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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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H3

FILE:

Office: MANILA, PHILIPPINES

Date: JUL 23 2009

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:

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).

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 dismissed.

The applicant, [REDACTED], is a native and citizen of the Philippines who was found to be inadmissible to the United States under 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 is the spouse of a U.S. citizen. She seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), of the Act in order to immigrate to the United States and live with her husband. The district officer concluded that the applicant had failed to establish that her 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 March 22, 2007. The applicant submitted a timely appeal.

On appeal, counsel states that a child of [REDACTED], the applicant's husband, recently passed away and that separation from the applicant compounds [REDACTED] loss. Counsel states that [REDACTED] and his wife have a young son and that [REDACTED] moved in with his aging mother so that she may help raise his son. Counsel states that [REDACTED] has recurring abscesses for which he takes medication. Counsel states that all of [REDACTED] family members live in the United States and that [REDACTED] is unfamiliar with the language and culture of the Philippines and will not find employment there. According to counsel, the Travel Warning by the U.S. Department of State shows that Americans are kidnapped in the Philippines. Counsel states that [REDACTED] son would experience extreme hardship in the Philippines because he is not familiar with its language and would be uprooted from his education and social development in the United States.

The AAO will first address the finding of inadmissibility.

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). For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.¹

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.

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States on a K-1 fiance visa on March 20, 1999, with authorization to remain in the country until June 20, 1999. The applicant did not marry her K-1 petitioner; however, she remained in the United States until October 24, 2003. The applicant therefore accrued four years of unlawful presence, from June 21, 1999 to October 24, 2003, and triggered the ten-year-bar when she left the United States, rendering her 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). That section 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.

The waiver 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 an applicant and to his or her child is not a consideration under section 212(a)(9)(B)(v) of the Act. 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. Hardship to children will be considered only to the extent that it results in hardship to a

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.

qualifying relative, who in this case is the applicant's U.S. citizen spouse. 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).

"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 husband must be established in the event that he joins the applicant to live in the Philippines, and alternatively, if he remains in the United States without her. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

Counsel on appeal portrays the hardship in this case as principally emotional in nature if Mr. [REDACTED] were to remain in the country without his wife. The psychosocial evaluation report that is dated July 12, 2006 and written by [REDACTED] conveys that [REDACTED] has been under significant stress since separation from the applicant, and [REDACTED] states that based on the Beck Depression Inventory II (BDI-II) [REDACTED] has moderate depression symptoms. Ms. [REDACTED] also provided a diagnosis based upon the Diagnostic and Statistical Manual of Mental Disorders IV (DSM-IV).

Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted report is based on a single interview between the applicant's spouse and Ms. [REDACTED]. The record fails to reflect an ongoing relationship between a mental health professional and [REDACTED] or any history of treatment for the depression suffered by [REDACTED]. Moreover, the conclusions reached in the submitted report, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering [REDACTED] findings speculative and diminishing the evaluation's value to a determination of extreme hardship.

██████████ indicates in his undated six-page letter that he is concerned about the emotional, psychological, and physical effects that separation from the applicant will have on his young son. ██████████ states that he is mentally worn out seeing the rough time his son is having on account of separation from the applicant, and that his son's separation from the applicant is a compromise of his son's quality of life, a violation of his liberty, and runs counter to family values.

Family separation must be considered in determining hardship. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (“the most important single hardship factor may be the separation of the alien from family living in the United States”).

However, courts have found that family separation does not conclusively establish extreme hardship. *See, e.g., Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991) (separation of the applicant 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); *Shoostary v. INS*, 39 F.3d 1049 (9th Cir. 1994) (finding separation of respondent from his lawful permanent resident wife and two U.S. citizen children is not extreme hardship); and *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985) (deportation is not without personal distress and emotional hurt).

Furthermore, the AAO notes that the general proposition is that the birth of an illegal alien's child who is a U.S. citizen is not sufficient in itself to prove extreme hardship. *See, Marquez-Medina v. INS*, 765 F.2d 673 (7th Cir. 1985) (an illegal alien cannot gain a favored status merely by the birth of a citizen child); *Lee v. INS*, 550 F.2d 554 (9th Cir. 1977) (“an alien illegally present in the United States cannot gain a favored status merely by the birth of his citizen child”); *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984) (birth of a U.S. citizen child is not per se extreme hardship).

██████████ is very concerned about his separation from the applicant and the impact of separation on their young son. The AAO is mindful of and sympathetic to the emotional hardship that is endured as a result of separation from a loved one. It has taken into consideration and carefully reviewed the evidence in the record. After careful consideration, it finds that the situation of the applicant's husband, if he remains in the United States without his wife, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as required by the Act. The record before the AAO is insufficient to show that the emotional hardship to be endured by ██████████ is unusual or beyond that which is normally to be expected upon removal. *See Hassan* and *Perez, supra*.

In considering all of the hardship factors presented, both individually and in the aggregate, the AAO finds they fail to demonstrate that the applicant's spouse would experience extreme hardship if he were to remain in the United States without his wife.

In regard to the hardship the applicant's husband will allegedly experience if he joined his wife to live in the Philippines, the report by ██████████ conveys that ██████████ states that during the two years his son lived in the Philippines his son was constantly sick with high fevers that required hospitalizations and that the doctors did not know the etiology of his son's health problems. Mr. ██████████ also states to ██████████ that his son returned to the United States to have adequate

medical treatment and a better education, and not live in poverty with his mother and grandparents in the Philippines. [REDACTED] states that [REDACTED] conveys that he is not able to live in the Philippines because he is not familiar with its languages or culture and is not a resident of the Philippines, and because he would not find employment and would not have adequate medical treatment and would lose his medical benefits. Medical records show that in 2006 [REDACTED] had surgery for abscesses of the lower extremities and as having recurrent abscesses. The letter by the Fulton County Employees Retirement System Board Department of Finance reflects that the applicant's husband receives a \$2,130 pension each month and has health, dental, and vision benefits. The AAO notes that in his undated six-page letter the applicant's husband conveys that he has a young daughter and other children from prior relationships that he would be forced to leave behind if he lived in the Philippines and that he is worried about his and his son's safety in the Philippines. The record contains medicine prescriptions for the applicant's son which seem to relate to his health problems while in the Philippines.

In view of [REDACTED]'s ongoing health problems and his concerns about his son's health in the Philippines, about the medical care available in the Philippines, about losing his health benefits if he lived in the Philippines, and about separating from his children living in the United States the AAO finds that the totality of the record establishes that [REDACTED] will experience extreme hardship if he joined his wife to live in the Philippines.

The applicant has established extreme hardship to her husband if he were to join her to live in the Philippines. However, when considered individually or in the aggregate the applicant fails to demonstrate that her spouse will experience extreme hardship if he remained in the United States without her.

It is thereby concluded that the factors presented do not 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).

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

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 remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.