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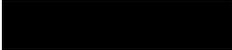


U.S. Citizenship  
and Immigration  
Services

H 3



FILE:



Office: MANILA

Date:

FEB 22 2005

IN RE:



APPLICATION:

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

ON BEHALF OF APPLICANT:



PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office



**DISCUSSION:** The waiver application was denied by the Officer in Charge, Manila (OIC). The matter 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 pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (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 and seeking readmission within 10 years of her last departure from the United States. The applicant is the fiancé of a citizen of the United States and seeks a waiver of inadmissibility in order to reside in the United States with her fiancé.<sup>1</sup>

The OIC found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen fiancé. The application was denied accordingly. *Decision of the Officer in Charge*, dated May 12, 2004. The applicant filed an appeal on June 14, 2004.<sup>2</sup>

On appeal, the applicant has submitted a statement from her fiancé, along with a number of exhibits, some of which were previously contained in the record. These exhibits relate to the applicant's immigration history, marital history, and correspondence between the couple and the congressional office of Representative Bud Cramer of the 5<sup>th</sup> District of Alabama. On appeal, the applicant's fiancé asserts that numerous factors support a finding of extreme hardship, and that therefore the OIC's decision was erroneous. *See Letter from Timothy E. Curtis*, dated June 3, 2004. That letter, along with an earlier letter from the applicant detail various facts which they believe demonstrate extreme hardship to the U.S. citizen fiancé. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(B) Aliens Unlawfully Present.-

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

.....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission

<sup>1</sup> If an alien seeking a K nonimmigrant visa is inadmissible, the alien's ability to seek a waiver of inadmissibility is governed by 8 C.F.R. § 212.7(a), which provides, in pertinent part:

(a) *General*—(1) *Filing procedure*—(i) *Immigrant visa or K nonimmigrant visa applicant*. An applicant for an immigrant visa or "K" nonimmigrant visa who is inadmissible and seeks a waiver of inadmissibility shall file an application on Form I-601 at the consular office considering the visa application. Upon determining that the alien is admissible except for the grounds for which a waiver is sought, the consular officer shall transmit the Form I-601 to the Service for decision.

<sup>2</sup> The AAO notes that the applicant has been represented by attorney Joan M. Harris. Although the Notice of Appeal (Form I-290B), was signed by the applicant's fiancé, the AAO is nevertheless sending a copy of the decision to Ms. Harris as there is no indication that she has withdrawn or been released as the applicant's representative. A copy of the decision has also been furnished to the applicant's fiancé.

within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

.....

(v) Waiver. – The Attorney General [now the Secretary of 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.

In the present case, the record indicates that the applicant initially entered the United States pursuant to a fiancé visa (K visa) on June 19, 1999. The visa had been approved in order to allow her to enter the United States for the purpose of marrying the petitioning U.S. citizen, [REDACTED] within 90 days of her arrival. However, the applicant did not marry her fiancé. Furthermore, she did not depart the United States, but instead married another U.S. citizen, [REDACTED] on September 4, 1999, prior to the expiration of the visa. The applicant's spouse filed a Petition for Alien Relative (Form I-130), and the applicant filed an Application for Adjustment of Status (Form I-485), on or about September 15, 1999. The former Immigration and Naturalization Service (INS, now Citizen and Immigration Services (CIS)), denied the I-485 on March 7, 2001, on the basis that under 8 C.F.R. § 245.1, the applicant was prohibited from adjusting status because she had not married the United States citizen who had petitioned for her to enter the United States. *See Decision of the District Director*, dated March 7, 2001. The applicant was placed into removal proceedings before the Executive Office for Immigration Review (EOIR). Following the denial of the adjustment of status application, and during the pendency of the removal proceedings, the applicant and her spouse divorced. The applicant was ultimately granted voluntary departure for a period of sixty days on November 27, 2001, and departed the United States on or about January 24, 2002.

The applicant is now engaged to marry her current fiancé, [REDACTED]. According to the statements submitted by the couple, they had met while the applicant was residing in the United States. They re-established contact after the applicant returned to the Philippines, and began a romantic relationship that ultimately led to the applicant's fiancé filing a Petition for Alien Fiancé (Form I-129-F) on March 27, 2003. The petition was approved by CIS on October 10, 2003. The record reflects that the applicant departed the United States on or about January 24, 2003. During the course of the application process for the K visa, the applicant and her fiancé became aware of the ground of inadmissibility that arose from her unlawful presence in the United States between September 19, 1999, and November 27, 2001, the date when she was granted voluntary departure, a period of more than one year. She was advised that she could seek a waiver of inadmissibility to overcome the ten-year bar to her admission, which would require that she demonstrate extreme hardship to her U.S. citizen fiancé. The applicant filed the Application for Waiver of Ground of Excludability (Form I-601) on February 10, 2004, which was denied by the OIC on May 12, 2004, after finding that the applicant had failed to establish extreme hardship to her U.S. citizen fiancé.

Applicability of the Ten-Year Bar to the Applicant's Admission

Although not raised by the applicant, the AAO will briefly discuss the applicability of the ten-year bar to the applicant's admission due to the unique facts presented by the applicant's case. CIS has issued guidance to the effect that an alien is considered to be in a period of stay authorized by the Attorney General (now the Secretary of Homeland Security) during the period of time that an application for adjustment of status is pending. Although the record shows that the applicant had an application for adjustment of status pending between September 15, 1999, and March 7, 2001, the AAO notes that it is not enough for an application to be pending. It must also be properly filed. The applicant's adjustment of status application would only be considered properly filed if it "[meets] the filing requirements contained in parts 103 and 245." See 8 C.F.R. § 245.2(a)(2)(i)(B). Because the applicant was ineligible to apply for adjustment of status pursuant to the requirements of 245.1(c)(6)(i), her application was not properly filed, and thus she accrued unlawful presence beginning on September 19, 1999. Because her period of unlawful presence exceeded one year, she is subject to the ten-year bar to admission.

The OIC's Decision that the Applicant Failed to Establish Extreme Hardship

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the alien herself experiences upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. 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).

*Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals (BIA) deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These 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.

The OIC found that the evidence submitted by the applicant, while showing that some hardship would be experienced by the applicant's U.S. citizen fiancé, failed to rise to the level of extreme hardship. Specifically, the evidence consisted principally of the applicant's own statement dated January 20, 2004. In that statement the applicant recounted her immigration history and provided explanations as to why she had not married the U.S. citizen who originally petitioned for her, and why she divorced the U.S. citizen whom she ultimately married. The letter emphasized the reasons why she had remained in the United States, in part, due to the advice of her Congressman, and how she ultimately departed the United States voluntarily in January 2002. The applicant went on to explain how she met her current fiancé, and how they maintained contact after she had departed the United States. She describes the impact of her inability to return to the United States as "very devastating" for her fiancé and herself. She describes how they speak on the phone daily and discuss their "dreams of being together and growing old together." See *Letter form Mildred Delos Reyes*, dated

January 20, 2004. The applicant states that she and her fiancé are “at the verge of exhaustion just thinking about how to resolve the problem.” The applicant also stated that they have incurred substantial expense maintaining their long distance relationship. No other evidence detailing extreme hardship was submitted with the application.

On appeal, the applicant has submitted additional evidence in the form of two letters from the applicant’s fiancé in support of the appeal. One letter is a very brief letter from the fiancé in which he requests an oral argument before the AAO, and states that the applicant only overstayed her visa to remain in the United States pursuant to advice that she had been given.<sup>3</sup> The second letter offered in support of the appeal is a four-page letter from the applicant’s fiancé. In this letter, the applicant’s fiancé recounts the applicant’s immigration history and again explains that the reason the applicant remained in the United States beyond the period of her authorized stay was due to advice she had been give and her belief that it was appropriate to do so. *See Letter from Timothy E. Curtis*, dated June 20, 2004. The remainder of the letter describes the circumstances that led to the couple meeting and continuing their relationship even after her departure to the Philippines. The latter part of the letter describes the couple’s relationship and future plans and the fact that they wish to remain together in order to be able to live as husband and wife. The only reference to factors relating to hardship that would be caused by the applicant’s inability to return to the United States is the fiancé’s statement that it “has been catastrophic to our mental well being because we truly love each other.” In addition, the fiancé relates the fact that he has spent thousands of dollars on the relationship. The letter concludes by asking that the waiver be authorized. *See Letter from Timothy E. Curtis*, dated June 20, 2004.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. 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. *Hassan v. INS, supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. *See also 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 recognizes that the applicant’s fiancé will endure hardship as a result of separation from the applicant. It is further noted that the applicant and his spouse have continued to keep in touch despite the fact that they have been separated, and it is reasonable to assume that she will continue to provide him with emotional

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<sup>3</sup> The regulation at 8 C.F.R. § 103.3(b) provides that the affected party must explain in writing why oral argument is necessary. CIS has the sole authority to grant or deny a request for oral argument and will grant such argument only in cases that involve unique factors or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Consequently, the request is denied.

support. The evidence also reflects that the fiancé has traveled to the Philippines to be with the applicant and to meet her family. Therefore, it appears that the hardship caused by the separation could b continue to be alleviated somewhat by the couple periodically meeting either in the Philippines or some other location outside of the United States. Nevertheless, even if they are not able to do so, their situation is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. The AAO finds that the OIC did not err in finding that the hardships claimed were consistent with the ordinary hardship that results from separation but did not constitute extreme hardship.

**ORDER:** The appeal is dismissed