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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

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Office: PHILADELPHIA, PA

Date:

MAR 10 2010

IN RE:

[REDACTED]

PETITION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF PETITIONER:

[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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania, 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)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude (CIMT). The applicant is the spouse of a United States citizen and the father of three United States citizens.¹ He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse and children.

The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) on March 3, 2009.

On appeal, counsel asserts that the Field Office Director erred in her denial, and that the record establishes that the applicant's qualifying relatives will experience extreme hardship if the applicant is removed.

Section 212(a)(2)(A) of the Act states in pertinent part:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
 - (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

- (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
 - (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -
 - (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
 - (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

¹ The record establishes that the applicant has a fourth child, an adult daughter, but indicates that she has not yet obtained lawful permanent resident status. Accordingly, she is not a qualifying relative for the purposes of this proceeding.

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

The record reflects that on February 15, 2000, the applicant was convicted of Attempted Assault 1st Degree (Knife), § 110/120.10 New York Penal Law, in the County Court of the State of New York, stemming from an arrest on April 19, 1987. On October 18, 1994, the applicant was convicted of Resisting Arrest, New Jersey Statutes § 2C:29-2, and Possession of a Handgun, New Jersey Statutes § 2C:39-5b, in Hudson County Superior Court, New Jersey. Attempted Assault 1st Degree with a knife is a CIMT. See *Matter of Goodalle*, 12 I. & N. Dec. 106 (BIA 1967)(finding that second degree assault with a knife under New York Penal Law § 242(2) constituted a CIMT). As such, the applicant has been convicted of a CIMT and is inadmissible under 212(a)(2)(A) of the Act. The applicant does not contest this finding.²

It is noted for the record that the activities resulting in the applicant's CIMT convictions occurred more than 15 years ago as of the date this appeal is being adjudicated. Any activities resulting in CIMT convictions that occurred 15 years prior to the final decision on a waiver application may be considered pursuant to section 212(h)(1)(A) of the Act. Accordingly, the applicant may establish eligibility for a waiver by showing that he is not a risk to the welfare, safety or security of the United States and has been rehabilitated.

Based on the record before it, the AAO finds that the record indicates that the applicant is not likely to pose a threat to the welfare, safety or security of the United States. In addition, the record establishes that the applicant has not been charged with any additional crimes since 1989. The applicant is employed and provides financial support for his children. Therefore, the record also demonstrates that the applicant has been rehabilitated and the USCIS will consider whether the applicant's waiver application should be approved as a matter of discretion.

A favorable exercise of discretion is limited when an applicant has been convicted of a violent or dangerous crime. In the present matter, the applicant has been convicted of a violent or dangerous crime as defined by 8 C.F.R. § 212.7(d), namely Attempted Assault 1st Degree (Knife). This crime involves the "use, attempted use, or threatened use of physical force against the person or property of another," a crime of violence under 18 U.S.C. § 16(a).5. Therefore, he is subject to the regulation at 8 C.F.R. § 212.7(d).

The regulation at 8 C.F.R. § 212.7(d) states:

² The AAO will not address whether the applicant's conviction for Possession of a Handgun is a CIMT as the applicant's assault conviction carries a sentence of more than one year and is not, therefore, amendable to the petty offense exception in section 212(a)(2)(ii)(II) of the Act.

(d) Criminal grounds of inadmissibility involving violent or dangerous crimes

The Attorney General [now Secretary of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. § 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application of adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

In that he is subject to the requirements of 8 C.F.R. § 212.2(7)(d), the applicant must show that "extraordinary circumstances" warrant the approval of his waiver application. Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant's admission would result in exceptional and extremely unusual hardship. As the AAO finds no evidence of foreign policy, national security or other extraordinary equities, it will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship" to a qualifying relative.

The concept of exceptional or unusual hardship is addressed by the Board of Immigration Appeals (BIA) in *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001), in which the BIA found that many of the factors that are considered in assessing "extreme hardship" should be considered in evaluating "exceptional and extremely unusual hardship." The BIA held, however, that the hardship suffered by the qualifying relative(s) must be "substantially beyond that which would ordinarily be expected to result from the alien's deportation," but need not be "unconscionable." *Id.* At 59-63. As such, in determining whether the record establishes that any of the applicant's qualifying relatives, his spouse and three U.S. citizen children, would suffer exceptional and extremely unusual hardship as a result of his inadmissibility, the AAO will first consider whether the record before it satisfies the lower standard of extreme hardship pursuant to section 212(i) of the Act. Any finding of extreme hardship under section 212(i) would then be examined under the standards of exceptional and extremely unusual hardship pursuant to section 8 C.F.R. § 212.2(7)(d).

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 provides a list of factors relevant in 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).

The AAO notes that extreme hardship to a qualifying relative must be established whether he or she accompanies the applicant or remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record contains documentation filed in conjunction with the applicant's Form I-130, Form I-485 and Form I-864. Pertaining to the applicant's Form I-601, the record includes, but is not limited to, a brief from counsel; statements from the applicant's spouse, ex-spouse, and his oldest daughter; letters, dated August 14, 2006 and January 21, 2008, from [REDACTED] a Licensed Clinical Social Worker; medical records and forms pertaining to the applicant's younger son's health and the applicant's and his spouse's fertility treatment; documents relating to a property owned by the applicant's spouse; school records pertaining to the applicant's older son; court records relating to the applicant's convictions; a statement from the Lehman Intermediate School Guidance Office secretary verifying the enrollment of the applicant's older son; country conditions materials for the Philippines; and birth certificates for the applicant's spouse and children. The entire record was considered in rendering a decision on the appeal.

Counsel asserts that the applicant's removal would cause extreme financial, emotional and psychological damage to the applicant's family. Counsel states that the applicant's older son resides with him because he has behavioral problems and feels abandoned by his mother, residing with his father out of preference. The record indicates that the child's mother and the applicant have joint custody. The record contains letters from [REDACTED] a Licensed Clinical Social Worker, with regard to the applicant's older son. [REDACTED] discusses the emotional struggles of this child and the impact that his father's absence would have on him, as well as the impact of removal on the applicant's spouse and his other children.

The AAO notes that the record contains an August 14, 2006 email transmitting a draft of [REDACTED] first letter, also dated August 14, 2006, to the applicant's spouse. In her accompanying note to the applicant's spouse, [REDACTED] makes the following statement:

Here is the revised letter at the bottom of this email. I can modify it if I get feedback from you/lawyer If there is something you or [the applicant] would like me to

add or omit let me know. . . . Hang in there! Send my best to [the applicant] and tell him to try to relax Love, [REDACTED]

Based on this statement, the AAO finds reason to question the objectivity of [REDACTED] evaluation of the emotional impact that the applicant's removal would have on his family members and will accord it little evidentiary weight in this proceeding. *See Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988)(confirming that USCIS is free to determine that submitted documentation is not accurate or credible). The AAO also notes that [REDACTED] January 21, 2008 letter indicates that she is no longer treating the applicant's older son and that he is now receiving counseling from a new therapist. The record does not identify the new therapist or provide any statement from this individual.

The AAO observes that school records for the applicant's older son, which have been submitted in support of the waiver application, indicate that he has behavioral problems at school but do not identify the basis of these problems. Although in her statement the applicant's spouse asserts that the applicant's older son is estranged from his mother and that his academic performance and behavior suffered when he lived with her, the record offers no credible documentation that he would be harmed by residing with his mother in the absence of his father. The statement from the applicant's former spouse, although it indicates that her oldest child lives with the applicant, does not establish that she would be unable or unwilling to have him return to live with her. The record contains no statement from the applicant's older son regarding his relationship with his mother. Accordingly, the record does not establish that the applicant's older son would experience hardship if he returned to reside with his mother. It also fails to offer credible documentation of the emotional impact that the applicant's removal would have on his other children.

Counsel also contends that the applicant's children would suffer financial hardship in the applicant's absence in that their mother would have to support them without the applicant's child support payments. However, the AAO notes that the record fails to document through proof of her expenses and income that the applicant's former spouse is dependent on the child support she receives from the applicant to care for their children and that, without it, they would suffer financial hardship. Moreover, the record offers no documentary evidence, e.g., published country conditions reports, to establish that the applicant would be unable to obtain employment upon return to the Philippines and assist his children financially from outside the United States. Therefore, the record does not establish that the applicant's children would suffer financial hardship if he were removed from the United States.

The applicant's spouse, counsel contends, would experience both financial and emotional hardship in the applicant's absence. He notes that she and the applicant are moving into a new house and that the applicant's spouse will lose her home if the applicant is removed. Counsel also states that the applicant and his spouse are working with a medical specialist to have a child and that the applicant's spouse's age means that her "window for childbearing" is rapidly closing. Counsel asserts that, if the applicant is removed, his spouse will probably be unable to have children.

The applicant's spouse states that, if she loses the applicant, it will put a stop to her plans to have a child and that she despairs at the thought that she will not have children. She also states that she and the applicant are building a home and that she is certain that she will not be able to pay the mortgage in the applicant's absence.

The AAO notes that the record contains documentary evidence that the applicant's spouse has received a construction loan. It does not, however, find the record to establish that the applicant's spouse is financially dependent on the applicant to meet the terms of that loan or that she is financially dependent on him in any other area of her life. Although the record indicates that the applicant and his spouse are jointly responsible for their car and car insurance payments, there is no other evidence in the record of their financial interdependence. The construction loan obtained by the applicant's spouse is in her name alone and there is no indication that the applicant's income was taken into consideration in approving it. The tax returns in the record are not joint filings, but those of the applicant's spouse. The applicant's spouse's health coverage is provided through her employer, not through the applicant's. The record contains no evidence of the applicant's income and the copies of his submitted bank statements and cancelled checks do not demonstrate the extent to which he is responsible for his and his spouse's expenses. Accordingly, the record does not establish that the applicant's spouse would lose her newly-constructed home if the applicant were to be removed from the United States. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See *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)).

The record also contains documentation that establishes the applicant and his spouse are exploring fertility treatment and that the applicant's spouse has experienced recurrent miscarriages. However, while the AAO acknowledges the desire of the applicant's spouse to conceive a child, it does not find the submitted documentation to establish that she would experience extreme emotional hardship if the applicant were removed from the United States. Although the applicant's spouse states that she despairs at the thought of not having children, the record offers no documentary evidence of the emotional impact that her inability to have children has had or would have on her. Further, based on the record before it, the AAO does not find the record to document that the applicant and his spouse have begun fertility treatment and that the applicant's removal would therefore disrupt any ongoing treatment. It finds the May 17, 2006 progress note in the record from [REDACTED] at Reproductive Associates of New Jersey to indicate only that he plans to discuss treatment options with the applicant and his spouse following the completion of medical testing.

Based on the record before it, the AAO does not find the applicant to have established that his spouse and/or his children would experience extreme hardship if he were to be removed from the United States.

Extreme hardship to a qualifying relative must also be established if he or she relocates with the applicant. Counsel asserts that having to adjust to a new culture, new language and new environment would result in extreme hardship to the applicant's spouse and children. The applicant's spouse also asserts that she does not believe she would be able to go to the Philippines with the applicant because it is an unknown country with customs and a language that she does not know. In support of these claims, the record contains a copy of the Department of State's "Country Specific Information" on the Philippines.

The AAO notes that in *Matter of Kao & Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the Board of Immigration Appeals (BIA) found that a 15-year-old child who had lived her entire life in the United States and was not fluent in Chinese would suffer extreme hardship if she moved with her parents to Taiwan. In making its decision, the BIA reasoned that "to uproot [her] at this stage in her education and her social development and to require her to survive in a Chinese-only environment would be a significant disruption that would constitute extreme hardship. In the present case, however, the country conditions report submitted by the applicant states that "English is widely spoken in the Philippines, and most signs are in English." Therefore, the AAO does not find the reasoning in *Matter of Kao & Lin* to be persuasive in the present case and finds that the record fails to establish that the applicant's children would face extreme hardship as a result of their relocation to the Philippine environment.

Counsel also states that the applicant's younger son suffers from a kidney problem and that the applicant would not be able to afford the cost of a kidney transplant in the Philippines. The AAO acknowledges that the applicant's younger son has been treated for a serious problem with his right kidney. However, it also notes that the documentation submitted to establish this medical problem indicates that the physician who treated the child recommended that he be referred for surgery to repair the kidney. There is no documentation in the record that indicates whether this surgery was performed and its outcome. As a result, the AAO is unable to determine whether the applicant's younger son's medical condition continues to threaten his health and would result in extreme hardship if he were to relocate to the Philippines with his father. Based on the record, the AAO finds that that applicant has failed to establish that any of his children would experience extreme hardship upon relocation.

While the AAO recognizes that the applicant's spouse does not want to reside in the Philippines, it notes that the record offers no documentary evidence that she would be unable to adjust to life there. Further, as just noted, the "Country Specific Information" on the Philippines submitted for the record indicates that English is widely spoken and that signage is generally in English, thereby offering the applicant's spouse an easier transition to a new culture. The record also lacks any documentation that demonstrates that the applicant and his spouse would be unable to obtain employment in the Philippines and support their family. Accordingly, the record does not establish that the applicant's spouse would experience extreme hardship upon relocation.

In the present case, the record fails to establish that the applicant's spouse and/or children would experience extreme hardship as a result of his inadmissibility. The AAO recognizes that the applicant's spouse and children will experience hardships as a result of the applicant's

inadmissibility. The record, however, does not distinguish their hardships, even when considered in the aggregate, from those commonly associated with removal and separation, and it does not, therefore, rise to the level of "extreme" as informed by relevant precedent. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

As the record does not establish that a qualifying relative would suffer extreme hardship as a result of a denial of the applicant's waiver application, the AAO finds that it also fails to demonstrate that a qualifying relative would suffer the heightened standard of exceptional and extremely unusual hardship imposed by the regulation at 8 C.F.R. § 212.7(d). As the record does not establish that a qualifying relative would experience exceptional and extremely unusual hardship if the applicant's waiver application is denied, the AAO finds that the applicant has failed to demonstrate that he merits a favorable exercise of discretion under section 212(h)(2) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. 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.