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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: FEB 25 2013 Office: SAN JOSE, CA

FILE: [Redacted]

IN RE: Applicant: [Redacted]

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

ON BEHALF OF APPLICANT:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with a long horizontal flourish extending to the right.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, San Jose, California. The denial was appealed to the Administrative Appeals Office (AAO). The appeal was dismissed. The applicant filed a motion to reopen and reconsider the AAO decision, which is now before the AAO. The motion will be granted, the matter will be reexamined, and the application will be approved.

The applicant is a native and citizen of the Philippines. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(h), for having violated laws related to a controlled substance. He is married to a U.S. citizen and has two U.S. citizen children. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The Field Office Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse and children, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on August 29, 2008. The AAO found that the applicant's spouse would not experience extreme hardship upon relocation to the Philippines or remaining in the United States. *AAO Decision*, dated December 22, 2011.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

On motion, counsel refers to the applicant's statement which asserts that the applicant's spouse will experience physical, emotional and financial impacts due to separation, and that his spouse and daughters would experience extreme physical, financial and emotional hardship upon relocation to the Philippines. Although the applicant essentially reiterates his prior assertions with regard to the extreme hardship experienced by his spouse and daughters, the AAO notes that there appears to be new, additional facts established by the evidence submitted to corroborate the applicant's assertions. In addition, the applicant more clearly articulates the basis of financial and emotional impacts on his spouse and daughters and includes new evidence to support these assertions.

Based on the applicant's statement of both old and new facts to be proved by submitted affidavits and documentary evidence, the AAO will grant the motion to reopen.

The record includes documentation filed on appeal and discussed in the AAO's previous decision. On motion, the applicant submits statements from himself and his spouse; statements from friends and family members of the applicant; copies of medical documents related to the applicant's children; financial records, including tax returns, a lease agreement, insurance premiums, credit card statements and utility invoices; photographs of the applicant, his spouse and their family; and country

conditions materials on the Philippines. The entire record was reviewed and all relevant evidence considered in rendering this decision.

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.

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) . . . 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), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—

(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 . . .

Inadmissibility under section 212(a)(2)(A)(i)(II) of the Act may be waived only as it relates to a single offense of simple possession of 30 grams or less of marijuana.

As discussed by the Chief, the applicant has been convicted of two simple possession charges for marijuana. The first offense, dated November 30, 2004, was found by the Chief to qualify for treatment under the Federal First Offender's Act pursuant to Lujan-Armedndariz v. INS, 222 F.3d 728 (9th Cir. 2000). As such, for the purposes of this proceeding the AAO will only consider the applicant's second conviction for simple possession, on December 7, 2004, under section 11357(b) of the California Health and Safety Code, which renders him inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act. The Chief determined that the applicant's second conviction for possession of marijuana was a "simple possession" charge, less than 28 grams, and that the applicant

was thus eligible for consideration for a waiver under section 212(h) of the Act. The AAO does not find any basis upon which to disturb this finding.¹

A waiver of inadmissibility under section 212(h) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse and daughters are the qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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 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.

¹ The AAO notes that the applicant has also been convicted of Petty Theft under section 408 of the California Penal Code. Counsel has asserted that a criminal defense attorney is in the process of clearing this charge from the applicant's record and that he would no longer be inadmissible. The AAO disagrees, as the applicant would remain inadmissible due to his drug-related conviction. For the purposes of this proceeding, the AAO need not review the merits of whether the applicant is or is not inadmissible pursuant to section 212(a)(2)(A) for having been convicted of a crime involving moral turpitude as he is inadmissible for his conviction related to a controlled substance.

880, 883 (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 at 1293 (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.

The applicant has asserted that the conditions in the Philippines would result in physical hardship to both his spouse and children. *Statement of the Applicant on Motion*, dated May 29, 2012. He explains that the economic conditions, physical environment and crime would jeopardize their physical safety. He explains that his spouse was born and raised in the United States, as were his children, and adjustment to the conditions in the Philippines with two young children would result in extreme hardship.

In this case the AAO will begin with an analysis of the hardship to the applicant’s children. The record demonstrates that the applicant’s children were both born in the United States and are now six and eight years of age. The record contains evidence that they are enrolled in school and have educational, medical and familial ties to the United States. Their mother was born and raised in the United States and does not speak Tagalog. *Statement of the Applicant’s Spouse*, dated May 29, 2012. In *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent’s 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan and that uprooting her to a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the Fifth

Circuit stated that “imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language,” must be considered in determining whether “extreme hardship” has been shown. And finally, in *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Ninth Circuit found the BIA abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

On motion the applicant has submitted a number of medical visitation reports relating to one of his daughters for Atopic Dermatitis. This evidence is sufficient to demonstrate that the applicant's daughter is experiencing a medical condition, and that relocation to the Philippines would most likely result in her losing her U.S. medical insurance and suffering a significant disruption in her medical care.

In this case, as the applicant is applying for a section 212(h) waiver, which includes children as qualifying relatives. The AAO notes that the children have been born and raised in the United States, at this point they are ages six and eight years old. Relocation to the Philippines from the only home they have known, severing ties with schools, doctors, friends and family members, would result in substantial hardships rising to the level of extreme hardship.

The record contains country conditions materials on the Philippines, including materials discussing the social and political conditions throughout the country. While these materials do not demonstrate that relocation to Philippines necessarily results in extreme hardship, they are sufficient to demonstrate that, in the presence of aggregating factors such as caring for children, the presence of medical conditions, and a lack of familiarity with life there and no family or community ties, would result in a substantial physical impact on the applicant's spouse. As discussed above, the AAO has found that these hardships would rise to the level of extreme hardship on the applicant's school-age children, and when the hardships to them are aggregated with the other impacts on the applicant's spouse due to relocation, the AAO finds that the applicant's spouse would experience extreme hardship upon relocation as well.

With regard to hardship upon separation, the applicant's spouse has asserted that she is suffering a tremendous emotional impact at the prospect that the applicant will be removed and that she is struggling to meet her financial obligations. *Statement of the Applicant's Spouse on Motion*, dated May 29, 2012. The applicant's spouse has also explained that she and the applicant have combined financial obligations, and that the removal of the applicant would result in the loss of almost half of the family's income, a burden that would complicate her ability to provide for her two children physically because she would be unable to afford child-care.

The record includes copies of tax returns for the applicant and his spouse. There are also copies of other bills and financial obligations such as lease agreements, insurance costs and cost of living expenses. The record indicates that the applicant's spouse earns roughly \$41,000, per year, and that

the applicant has been earning, according to a statement by the applicant's spouse, \$35,000 annually. It is reasonable to consider, based on witness statements in the record, that the applicant's departure would necessitate hiring additional child care for their children. *Statement of the Applicant's Spouse's Father*, received August 27, 2012. The AAO notes the presence of a medical condition in one of the applicant's children, which would reasonably result in additional costs.

Based on the evidence in the record, which corroborates that the applicant has been providing a substantial portion of the household income, the AAO can discern that the significant reduction in the applicant's spouse's income would result in a financial hardship based on the fact that she would also be responsible for caring for their two children.

The applicant's spouse asserts on motion that she and her children are experiencing emotional hardship at the prospect of the applicant's removal to the Philippines. *Statement of the Applicant's Spouse*, dated May 29, 2012. She notes that the applicant is the one who has been primarily caring for them since he lost authorization to work in 2009, performing daily parenting duties such as school and meal preparation, doctors visits and other household chores. Statements from family members also state that the applicant plays a significant role in the daily care of their children. The AAO finds this evidence sufficient to demonstrate some emotional impact due to separation.

In that regard, the AAO notes an additional factor which will likely impact the applicant's spouse's emotional and psychological state regarding the applicant's removal from the United States. Beyond separation from herself, their children and other family members, the applicant's spouse and other members of the family describe a situation with regard to the applicant's return to the Philippines. The applicant's spouse's father notes that the applicant has been in the United States since a young age (since age 6 according to other evidence in the record), and that both of the applicant's parents (recently deceased) and remaining family members are in the United States. The applicant himself notes that he came to the United States in 1985 with his parents at the age of six and has no significant ties in the Philippines and has very little memory of the country. *Statement of the Applicant on Motion*, dated May 29, 2012. He further explains that his parents have both recently passed away and are buried in the United States and that his brothers and sisters reside in the United States. While hardship to an applicant is not a basis for a waiver under section 212(h) of the Act, in this case equity would suggest considering the emotional and psychological impact on the applicant's spouse and children if they were to see him removed to a country he has not resided in since 1985, and in which he never resided as an adult, separated from his only immediate family members in the United States and having recently lost both of his parents. Removing the applicant from the only country he has ever really known would be significantly different from returning an applicant to a country from which he arrived as an adult. Based on the evidence in the record, including the body of evidence demonstrating the applicant's long-time residence in the United States and witness statements which specifically detail the unusual circumstances and resulting emotional impacts surrounding the potential removal of the applicant to the Philippines, the AAO finds it reasonable to determine that the applicant's spouse and children will experience an uncommon emotional hardship due to forced separation from the applicant.

The record demonstrates that the applicant's spouse would experience a financial impact due to the absence of the applicant. In addition, there is evidence indicating the applicant's spouse and children will experience some emotional impact due to separation, heightened by the unusual situation regarding the applicant's acculturation to the United States. As noted by counsel on appeal, the applicant has no other means of migrating to the United States, and as such is likely to remain permanently inadmissible. When these impacts are considered in the aggregate the AAO can determine that they rise to the level of extreme hardship due to separation.

As the applicant has established that a qualifying relative will experience extreme hardship upon relocation and separation, the AAO may now consider whether the applicant warrants a waiver as a matter of discretion.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300 (Citations omitted).

The AAO finds that the unfavorable factors in this case include the applicant's conviction for simple possession of marijuana and theft. The favorable factors in this case include the presence of the applicant's spouse, the presence of his U.S. citizen children and family members, the medical condition of his youngest daughter, the extreme hardship his family would experience due to his inadmissibility, character witness statements from family members and the applicant's church, the

applicant's stable employment history, long-term residence in the United States and the fact that the applicant was brought to the United States as a six-year-old child. The applicant's conviction for simple possession of marijuana is a serious matter, nonetheless, the favorable factors in this case outweigh the negative factors, therefore favorable discretion will be exercised.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the motion will be granted and the application will be approved.

ORDER: The motion is granted and the application is approved..