicant's inadmissibility. He states that the applicant's mother and spouse have extensive family ties to the United States, but no family in the Philippines. *Counsel's Brief*, dated May 18, 2005. Specifically, counsel states that the applicant's spouse needs the emotional support and stability provided by the applicant. He states that the applicant's spouse was in prison from January to June 2003 for a grand theft conviction and was again in prison from May to July 2004 and September 2004 to January 2005 for violating his parole. Counsel states that the applicant's spouse is unemployed, has been in rehabilitation for a cocaine addiction and requires the applicant's help in supporting his son from a prior relationship, overcoming his cocaine addiction and staying out of prison. *Id.*

The applicant's spouse states that he needs the applicant to remain in the United States to help support him and his son. *Spouse's Statement*, dated May 16, 2005. He states that he needs the applicant to help him with his addiction to drugs and to help him stay out of prison. The applicant's spouse states that he is currently trying to get his life back on track and that it is very important to have his wife with him to support him financially and emotionally. He asserts that without the applicant his life will go down a path of drug abuse and self-destruction. *Id.* In an affidavit previously submitted, the applicant's spouse states that family unity is very important to him and if his wife is removed it will disrupt his established family unit. *Spouse's Affidavit*, dated June 6, 2000. He states that he is extremely unhappy, anxious, depressed and emotionally disturbed as a result of the applicant's immigration problems. He also states that his son, the applicant's stepson, will suffer emotionally if the applicant is removed. *Id.* The record indicates that the applicant's spouse was convicted of grand theft in 2003 and was sentenced to prison time and probation. *Record of Conviction*, dated March 12, 2003. The conviction record shows that, in addition to being convicted of grand theft, the applicant's spouse was ordered not to use or possess narcotics or drugs, to avoid places where the users, sellers and buyers of narcotics congregate, and not to associate with persons he knew to be sellers or users of narcotics. The applicant also was required to submit to periodic anti-narcotics tests as directed by his probation officer and cooperate with his probation officer in a plan for drug education, treatment and counseling. The AAO notes the preceding orders issued by the court, but does not find them to establish that the applicant is addicted to cocaine and/or that he has been in rehabilitation for addiction.

The applicant's mother asserts that she is extremely anxious, depressed and emotionally distressed as a result of the possible separation from her daughter, but she cannot relocate to the Philippines. *Mother's Affidavit*, dated June 29, 2000. The mother states that separation of a mother from her child constitutes extreme hardship and that she will never be able to see any future grandchildren because of the applicant's inadmissibility. The applicant's mother states that she has been suffering from paranoia or separation anxiety because she feels her other children blame her for not preventing the applicant's removal. She states that her children's disapproval is always on her mind. The applicant's mother also states that in Filipino culture the youngest child is always responsible for caring for his or her aged parents and that without the applicant, her youngest child, in the United States, she will be placed in a convalescent home or a government-run senior care center. *Id.* The AAO notes that the record does not contain any supporting documentation regarding the applicant's mother's emotional state or that other family members are unwilling to care for her in the applicant's absence.

Based on the record before it, the AAO does not find the applicant to have demonstrated that her spouse or her mother would experience extreme hardship if they remained in the United States following her removal to the Philippines.

Were he to relocate to the Philippines, the applicant's spouse states that he would be moving to a foreign country, where he has no family ties and does not speak the language. The applicant's spouse contends that the Philippines are economically and politically unstable and that unemployment is high. He asserts that he cannot liquidate his personal property and lose its true value. *Spouse's Affidavit*, dated June 6, 2000.

In his brief, counsel asserts that the applicant's mother suffers from rheumatism, hypertension, anxiety and depression and receives medical treatment through U.S. healthcare programs and insurance plans. *Counsel's Brief*, dated May 18, 2005. He states it is unlikely that the applicant's mother's medical treatments can be continued in the Philippines at the level she is receiving in the United States. He also asserts that her medical insurance will not extend to care in the Philippines. *Id.*

The applicant's mother states that she is 65 years old and that she cannot relocate to the Philippines. She states that she does not have significant family ties to the Philippines, she has substantial family ties to the United States and that suitable medical care is not available in the Philippines. *Mother's Affidavit*, dated June 29, 2000. The record includes a medical document for the applicant's mother stating that she has been suffering from headaches, palpitations and chest pains for one week. *Medical Record*, dated February 4, 2005. The record includes additional medical documentation showing that the applicant's mother had a colonoscopy where a polyp was removed and a biopsy performed. *Colonoscopy and Biopsy Report*, dated June 1, 2004. The record also contains a medical record, dated September 23, 2003 with notations that are illegible. The AAO notes that these medical records do not reflect that the applicant's mother requires continued medical care and/or that her medical problems would be affected were the applicant removed from the United States.

Counsel also asserts that the applicant's qualifying relatives would suffer financially upon relocation to the Philippines. *Counsel's Brief*, dated May 18, 2005. Counsel states that financial support and survival are not certain in the Philippines. He states that the applicant's family cannot afford to return to the Philippines. Counsel also submits travel warnings, an internet article and a consular information sheet from the U.S. Embassy in the Philippines to support his assertions regarding the country conditions in the Philippines. A Warden Notice from the U.S. Embassy in the Philippines states that the terrorist threat to Americans in the Philippines is high and that Americans in the Philippines are urged to exercise caution and to maintain heightened security awareness. *Warden Notice*, dated February 14, 2005. The Consular Information Sheet also expresses concern about the threat of terrorist activities against Americans in the Philippines. *Consular Information Sheet*, dated February 15, 2005. The Consular Information Sheet states that adequate medical care is available in major cities, but may not meet the standards of hospitals in the United States. *Id.*

The AAO finds that, when considered in the aggregate, the hardships facing the applicant's mother in the Philippines would make her relocation there an extreme hardship. In light of her age and general health, the resulting separation from her other children who now live in the United States and the security threats facing U.S. citizens in the Philippines, the applicant has established that her mother would suffer extreme hardship if she returned to the Philippines. However, in that the record does not also demonstrate that the applicant's

mother or spouse would suffer extreme hardship as a result of being separated from the applicant, the applicant has not established the existence of extreme hardship to a qualifying relative caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.