

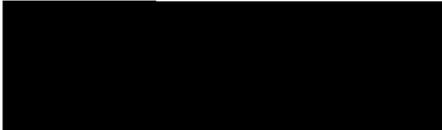
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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U.S. Citizenship
and Immigration
Services



H5

Date: MAY 22 2012

Office: SAN FRANCISCO

FILE: 

IN RE: Applicant: 

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,



Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, San Francisco, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application approved.

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)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or misrepresentation and under section 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 the United States for one year or more. The applicant is married to a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant does not contest these findings of inadmissibility. Rather, he is seeking a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

The field office director concluded the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and, accordingly, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601). *Decision of the Field Office Director, December 17, 2009.*

On appeal, counsel for the applicant and his wife asserts that USCIS misapplied the law and mischaracterized the facts in finding the applicant had not shown undue hardship to a qualifying relative. In support of the waiver appeal, counsel submits a brief and supporting documentation including, but not limited to: supporting statements from the applicant, his wife, and other family members; naturalization, marriage, and birth certificates; passport copies; a psychological evaluation and medical information; financial information, including tax returns and W-2s, as well as mortgage, auto, and personal loan statements and other receipts; education records; photographs; and country condition information. The record also contains two Notices of Appeal (Form I-290B), several Forms I-601, and a Form I-130 with supporting documents. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(6)(C)(i) of the Act provides, in pertinent part:

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 Act is inadmissible.

Section 212(i)(1) of the Act provides:

The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien 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 [Secretary] 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 [...].

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 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 sections 212(i) and 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common

rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[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) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record shows that the applicant entered the United States from Mexico in July 1994 with a fraudulent green card and remained until January 2003, when he traveled to the Philippines after being issued an advance parole document. The applicant was paroled into the United States on March 24, 2003 to resume his application for adjustment of status. In *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), the Board of Immigration Appeals (BIA) held that an alien who leaves the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act does not make a departure from the United States within the meaning of section 212(a)(9)(B)(i)(II) of the Act. Here, the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States pursuant to that grant of advance parole, and was paroled into the United States to pursue a pending application for adjustment of status. In

accordance with the BIA's decision in *Matter of Arabally*, the applicant did not make a departure from the United States for the purposes of section 212(a)(9)(B)(i)(II) of the Act. Accordingly, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act, but still requires a waiver of inadmissibility under section 212(i) of the Act for procuring admission through use of a fraudulent document in July 1994.

The applicant's wife contends she will suffer emotional and financial hardship if she remains in the United States while the applicant resides abroad due to his inadmissibility. She claims to be stressed and depressed by thoughts of possible separation from the applicant, to whom she has been married for 11 years, and with whom she has been trying to start a family. Besides asserting she will be unable to function if her husband is not available to drive her to work and accompany her out in public, the applicant's wife suggests that removal of the primary wage earner from the household will make it impossible for her to cover living expenses and loan obligations.

The applicant's wife states separation from her husband will represent loss of the moral support, love, and companionship of someone to whom she has grown ever closer during their marriage, and the applicant expresses similar sentiments. The record reflects that they have known each other since 1997 and have cohabited since 1998, when the applicant followed his wife to her temporary work assignments in North Carolina and Florida, before they returned to California and were married in 2001. The record reflects that they have been trying to have a child for some time, which has added to her stress at the applicant's prospective departure. Her mother and several siblings echo the concern about her ability to function without the applicant and his wife herself reports being unable to leave home without him. Corroborating these concerns is a psychological evaluation diagnosing the applicant's wife with panic disorder--agoraphobia and depression based on interview, observation, and several standardized psychological tests. In presenting the findings of a 2009 re-evaluation, the psychologist observes the qualifying relative's distress level has increased since an evaluation 18 months earlier and notes symptoms including insomnia, loss of appetite, fatigue, heart palpitations, and crying. Describing the qualifying relative's panic reaction, the report concludes that, "[w]ere her husband sent back to live in the Philippines, she is too psychiatrically disabled to function here in the United States as she cannot leave her house unless he drives her." *Psychological Evaluation of the* [REDACTED] October 29, 2009.

As for the predicted financial hardship, there is evidence that removal of the applicant's contribution will eliminate over half of the couple's joint income: in 2007, the applicant contributed nearly 60% of their reported \$86,000 income. The applicant's wife also contends she will be unable to support her husband economically should he fail to find a job, due to a lack of employment prospects in the Philippines, as evidenced by country information in the record. The record also reflects the likelihood that her heightened agoraphobia will negatively affect the qualifying relative's ability to continue performing her job of almost 20 years. Further, two siblings who have loaned money to their sister in the past report being unable to assist her in meeting documented monthly obligations exceeding \$4,000.

The evidence on the record, when considered in the aggregate, establishes that the emotional and financial hardship the applicant's wife would experience if she were to remain in the United States without the applicant would rise to the level of extreme.

The applicant also contends that his qualifying relative would suffer extreme hardship in the event that she relocated to the Philippines with the applicant. She is a U.S. citizen whom the record shows has extensive ties to the United States, where she works, owns real estate, and has lived for over 20 years. Her entire immediate family has immigrated, including a U.S. citizen father, permanent resident mother, and seven U.S. citizen siblings. Faced with moving back to the country she left while in her twenties, the applicant's wife expresses a number of concerns: she has no remaining ties there; her job prospects are poor due to documented difficult economic conditions in a country where she has never worked; she will forfeit stable employment; and her parents are nearly 80 years old and suffering age-related maladies, including prostate cancer and heart problems.

The record reflects that the cumulative effect of the applicant's wife's strong ties to the United States and absence of ties in the Philippines, her long residence in the United States, her health concerns, and her loss of employment, were she to relocate, rises to the level of extreme. The AAO thus concludes that were the applicant unable to reside in the United States due to his inadmissibility, a qualifying relative would suffer extreme hardship were she to relocate to reside with her husband.

Review of the documentation in the record, when considered in its totality, reflects that the applicant has established that his U.S. citizen spouse would suffer extreme hardship were the applicant unable to reside in the United States. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship. However, the grant or denial of the waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as she may by regulations prescribe. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996).

The AAO must then “balance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The favorable factors in this matter are the extreme hardships the applicant’s U.S. citizen wife would face if the applicant were to reside in the Philippines, regardless of whether she accompanied the applicant or remained in the United States; the applicant’s lack of any criminal convictions; support letters; community involvement; gainful employment in the United States; payment of taxes; and the passage of more than 17 years since the applicant’s unlawful entry into the United States. The unfavorable factors in this matter are the applicant’s procurement of U.S. admission by fraud, and his unlawful presence and employment here.

Although the applicant’s violations of the immigration laws cannot be condoned, the positive factors in this case outweigh the negative factors. Given the passage of time since the applicant’s violations of immigration law, the AAO finds that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

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