



U.S. Citizenship
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Services

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FILE:

Office: MANILA

Date:

MAY 19 2009

IN RE:

APPLICATION:

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

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of the Philippines, the husband of a U.S. citizen, father of three U.S. citizen daughters, and the beneficiary of an approved Form I-130 petition. The applicant was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act in order to remain in the United States with his wife and daughters.

The district director found that the applicant had failed to establish extreme hardship to his U.S. citizen spouse and denied the application. On appeal, the applicant¹ contended that the evidence shows that failure to approve the waiver application will cause extreme hardship to his wife. Although the appeal brief did not appear to contest the OIC's determination that the applicant is inadmissible, this office will review that determination.

Section 212(a)(9)(B)(i) of the Act provides:

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 (whether or not pursuant to section 1254a(e) of this title) prior to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, 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.

A non-immigrant visa Applicant Detail provided by the U.S. Department of State indicates that the applicant applied, in Manila, Philippines, for a K-1 visa to come to the United States as the fiancée of [REDACTED] of North Wales, Pennsylvania. That visa was issued on May 15, 2000. In a statement submitted with the Form I-601 waiver application, counsel stated that the applicant subsequently entered the United States pursuant to that K-1 visa. The record indicates that the entry was on June 12, 2000. The K-1 visa permitted the applicant to remain in the United States for 90

¹ The record contains a Form G-28 Notice of Entry of Appearance dated August 30, 2006 and recognizing counsel. Neither the appeal nor brief, nor any of the evidence submitted on appeal, however, bears counsel's signature or any other indication that he was involved in its preparation or submission.

days for the purpose of marrying his intended spouse. The applicant did not marry the original petitioner, and his presence became unlawful on September 12, 2000.

The applicant married his current wife on January 19, 2002. His wife petitioned for him on the Form I-130, and the applicant submitted a Form I-485, Application to Adjust Status on April 25, 2002. That Form I-485 application was denied on September 7, 2004 because the applicant was found to be ineligible to adjust status pursuant to section 245(d) of the Act. The applicant was placed in removal proceedings and allowed to voluntarily depart the United States before December 7, 2005. The applicant departed the United States during November of 2005.

The applicant's unlawful presence was interrupted by his filing the Form I-485 in this case. Memo. from [REDACTED], Exec. Assoc. Commr., Ofc. of Field Oper., Imm. and Natz. Serv., to Reg. Dirs. et al., Unlawful Presence HQADN 70/21.1.24-P. When that application was denied, the applicant's presence again became unlawful.

The AAO finds, therefore, that the applicant was unlawfully present from September 12, 2000 to April 25, 2002, a period of more than one year, and from September 7, 2004 until his departure during November 2005, also a period of more than one year. Either of those periods of unlawful presence is sufficient to render the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act. The remainder of this decision will address whether waiver of the applicant's inadmissibility is available, and, if so, whether waiver of inadmissibility should be granted.

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

The Attorney General [now Secretary of Homeland Security] 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 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) 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 the applicant, his children, or his in-laws is not directly relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's wife is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See 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 nonexclusive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative

pursuant to section 212(a)(9)(B)(v) 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. The BIA has held:

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).

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).

In a brief filed with the Form I-601 waiver application, counsel noted that the applicant's children speak only English, rather than any of the native languages of the Philippines. The AAO notes that evidence provided by counsel shows that English is one of the two official languages of the Philippines. Counsel provided no evidence to demonstrate that life in the Philippines is difficult for a person who speaks only English.

Counsel stated that the children are having a difficult time adjusting to life in the Philippines, where they are staying with the applicant's parents. Counsel noted that the applicant's wife's mother suffers from multiple sclerosis and traveling to the Philippines would be difficult for her. He stated that, therefore, if waiver is not granted the applicant's wife's parents will "lose all meaningful contact with their grandchildren and their daughter, [the applicant's wife]. Counsel did not then address the possibility of the applicant's wife and/or his children returning to the United States.

Counsel stated that the applicant's wife "has an extensive background in sales and logistics, and that before moving to the Philippines she "was gainfully employed in the United States . . . at Walmart and J&F Distributors." Counsel further stated that the financial impact of her move to the Philippines has been difficult for the applicant's wife. Counsel attributed this to the economic situation in the Philippines and a language barrier. Again, the AAO notes that English is one of the two official languages of the Philippines. In any event, counsel failed to demonstrate that the applicant's wife has tried but been unable to find employment in the Philippines.

Counsel stated that the applicant himself, although he has a bachelor's degree in computer science, has only been able to secure a menial job in a cell phone call center making less than \$2 per hour. Other than characterizing it as menial, counsel did not describe the applicant's present position. Counsel stated that the diminished income is causing the applicant's children to suffer, but provided no budgets or any other evidence to demonstrate that the applicant's current income is insufficient to

support his family in the Philippines. Counsel stated that economic conditions in the Philippines are inferior to those in the United States, and that the national minimum wage law in the Philippines “does not provide a decent standard of living for a worker and his family,” but did not explain how those asserted facts affect the applicant and his family.

Counsel stated, in contrast, that in the United States the applicant “was able to earn at least \$13/hour.” As evidence of the economic condition of the applicant and his family in the United States, counsel provided copies of portions of their 2003, 2004, and 2005 tax returns. Those returns show that the applicant and his wife declared total income of \$23,394, \$38,350, and \$14,043.81 during those years, respectively. Form W-2 Wage and Tax Statements and 1099 Miscellaneous Income forms submitted show that the applicant’s wife earned \$3,465.01 and \$3,559.74 during 2003 and 2004, respectively, but the record contains no indication how much income, if any, the applicant earned during those years. No evidence was submitted to show how much income either the applicant or his wife had during 2005. The evidence of record is insufficient to demonstrate that the applicant earned any income in the United States, and therefore insufficient to show that being deprived of his income constitutes a hardship to the applicant’s wife.

Counsel stated that the applicant’s wife is suffering from being separated from her parents and that they are suffering from being separated from her. He noted that the applicant’s mother is taking anti-depressants. He stated that the only contact between the applicant’s family and the U.S. in-laws is via webcam a few days per week. Counsel characterized the cost of telephone calls to the Philippines as “prohibitively expensive,” but did not state how much such calls cost.

Counsel stated that life in the Philippines is dangerous, citing a 2004 report on human rights practices issued by the U.S. Department of State. Counsel noted that it described arbitrary and unlawful killings by the police and antigovernment insurgents. Counsel also noted that the report states that rape is a serious problem in the Philippines and that there are many reports of other types of violence.

The State Department report appears to indicate that the human rights abuses are chiefly the result of clashes between the government police and insurgents and occurred in areas far removed from Manila, where the applicant and his family live. Counsel offered no reason to believe that the applicant or members of his family are likely to suffer from that violence. Further, counsel did not then offer any reason that the applicant’s wife and children are obliged to live in the Philippines.

Counsel stated that prior to departing for the Philippines the applicant’s wife had never been outside of the United States and that “The shock and difficulty of establishing her life in the Philippines has been an extreme hardship to her and her family.” Again, counsel offered no explanation in that brief for the applicant’s wife’s decision to remain in the Philippines with her children.

Counsel also stated that although the applicant’s children need routine medical attention the applicant and his wife have been unable to find “decent healthcare.” Counsel did not further define that term or provide any evidence that the healthcare in the Philippines is insufficient.

The AAO notes that counsel provided a Consular Information Sheet pertinent to the Philippines published by the U.S. Department of State, and that it indicates that, although the care, sanitation, and facilities may not meet U.S. standards, adequate medical care is available in major cities in the Philippines. The record does not show that the medical care available in the Philippines is insufficient for the routine procedures described by counsel.

A brief filed on appeal states that the applicant's wife and children accompanied him to the Philippines to maintain family unity. That brief reiterates the arguments made previously, pertinent to the hardship the applicant's wife and children face living in the Philippines. The brief dismisses the possibility of the applicant's wife returning to the United States with the children, stating that family unity is "the highest priority" of the applicant and his family. As to the hardship the applicant's wife would face if she returned to the United States with her children but without the applicant, the brief states, without elaboration or evidence, that it would traumatize the applicant's wife and children. The brief also states, without evidence, that the applicant's wife earned \$9.25 working at Walmart, which, if she worked full-time, would equal \$19,240 annually. The brief notes that this amount is less than the 2007 poverty level for a family of four, and states that the children would require day care, which would constitute an additional expense. The brief further states that the applicant, working in the Philippines, would be unable to contribute to his family's support.

The record contains no evidence to support counsel's assertion of the wage the applicant was paid by Walmart. Further, the tax data provided shows that during 2003 and 2004 the applicant's wife had income from sources other than Walmart. Whether counsel is considering the applicant's wife's additional earning power, beyond the wages she is able to earn at Walmart, is unclear, as is whether that additional income is still available to her. No budgetary information accompanied the appeal brief.

The statements in the appeal brief pertinent to the applicant's wife's potential earnings in the United States and the potential emotional hardship to the applicant's wife and children if they return to the United States are not supported by any evidence. Those unsupported assertions are insufficient to sustain the burden of proof in this matter, whether they were made by counsel, *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980), or the applicant, *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

The record contains an affidavit, dated July 15, 2006, from the applicant's mother-in-law. In it she stated that she misses her daughter and granddaughters, one of whom she has never seen since her birth, and that she has been diagnosed with clinical depression and placed on medication. She stated, "I am sure I could handle my depression if my daughter and grandchildren were here with me."

The record contains a similar affidavit, also dated July 15, 2006, from the applicant's father-in-law. He stated that he misses his daughter and grandchildren very much, which has caused him hardship. He did not address what hardship failure to approve the waiver application would cause to his daughter, the applicant's wife.

The record contains a declaration, dated August 25, 2006, from the applicant's mother-in-law. She stated that the various members of her family miss each other very much; that the applicant, his wife, and their children want to return to the United States; and that she is sufficiently depressed that her antidepressant dose was recently raised. She stated that she has multiple sclerosis, is disabled, and is unable to go to the Philippines, but did not otherwise address the hardship that denial of the waiver application would cause to her daughter, the applicant's wife.

The record contains a declaration, dated August 26, 2006, from the applicant's father-in-law. He also stated that the various family members in the United States miss those who are in the Philippines but did not otherwise address the hardship that would be caused to his daughter, the applicant's wife, by failure to approve the waiver application.

The record contains an undated letter from the applicant's wife. She stated that she misses her family back in the United States and she wants her children to see her parents. She described medical crises one of her daughters has faced in the Philippines. She did not address why she and/or the children do not return to the United States.

The record contains an undated, unsigned, typewritten memorandum, submitted on appeal, that purports to be from [REDACTED], a psychiatrist. The body of that letter reads, in its entirety,

Due to pressing issues, the doctor's official report was unavailable at time of submission of this appeal. However, [REDACTED] has sought medical advise [sic] concerning her issues of depression and anxiety from [REDACTED]. Please contact the doctor for confirmation and/or official report will follow in approximately 2 weeks.

No further report was submitted.

Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted memorandum contains no indication that it was based on a continuing course of treatment, rather than a single interview and no indication that the psychiatrist found that the applicant's wife's depression and anxiety is the result of her husband's immigration status, or her reaction to the culture shock of living in the Philippines, or both, or neither, or whether the psychiatrist reached any conclusions at all. That report is of little value in demonstrating that failure to approve the waiver petition will cause hardship to the applicant's wife.

The evidence provided is insufficient to show that the applicant's wife is suffering hardship from living in the Philippines that, when combined with the other hardship factors, rises to the level of extreme hardship. The evidence provided is insufficient to show that the applicant is unable to support his family in the Philippines. The evidence provided is insufficient to show that the applicant's wife is unable to support herself and her children in the United States, and insufficient to show that her parents are either unwilling or unable to offer any assistance in that regard.

Counsel has asserted that the quality of medical care available in the Philippines is insufficient, and implied, perhaps in the alternative, that it is unaffordable, but provided insufficient evidence to support those assertions.

The brief provided on appeal asserts that being deprived of the applicant's income will cause hardship to the applicant's wife if she chooses to live in the United States without him, but was accompanied by no evidence that the applicant had any income in the United States.

Although that brief asserts that the applicant's family is determined to remain together, the fact remains that the applicant's wife and children are free to return to the United States although the applicant is not. Although counsel has stated that for the family to separate would traumatize the applicant's wife and children, he has provided no evidence that the emotional hardship they would experience would exceed that expected when a spouse or parent is unable to be admitted to the United States.

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 wife faces extreme hardship if the applicant is refused admission. Rather, the record suggests that she will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States.

The record demonstrates that the applicant has very loving and devoted family members who are extremely concerned about his inadmissibility. Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances.

In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress made plain that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

Separation from one's spouse is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the standard in INA § 212(i), the hardship must be greater than the normal, expected hardship involved in such cases.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *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 therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under INA § 212(i), 8 U.S.C. § 1186(i), and that waiver is therefore unavailable. Because the applicant has been found statutorily ineligible, the AAO need not address whether the applicant merits waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.