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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: MANILA, PHILIPPINES Date: JUL 0 1 2009

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[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.

Ellen C. Johnson

John F. Grissom,
Acting Chief Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Manila, Philippines, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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.

The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The OIC concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the OIC*, dated January 22, 2007. The applicant submitted a timely appeal.

The AAO notes that the OIC did not address whether the applicant's criminal convictions rendered him inadmissible pursuant to section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i), for committing a crime involving moral turpitude. However, because the OIC found the applicant to be inadmissible for unlawful presence, for which the waiver requirement is more stringent than for a crime involving moral turpitude, the AAO need not address whether the applicant is also inadmissible under section 212(a)(2)(A)(i) of the Act.

On appeal, counsel states that United States Citizenship and Immigration Services (CIS) failed to collectively consider the evidence of extreme hardship, and erroneously found family separation as being "self-imposed." Counsel states that the applicant contributed to one-half of his family's income and that following his removal from the United States his wife filed bankruptcy and moved in with her parents. He states that the applicant's mother-in-law takes care of the applicant's child because his wife cannot afford childcare, and that the applicant's father-in-law died in 2004 and the applicant's wife may need to care for her mother. Counsel states that the applicant's wife had health problems and depression during her pregnancy in 2003, and that after four months, treatment for her depression became unaffordable. Counsel indicates that CIS gave little consideration to the hardship imposed on the applicant's father, who has cancer, and gave no consideration to the applicant's inability to immigrate to the United States by any other means and its impact on relatives remaining in the United States. Counsel indicates that the U.S. Department of State's travel warnings urge U.S. citizens to exercise caution, and he states that CIS errs by stating that "U.S. citizens . . . [do not] run greater security risks than other native Filipinos." Counsel further claims that CIS erred by finding it would not be unreasonable to assume the applicant's spouse has surviving relatives in the Philippines. Lastly, counsel states that CIS failed to consider the applicant's wife's emotional hardship and depression.

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

(B) Aliens Unlawfully Present

> (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
>
> (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.[1] For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.[2]

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* Memo, note 1.

CIS records reflect that the applicant was born on February 27, 1974, and was admitted to the United States in June 1985 with an F-1 student visa with authorization to remain in the country until the duration of status. Departure Record, I-94. The Notice to Appear reflects that the applicant's authorization to remain in the United States was for a temporary period not to exceed June 1, 1992. In 1993, the applicant filed an asylum application and on May 4, 1999, it was referred to an immigration judge. On May 18, 1999, the applicant was given notice to appear before an immigration judge on September 3, 1999. The applicant did not appear on that date, and because of that he was ordered removed in absentia on February 6, 2001. On May 13, 2002, he was physically removed from the United States pursuant to the removal order.

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[1] Memorandum by Lori Scialabba, Assoc. Director, Refugee, Asylum and International Operations Directorate and Pearl Chang, Acting Chief, Office of Policy and Strategy, 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; AFM Update AD 08-03; May 6, 2009.

[2] *Id.*

An alien with a pending asylum application is in an authorized period of stay and does not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act unless the alien is employed without authorization while the application is pending. *See* Memo, note 1.

Here, the applicant had a pending asylum application as of 1993, which was referred to an immigration judge on September 3, 1999. The final order was issued on February 6, 2001. The record establishes that the applicant accrued unlawful presence from February 6, 2001 until his removal date of May 13, 2002. Removal of the applicant triggered the ten-year-bar, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The waiver for unlawful presence is found under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which provides that:

> (v) Waiver. – The Attorney General [now Secretary, Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

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

In support of the waiver application, the record contains affidavits by the applicant and his spouse, and family members and friends; birth certificates; a marriage license; photographs; financial records, medical records relating to the applicant's spouse and father; an employment letter; and other documentation. In rendering this decision, the AAO has carefully considered all of the documentation in the record.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). *Matter of Cervantes-Gonzalez* lists the factors considered relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors relate to an applicant's qualifying relative and include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such

countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* at 565-566.

The factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and the "[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). The trier of fact considers the entire range of hardship factors in their totality and then determines "whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige,* 20 I&N Dec. 880, 882 (BIA 1994).

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

Counsel is correct in stating that family separation is a hardship factor. Courts have stated that "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted).

However, in *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission." (citing *Patel v. INS,* 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). As stated in *Perez v. INS,* 96 F.3d 390, 392 (9th Cir. 1996), "[e]xtreme hardship" is hardship that is "unusual or beyond that which would normally be expected" upon deportation and "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship." (citing *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir.1991)).

The affidavits dated August 17, 2005, convey that the applicant's spouse and father are concerned about separation from the applicant. His spouse states "[i]t is unbearable for me to think I may have to face a life without my husband by my side," and she expresses concern about raising her daughter alone. She conveys that she has had financial hardship without her husband's income, eventually filing for bankruptcy in March 2003 and moving in with her parents. The record contains the applicant's wife's Chapter 7 bankruptcy documents, which were filed on March 27, 2003. She had debt of $87,668. She conveys that her father died about the same time her husband was removed from the United States, and that she has been taking medication because of depression. A medical record reflects that the applicant's spouse was diagnosed with depression on July 6, 2005. It states that the obstetrician prescribed Zoloft and counseling for the applicant's wife following her pregnancy in 2003, and that she, after a short period of time, stopped taking the medicine and never

attended counseling because she was overwhelmed with her baby and had to work to support herself and her daughter. The doctor indicates that the applicant's wife "has been struggling and [is] just not able to recover completely," and conveys that the applicant's wife "[h]as been feeling depressed, often crying, sleeping fitfully and feels fatigued even after a night of sleep." The applicant's wife asked her doctor for medication as her short period of time on Zoloft had helped her. The doctor also advised the applicant's spouse to seek counseling. The applicant's father states that he was diagnosed with cancer in 1999 and that in the past the applicant supported him morally and financially. Medical records indicate that the applicant's father was diagnosed with ampullary cancer.

The applicant has not presented sufficient documentation to establish that his wife will experience extreme financial hardship in his absence. The applicant's spouse filed for bankruptcy in March 2003. The applicant, however, has provided no documentation on appeal to show that she presently is experiencing financial hardship without financial assistance from her husband.

The hardship presented in this case is largely emotional in nature. The applicant's wife is described as having depression following the birth of her child in 2003, and as continuing to have depression in July 2005. Her medical records describe her in 2003 as being overwhelmed with a baby and having to work to support herself and her daughter, and later, in July 2005, as struggling and not being able to recover completely. For her depression in 2005 she was prescribed Zoloft and told to seek counseling. The applicant's father has ampullary cancer, and he describes the applicant as morally supporting him. In light of the evidence in the record, and in particular the above-described medical record of the applicant's wife and the medical records of his father, the AAO finds that the cumulative general emotional effect that family separation would have on the applicant's wife and his father, combined with the increased familial burdens that his wife has faced since her husband's removal from the United States, render the hardship in this case beyond that which is normally experienced in most cases of removal.

Medical records show that the applicant's father receives follow-up care for ampullary cancer. In her affidavit, the applicant's spouse stated that her father-in-law is monitored on a regular basis, that he has high blood pressure and diabetes, and that he cannot travel to the Philippines due to his health. In light of the fact that the applicant's father has ampullary cancer for which he receives follow-up care, and, as the applicant's wife indicates that his medical condition makes it difficult for him to travel to the Philippines, the AAO finds that he would experience extreme hardship if he were to join his son to live in the Philippines.

Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do in this case constitute extreme hardship to a qualifying family member for purposes of relief under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The grant or denial of the above waiver does not depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

The favorable factors in this matter are the hardship to the applicant's spouse, father, and his U.S. citizen child; the affidavits commending the applicant's character; his record of employment as shown in the Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents; and the passage of approximately seven years since the applicant's immigration violation. The unfavorable factors in this matter are the applicant's periods of unauthorized presence; his removal from the United States; his *nolo contendere* pleas to violation of PC 484 (theft) in 1995, and to violation of PC 496(A) (buying or receiving stolen property) and Vehicle Code 2800.1 (operating a motor vehicle with intent to evade, willfully flee or otherwise attempt to elude a pursuing peace officer's motor vehicle) in 1994. The AAO notes that the applicant does not appear to have any criminal convictions after 1995.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's breach of the immigration laws of the United States, the AAO finds that the hardship imposed on the applicant's spouse and family as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.