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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

H3



FILE:



Office: HONOLULU, HI

Date:

JUN 01 2009

IN RE:



APPLICATION:

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

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, 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 District Director, Honolulu, Hawaii. 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 Korea. She was found to be inadmissible to the United States pursuant to sections 212(a)(6)(C)(i) of the Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to enter the United States by fraud and willful misrepresentation, and 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in Guam for one year or more and seeking admission within ten years of her last departure. She is married to a U.S. citizen. She seeks waivers of inadmissibility under sections 212(i) of the Act, 8 U.S.C. § 1182(i), and 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The District Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, her U.S. citizen spouse, and denied the Application for Waiver of Ground of Excludability (Form I-601) on November 14, 2006.

On appeal, counsel for the applicant asserts that the District Director failed to properly address the lawful entries of the applicant and that the decision is not properly supported by law.

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

(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 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 [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.

Section 212(a)(6)(C) Misrepresentation, states in pertinent part:

(i) **In general.** Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other

documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

Section 212(a)(6)(C)(iii) authorizes a waiver, in the discretion of the Attorney General, as proscribed by Section 212(i):

- (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) of this section in the case of an immigrant who is the spouse, 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 that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien

Any misrepresentation, including one pertaining to identity, is material if it "has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed." *See, Monter v. Gonzales*, 430 F.3d 546, 553-54 (2d Cir. 2005). A willful misrepresentation only requires that the alien knowingly make a material misstatement to a government official for the purpose of obtaining an immigration benefit. *Matter of Kai Hing Hui*, 15 I. & N. Dec. 288, 289-90 (B.I.A.1975).

The record indicates that during an admission interview on December 5, 2001, the applicant falsely claimed she was still married to her former husband in Korea. However, Documentation submitted by the applicant in support of her Form I-485, Application to Register Permanent Residence or Adjust Status, shows that she was divorced from her Korean husband in 1999. As noted by the director, in representing that she was still married to her husband in Korea, the applicant sought to establish that she had not abandoned her residence in Korea and, therefore, was not residing in Guam (the United States) in violation of her B1/B2 visa. Based on the record before it, the AAO also finds the length of time the applicant spent in the United States between May 1999 and her attempted entry on December 5, 2001 to indicate that she had abandoned her Korean residence and was residing in the United States. It further agrees with the director that her misrepresentation of her marital status was intended to support her false claim to nonimmigrant status. The AAO notes that it is the applicant's burden to establish admissibility in these proceedings, and the record does not contain any evidence that rehabilitates the applicant's misrepresentation with regard to her marriage, or that contradicts the conclusion that she was residing in Guam in violation of her B1/B2 visa. Accordingly, as the applicant used a B1/B2 nonimmigrant visa to enter the United States when she was no longer eligible for this status, she is inadmissible under section 212(a)(6)(C)(i) of the Act for having entered the United States through fraud or willful misrepresentation.

The record reflects that the applicant entered the Guam under the Guam Visa Waiver Program, which allows admissions of no more than 15 days, on or about January 12, 2002, and remained until she voluntarily departed for Korea on June 19, 2005. As she was unlawfully present in Guam for over a year, from January 2002 until June 2005, and is now seeking admission within ten years of her last

departure from the United States. Therefore the applicant is also inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

A waiver of inadmissibility under sections 212(a)(9)(B)(v) or 212(i) 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 is not directly relevant to a determination of extreme hardship under the statute and will be considered only insofar as it results in hardship to a qualifying relative. In the present, case the applicant's U.S. citizen spouse is the only qualifying relative. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Sections 212(a)(9)(B)(v) and 212(i) of the Act; *see also Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

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 set forth a list of non-exclusive factors relevant to 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 relocates with the applicant or remains in the United States, as a qualifying relative is not required to reside outside the United States based on the denial of the applicant's waiver request.

The record of proceeding contains, but is not limited to, a brief from counsel, a statement from the applicant, a statement from the applicant's husband, utility bills, bank records, and a rental agreement and receipts for the applicant and her husband, and birth and marriage certificates for the applicant and her husband.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

Counsel for the applicant asserts that the applicant's spouse cannot relocate to Korea to be with the applicant because he works on projects for the U.S. Navy in Guam and would not be able to find a similar job in Korea. The applicant's spouse states that he would be unable to find comparable employment if he relocated with the applicant to Korea, and that he is also concerned about the hardship created by family separation.

The record does not support the assertions of counsel or the applicant's spouse with regard to finding comparable employment in Korea. It offers no documentary evidence that the applicant's spouse would be unable to find employment in the field of computer aided design drafting in Korea. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Further, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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). Moreover, the AAO notes that the inability to pursue a chosen profession does not constitute extreme hardship for the purposes of this proceeding. *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996). Therefore, the record fails to demonstrate that the applicant's spouse would suffer extreme hardship upon relocation.

As noted above, extreme hardship to a qualifying relative must also be established if he or she remains in the United States. In this case, although the applicant's spouse states that he wishes to be with the applicant and would suffer emotionally if she were excluded, the record fails to document, e.g., a mental health evaluation of the applicant's spouse prepared by a licensed mental health professional, that separation from the applicant would result in extreme emotional hardship for her spouse. As such, the record also does not demonstrate that the applicant's spouse would suffer extreme hardship if she were excluded and he were to remain in Guam.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's husband would face extreme hardship if she is refused admission. The AAO recognizes that the applicant's husband will suffer hardship as a result of the applicant's inadmissibility. However, 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. In the present case, the record fails to distinguish the hardship that would be experienced by the applicant's spouse from that suffered by other individuals whose spouses have been found to be inadmissible to the United States. The AAO therefore finds that the applicant has failed to establish extreme hardship to her U.S. citizen spouse as required under sections 212(a)(9)(B)(v) or 212(i) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion. Accordingly, the AAO will not address counsel's discussion regarding the exercise of discretion as it applies in the present case.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(9)(B)(v) or 212(i) of the Act, the burden of proving eligibility rests with the applicant. *See* 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.