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U.S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: MANILA Date: JAN 12 2010

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)

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.

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).

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of the Philippines, the husband of a U.S. citizen, the father of a two U.S. citizen children, and the beneficiary of an approved Form I-130 petition. The OIC found that the applicant had been unlawfully present in the United States for more than a year and is therefore inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

The applicant seeks a waiver of inadmissibility in order to reside in the United States with his wife and children. The OIC also found that the applicant had not established that failure to approve the waiver application would cause extreme hardship to his U.S. citizen spouse, and denied the waiver application.

On appeal, counsel asserted that the applicant is not inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act because his presence was not unlawful. Counsel also argued, in the alternative, that failure to approve the applicant's waiver application would result in extreme hardship to the applicant's wife, and the applicant should therefore be granted waiver.

The AAO will first examine the assertion that the applicant is not inadmissible. Section 212(a)(9)(B)(i) of the Act provides:

> 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 (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, 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.

The record shows that on May 7, 1989 the applicant married his previous wife, who filed a petition for the applicant, and that the applicant was granted conditional residence. The applicant entered the United States on November 10, 1989. Because the applicant's previous wife filed for divorce, he did not commence proceedings to remove the conditions on his residence. The applicant and his previous wife were divorced during 1990.

A Notice of Intent to Terminate Conditional Permanent Resident Status was issued on January 9, 1991 by the Honolulu office of the Immigration and Naturalization Service, which is the predecessor

of the USCIS. A Notice of Termination was issued on January 29, 1991. The applicant then no longer had Conditional Resident status, nor any other legal status in the United States.

An Order to Show Cause and Notice of Hearing were issued on February 22, 1991. After several hearings, an immigration judge (IJ), on December 3, 1991, ordered the applicant removed. A notice of that decision was sent to the applicant on December 6, 1991, informing him that he had 13 days within which to perfect an appeal, and that absent a timely appeal the decision would become final. On July 28, 1999, the INS issued a warning to the applicant about his unlawful presence in the United States, but the applicant remained in the United States until October 2002, when he left voluntarily.

Although counsel's argument on this point is not entirely clear, he appears to argue that the applicant's presence in the United States was not unlawful because section 241(a)(1)(A) of the Act states that "the Attorney General shall remove the alien from the United States." Until the Attorney General removes the alien, counsel appears to argue, the alien is authorized to remain in the United States, and does not accrue unlawful presence for the purposes of section 212(a)(9)(B) of the Act.

Counsel apparently asserts that, therefore, the applicant accrued no unlawful presence in the United States notwithstanding that his conditional residence was terminated during 1991 and he remained in the United States until 2002.

The AAO does not read the language of section 241(a)(1)(A) of the Act to imply that if the Attorney General fails, for whatever reason, to remove an alien who has been ordered removed, then the alien will not accrue unlawful presence pursuant to section 212(a)(9)(B)(i) of the Act. Further, such an interpretation is contrary to USCIS policy:

> An alien lawfully admitted for permanent residence will not accrue unlawful presence unless the alien becomes subject to an administratively final order of removal by the IJ or BIA (which means that during the course of proceedings the alien was found to have lost his or her LPR status), or if he or she is otherwise protected from the accrual of unlawful presence. Unlawful presence will start to accrue on the day after the order becomes administratively final, and not on the date of the date of the event that made the alien removable.

Memo. from Donald Neufeld, Acting Assoc. Dir., Domestic Ops. Directorate, US Citizenship and Immigration Services, US Dept. Homeland Sec., to Field Leadership, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* (May 6, 2009) at (b)(3)(A). According to the instructions contained in that document, at Page 22,

In the instant case, an IJ, on December 3, 1991, ordered the applicant removed from the United States. A Written Notice of Decision was sent to the applicant at his address of record on December 6, 1991, and accorded him 13 days to appeal. That notice stated that, if an appeal were not filed on

time, the decision of deportation would become final. The applicant did not appeal. The applicant's presence in the United States became unlawful on December 20, 1991.

Pub. L. 104-208, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides at section 309,

> (a) IN GENERAL.-Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

At section 301(b)(3), the IIRIRA provides,

> TREATMENT OF UNLAWFUL PRESENCE BEFORE EFFECTIVE DATE.-In applying section 212(a)(9)(B) of the Immigration and Nationality Act, as inserted by paragraph (1), no period before the title III-A effective date shall be included in a period of unlawful presence in the United States.

The IIRIRA was passed by the 104th United States Congress on Sept. 30, 1996. Therefore, for the purpose of this inadmissibility provision, the applicant's illegal presence began on April 1, 1997 and continued until October 2002, a period of more than one year. The AAO finds, therefore, that the applicant is inadmissible for ten years after the date he left the United States during October 2002, which period has not yet ended. The remainder of this decision will be concerned with whether waiver of the applicant's inadmissibility is available and whether it should be granted.

Section 212(a)(9)(B)(v) of the Act provides, in pertinent part:

> The Attorney General [now Secretary of Homeland Security] 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 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) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.,* the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or his children is not directly relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's wife is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

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 nonexclusive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. 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. The BIA has held:

> 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).

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).

In a declaration dated August 25, 2005 the applicant described the circumstances leading to the dissolution of his previous marriage and the formation of his current marriage. He also stated that his daughter was born with jaundice and diagnosed with asthma and eczema two months later. He stated that his daughter is still under the ". . . strict and constant care of her doctor."

The applicant stated that his absence has greatly affected his wife's finances. He stated that she earns $2,400 per month, which has proven barely sufficient to pay the family's bills. He stated that a family car has been repossessed and his wife was forced to vacate the apartment they shared. The applicant did not indicate where his wife now lives or whether the applicant's wife is suffering any hardship as a result of the relocation. The applicant did not state whether the loss of a car is causing his wife any hardship.

The applicant stated that he was not present in the United States when his daughter required hospitalization, and will be unable to be in the United States if tests show that his wife needs surgery.

The record contains a similar declaration, dated August 17, 2005, from the applicant's wife, that attests to substantially the same facts as are contained in the applicant's August 25, 2005 declaration. In addition, she stated that she is not physically, financially, or emotionally able to care for the child alone. She stated that in financial emergencies she relies on her brother and her adoptive mother for financial support. At one point in her declaration she stated that she lives with her adoptive mother

to save on rent, and in another part of the declaration she stated that she lives with her brother and sister-in-law.

As to her daughter's health, the applicant's wife stated that the child "still needs strict doctor care," and "needs special diet and medications," but did not describe her daughter's condition any more specifically. She stated that the medical care available in the Philippines is inferior to that in the United States, but did not detail in what way it would be insufficient to care for her daughter. She stated that her health insurance pays most of the child's medical costs, but only if the child remains in the United States, and stated that she would therefore be unable to afford medical care for her child in the Philippines.

The applicant's wife stated that obtaining a babysitter is difficult for her financially, but that because of her adoptive mother's age and physical condition placing that burden on her is unfair. The applicant's wife did not state her adoptive mother's age or otherwise describe her adoptive mother's physical condition. She also stated that her brother and sister-in-law have a new baby, and that relying on them would also be unfair.

The record contains an employment verification letter dated December 9, 2004 showing that the applicant's wife was then employed by Wells Fargo Bank, where she had worked since August 30, 2004. It further shows that she was then working 40 hours per week and earned a salary of $29,500 per year.

The record contains various medical records. Some of those records pertain to the applicant's wife. Some pertain to the applicant's daughter. The patient to whom other records pertain is unidentified.

Records pertinent to the applicant's wife show that on August 23, 2002, while under general anesthesia, she had two teeth extracted and a large cyst removed by a doctor of medical dentistry. A report dated September 4, 2002 states that the tissue removed showed no sign of malignancy.

As to the applicant's daughter, those records document, over the course of several years, colds, sore throats, fevers, coughs, behavioral problems (tantrums), eczema, inoculations, and body mass measurements. Notes in the records show that the applicant's daughter suffered from asthma and was hospitalized for three days during September 2002. The record contains no other medical evidence that the applicant's daughter's conditions are serious.

An assessment dated November 19, 2003 characterized the applicant's daughter, then three years and two months old, as "Well."

The record contains a printout of the U.S. Department of State's 2004 Country Report on Human Rights Practices pertinent to the Philippines. The record contains a printout of web content showing an individual's calling card purchases. The individual is not identified by name in that printout.

To demonstrate that the applicant's absence would cause extreme hardship to his wife, the applicant must show that, if he is absent from the United States and his wife remains in the United States, with

or without their children, she will suffer extreme hardship. The applicant must also demonstrate that if he leaves and his wife joins him to live in the Philippines, that will cause her extreme hardship. The AAO will first consider the scenario of the applicant being removed and his wife remaining in the United States.

The record contains evidence of the applicant's wife's income. The record, however, contains no evidence, other than assertions, of the income of the applicant when he was in the United States. Without that critical evidence, the AAO cannot compare the applicant's family income before he left and after he left. Although the loss of any income constitutes a hardship, the AAO cannot determine the degree of hardship that the loss of the applicant's income caused to his wife.

Further, the record does not contain evidence of the families recurring expenses. Without that evidence, the AAO cannot compare the applicant's wife's income to the family's expenses to determine that her income is insufficient or, as the applicant stated, barely sufficient, to pay the family bills. Further still, the applicant's wife has indicated that she is able to depend on her brother and adoptive mother for financial assistance when necessary.

The record contains the assertion that the applicant's wife has relocated to live with relatives because she could not longer afford an apartment, and the assertion that the family's car has been repossessed. In addition to not containing any evidence in support of those assertions, the record contains no evidence that the applicant's wife is suffering as a result of those changes.

The evidence in the record does not demonstrate that, if the applicant remains in the Philippines and his wife remains in the United States, she will suffer financial hardship which, when combined with the other hardship factors in this case, will rise to the level of extreme hardship.

The record contains a wealth of medical records but no explanation of them or argument based on them. The evidence supports the assertions that the applicant's daughter had asthma and eczema at a young age, but, other than a single hospitalization, no evidence to show that either was severe and no evidence that either continues to be a problem for her.

The evidence in the record does not establish that, if the applicant remained in the Philippines and his wife remained in the United States, their daughter's medical conditions would cause the applicant's wife hardship which, when combined with the other hardship factors in this case, will rise to the level of extreme hardship.

Similarly, the applicant has alluded to tumors on the applicant's wife's chin and a possibility of cancer. The only evidence in the record remotely related to such implications is a letter, dated August 23, 2002, stating that the applicant's wife had two teeth and a large cyst removed from her mouth, and a letter dated September 4, 2002, stating that the cyst was negative for malignancy. The evidence in the record is insufficient to show that, if the applicant remains in the Philippines and his wife remains in the United States, she will suffer medical hardship which, when combined with the other hardship factors in this case, will rise to the level of extreme hardship.

Another hardship factor to be considered is the emotional hardship that will result to the applicant's wife as a result of the applicant's absence, *per se*. Although the applicant's wife said very little pertinent to her emotional attachment to the applicant and the extent to which she will miss him, the AAO observes that in nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "*extreme* hardship," Congress made clear that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

Separation from one's spouse or child is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the "extreme hardship" standard, hardship must be greater than the normal, expected hardship involved in such cases. The evidence in the record does not demonstrate that, if the applicant remains in the Philippines and his wife remains in the United States, she will suffer emotional hardship which, when combined with the other hardship factors in this case, will rise to the level of extreme hardship.

Considering the evidence in its entirety and all of the various hardship factors together, the AAO finds that the evidence is insufficient to show that, if the applicant remains in the Philippines and his wife remains in the United States, this arrangement will cause the applicant's wife extreme hardship.

The remaining scenario to consider is that of the applicant remaining in the Philippines and his wife departing the United States with the children in order to join him. Although the applicant's wife stated that the quality of medical care available in the Philippines is inferior to that available in the United States, the record contains no evidence pertinent to that assertion and, as was noted above, the evidence does not support the implication that the applicant's daughter suffers from severe medical problems.

The evidence provides no reason to believe that the allegedly inferior medical care available in the Philippines would adversely affect the applicant's wife. The evidence does not demonstrate that, if the applicant remains in the Philippines and his wife departs to join him, she will suffer hardship from the allegedly inferior medical care in the Philippines which, when considered together with the other hardship factors in this case, will rise to the level of extreme hardship.

The applicant's wife provided no other reasons why returning to the Philippines, the land of her birth, would pose any hardship. The record does not demonstrate, therefore, that if the waiver application is denied, the applicant remains in the Philippines, and his wife joins him there to live she will suffer extreme hardship.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's wife faces extreme hardship if the applicant's waiver application is not granted. Rather, the record suggests that she will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties that typically arise when a spouse is removed from the United States.

Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "*extreme* hardship," Congress made clear that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

Separation from one's spouse or child is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the "extreme hardship" standard, hardship must be greater than the normal, expected hardship involved in such cases.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai,* 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v) and that waiver is therefore unavailable. The AAO need not, therefore, consider whether this is an appropriate case in which to exercise its discretion to grant a waiver.

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 rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.