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U.S. Citizenship
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FILE: Office: MANILA, PHILIPPINES Date: SEP 29 2009

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom,
Acting Chief Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Manila, Philippines, 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)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), as an alien previously removed from the United States; and under section 212(a)(9)(B)(i)(II), of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. *Decision of the OIC*, dated March 21, 2007.

The applicant is the spouse of a naturalized citizen of the United States. The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), so as to immigrate to the United States. The OIC concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the OIC*, dated March 21, 2007. The applicant submitted a timely appeal.

On appeal, the applicant states that his wife is a naturalized citizen of the United and that he has three U.S. citizen daughters. He states that his wife is enduring extreme hardship because she works at night as a registered nurse and takes care of the children during the day, and that his wife's family members are not able to assist her. He indicates that his youngest daughter is sickly and requires strict monitoring and that a babysitter cannot replace a parent. The applicant states that his daughter does not want to live in the Philippines due to volcanic eruptions and typhoons, and he states that he is afraid the New Peoples Army in the Philippines will harm him. He indicates that he is a licensed vocational nurse in California and a fourth-year student nurse in the Philippines and will soon be a registered nurse.

The AAO will first consider the findings of inadmissibility.

The record reflects that on April 15, 1991, the applicant entered the United States as a crewman with authorization to stay in the United States for 29 days. In 1991, he filed an application for asylum, which was denied on February 28, 1994; the applicant was placed in removal proceedings. The applicant failed to appear at his April 26, 1994 deportation hearing, and the immigration judge ordered him deported in absentia. On November 4, 1994, the applicant's spouse filed a Form I-130, Immigrant Petition for Relative, on his behalf. On February 1996, the applicant's spouse became a naturalized citizen of the United States. On April 3, 1996, the applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status, and the Supplement to Form I-485 with legacy Immigration and Naturalization Service (INS). The applicant filed a motion to reopen with the immigration court on April 3, 1996, claiming he did not receive notice of the time and date of his hearing. On May 16, 1996, the immigration judge stated that the applicant received proper notice and denied the applicant's motion. On June 3, 1996, the applicant filed a motion to reconsider and a motion to reopen. On July 2, 1996, the immigration judge denied those motions. On August 14, 1996, the applicant filed a timely appeal with the Board of Immigration Appeals (BIA). On February 25, 1998, the applicant filed a motion to reconsider with the immigration court based on

the changed circumstances of the applicant's marriage to a U.S. citizen and his filing of an adjustment application with INS. The applicant stated in the motion that INS indicated that it does not have jurisdiction and for that reason the motion is being made. On February 11, 2000, the BIA stated that the applicant's appeal was not properly filed because the BIA was unable to collect the required appellate filing fee, and that the immigration judge's decision was final and the record will be returned to the immigration court without further action. On April 25, 2001, the applicant filed a motion to remand to the BIA to apply for adjustment of status. On August 29, 2001, the BIA stated that it had no jurisdiction over the motion as jurisdiction lies with the immigration judge and the BIA will return the record to the immigration court without BIA action. On April 29, 2003, the INS rejected the applicant's Form I-485 and returned the application to the applicant, indicating that jurisdiction lies with the Executive Office for Immigration Review. On May 14, 2004, the applicant filed a motion to reopen and a request for stay of removal with the immigration court. On May 14, 2004, the request for stay of deportation was denied and the applicant was removed from the United States. On May 20, 2004, the immigration judge denied the motion to reopen.

Inadmissibility for unlawful presence is found under section 212(a)(9) of the Act. That section states, in part:

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(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.

....

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.

If an individual is ordered removed in absentia pursuant to section 240(b)(5)(A) of the Act, and he or she challenges the order in a motion to rescind the in absentia order pursuant to section 240(b)(5)(C)

of the Act, for purposes of section 212(a)(9)(B) of the Act, the individual will not accrue unlawful presence during the pendency of the motion, including any stages of appeal before the BIA or Federal Court.

Based upon the record, the applicant would have accrued unlawful presence from April 29, 2003, when the INS rejected the Form I-485, to May 14, 2004, when the applicant filed the motion to reopen. He therefore accrued more one year of unlawful presence, and triggered the ten-year-bar when he was removed from the United States. The applicant is, consequently, inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year.

The waiver for unlawful presence is found under section 212(a)(9)(B) of the Act. That section provides the following:

- (v) Waiver. – The Attorney General [now Secretary, 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 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

A waiver of inadmissibility under section 212(a)(9)(B)(v) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, who must be the applicant’s U.S. citizen or lawfully resident spouse or parent. Hardship to an applicant and to his or her child is not a consideration under sections 212(a)(9)(B)(v) and 212(i) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s naturalized citizen spouse. Once extreme hardship is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

“Extreme hardship” is not a definable term of “fixed and inflexible meaning”; establishing extreme hardship is “dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). *Matter of Cervantes-Gonzalez* lists the factors considered relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors relate to an applicant’s qualifying relative and 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.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

Applying the *Cervantes-Gonzalez* here, extreme hardship to the applicant’s wife must be established in the event that she remains in the United States without the applicant, and alternatively, if she joins the applicant to live in the Philippines. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The psychological evaluation by [REDACTED] dated June 2, 2005, states that the applicant’s wife lives with her first and second born daughters and that her youngest daughter lives with the applicant in the Philippines due to childcare problems. The evaluation conveys that the applicant’s spouse and two daughters visited the applicant and the youngest child in the Philippines on two occasions. The birth certificates show the applicant’s daughters were born in the United States on January 13, 1995, August 4, 1999, and October 30, 2002. [REDACTED] conveys that the applicant’s spouse is a nurse on the Pediatric Cardiac Surgical Intensive Care Unit and that the nursing position requires a high level of focus, attention, and concentration. [REDACTED] states that the applicant’s wife is often required to work overtime to cover legal expenses and support her husband and daughter in the Philippines. She states that the applicant’s wife’s overall mood is mildly anxious and dysthymic, and that she exhibits low energy and fatigue. She states that the applicant’s wife reported frequent frustration, crying, feeling overwhelmed, problems with sleep and appetite, and worrying that her youngest daughter will feel abandoned. She indicates that the applicant’s spouse has reported deficits in focus, attention, and concentration, which [REDACTED] attributes to depressive and anxiety symptoms. She states that the applicant’s wife is experiencing significant stress related to family separation and her symptoms may negatively impact ability to provide nursing services to critically ill children. Ms. [REDACTED]’s evaluation of the applicant’s two daughters reveals they are experiencing anxiety, sadness, isolation, crying, persistent worry, and nightmares related to separation from their father. In the supplement to Form I-601, the applicant states that his spouse does not drive and he does all the driving for the family and he indicates that his wife is exhausted taking care of the children.

Courts have stated that “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).

However, courts have found that family separation does not conclusively establish extreme hardship. *See, e.g., Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991) (separation of the applicant from his wife

and child was not conclusive of extreme hardship as it “was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission”) (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship)).

As a result of separation from her husband and daughter, the applicant's spouse is experiencing significant stress having to raise two children alone. [REDACTED] conveys that the symptoms of the applicant's spouse may negatively impact her nursing duties in a pediatric cardiac surgical intensive care unit. Based on these factors, the AAO finds that the applicant has demonstrated extreme hardship to his wife if she were to remain in the United States without him, as her hardship is of such a nature that is beyond that which is usual or normally to be expected from an applicant's bar to admission.

With regard to joining her husband to live in the Philippines, the applicant conveys that he is afraid of the New Peoples Army and his daughter fears volcanic eruptions and typhoons in the Philippines. The record reflects that the applicant's application asylum, which was based on his fear of the New People's Army, was denied as he did not establish a well founded fear of persecution should he return to the Philippines. He has provided no evidence that either he or his family is currently in danger from the New People's Army. No evidence has been produced to show that the applicant's wife would experience extreme hardship in the Philippines due to volcanoes or typhoons.

The applicant has established extreme hardship to his spouse if she were to remain in the United States without him. However, in considering the evidence in the record in the aggregate, the AAO finds that it fails to establish that the applicant's wife would experience extreme hardship if she were to join her husband to live in the Philippines. Thus, the factors presented do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

Having found the applicant statutorily ineligible for relief under section 212(a)(9)(B)(v) of the Act, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.