

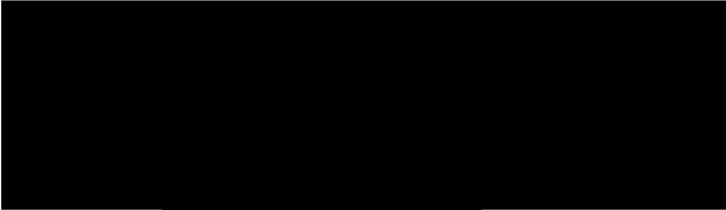
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



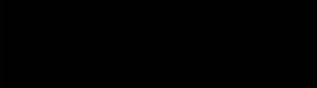
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FILE:



Office: MANILA, PHILIPPINES

Date:

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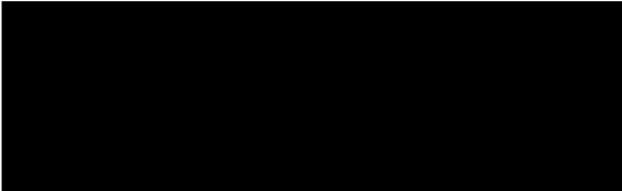
Applicant:



APPLICATIONS:

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:



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).

Perry Rhew

Chief, Administrative Appeals Office

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

The AAO notes that on appeal, the applicant requested 30 days to submit a brief and/or evidence to the AAO. *Form I-290B*, filed September 28, 2007. As of this date, the record contains no evidence that a brief or additional evidence has been filed and the record is considered complete.

The record reflects that 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 and seeking readmission within ten years of his last departure from the United States. The record indicates that the applicant is married to a naturalized United States citizen and the father of a United States citizen daughter. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his United States citizen wife and daughter.

The Acting OIC found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601). In that the applicant had not met the statutory requirements for a waiver under section 212(a)(9)(B)(v) of the Act, the Acting OIC denied the Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) as a matter of discretion.¹ *Decision of the Acting Office in Charge*, dated August 30, 2007.

On appeal, the applicant asserts that he has met his burden of proof and has established that his wife will suffer extreme hardship. *Form I-290B, supra*.

The AAO will adjudicate only the applicant's appeal of the Form I-601 denial. Should the applicant's appeal be sustained, the Form I-212 will be returned to the Acting OIC for a decision on its merits.

The record includes, but is not limited to, counsel's letter, statements from the applicant and his wife; documents pertaining to the applicant's immigration proceedings; tax documents, Form 1099s and W-2s

¹ The Adjudicator's Field Manual provides guidance on adjudicating Forms I-601 and I-212 that are filed together.

43.2 Adjudication Processes.

(c) Of course, an alien might be applying for both consent to reapply and a waiver of inadmissibility, provided the particular ground(s) of inadmissibility applying to the alien are waivable. If the alien has filed both applications (Forms I-212 and I-601), adjudicate the waiver application first. If the Form I-601 waiver is approved, then consider the Form I-212 on its merits; if the Form I-601 is denied (and the decision is final), deny the Form I-212 since its approval would serve no purpose.

for the applicant's wife; and the applicant's marriage certificate. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

(B) Aliens Unlawfully Present.-

- (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.

In the present case, the record indicates that the applicant entered the United States on March 7, 1998, on a B-2 nonimmigrant visa with authorization to remain in the United States until September 6, 1998. On April 17, 1998, the applicant married his wife, then a lawful permanent resident of the United States, in Hawaii. On February 14, 1999, the applicant voluntarily departed the United States. On March 13, 1999, the applicant entered the United States on a B-1 nonimmigrant visa with authorization to remain in the United States until May 12, 1999. The applicant failed to depart the United States when his authorization expired. On December 11, 2002, a Notice to Appear (NTA) was issued. On January 14, 2003, the applicant's wife filed a Form I-130 on behalf of the applicant. On July 21, 2003, an immigration judge granted the applicant voluntary departure until September 19, 2003, with an alternate order of removal. On or about August 19, 2003, the applicant filed an appeal of the immigration judge's decision to the Board of Immigration Appeals (BIA). On November 10, 2004, the applicant's wife became a United States citizen. On November 12, 2004, the BIA affirmed the immigration judge's decision and ordered the applicant to voluntarily depart the United States within 30 days of their order. On December 3, 2004, the applicant requested an extension of voluntary departure, which was approved, and the applicant was ordered to voluntarily depart the United States by January 11, 2005. On January 10, 2005, the applicant filed a motion for a temporary restraining order and stay of removal, which was granted by a District Court judge. On January 14, 2005, the restraining order and stay were extended, which also extended the applicant's grant of voluntary departure until a date ten days after the applicant's receipt of the decision on the Form I-130 benefiting him. On January 18, 2005, the applicant's Form I-130 was approved. On January 19, 2005, the applicant's counsel received the

approval of the Form I-130, thereby extending his period of voluntary departure until January 29, 2005. On January 21, 2005, the applicant filed a motion to reopen before the BIA. On January 28, 2005, the applicant filed another motion for a temporary restraining order, which was denied by a District Court judge. On February 1, 2005, the applicant departed the United States. On March 8, 2006, a Warrant for Removal/Deportation (Form I-205) was issued against the applicant. On March 15, 2007, the applicant filed a Form I-601. On August 28, 2007, the applicant filed a Form I-212. On August 30, 2007, the Acting OIC denied the applicant's Form I-212 and Form I-601, finding that the applicant had accrued more than a year of unlawful presence and had failed to demonstrate extreme hardship to his United States citizen spouse.

The applicant initially accrued unlawful presence from September 7, 1998, the day after his authorization to remain in the United States expired, until February 14, 1999, when he departed the United States. Following his second admission to the United States, the applicant accrued unlawful presence from May 13, 1999, the day after his authorization to remain in the United States expired, until July 21, 2003, the date on which he was initially granted voluntary departure by an immigration judge. The applicant is seeking admission to the United States within ten years of his February 1, 2005 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from a violation of section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant himself experiences upon removal is not directly relevant to a determination of extreme hardship under section 212(a)(9)(B)(v) of the Act. The AAO also notes that the record contains references to the hardship that the applicant's daughter would suffer if the applicant were denied admission into the United States. Section 212(a)(9)(B)(v) provides that a waiver is applicable solely where the applicant establishes extreme hardship to his citizen or lawfully resident spouse or parent. Unlike a waiver under section 212(h) of the Act, Congress does not mention extreme hardship to United States citizen or lawful permanent resident children. Therefore, hardship to the applicant's daughter will not be considered in this proceeding except to the extent that it creates hardship for her mother, the only qualifying relative. 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).

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 *Cervantes-Gonzalez*, the BIA 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. The BIA has also 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).

U. S. courts have stated, “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). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO notes, however, that the courts 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). The common results of deportation are insufficient to prove extreme hardship as extreme hardship has generally been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. *See Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *see also 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). Only “in cases of great actual or prospective injury...will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984).

Extreme hardship to a qualifying relative must be established in the event of relocation or in the event that the qualifying relative resides in the United States, as there is no requirement that the qualifying relative reside outside the United States based on the denial of the applicant’s waiver request.

The applicant states that “[r]elocation to the Philippines is not a reasonable option for [his wife].” Counsel asserts that the applicant “has been unable to find suitable work in the Philippines” and that his wife “would suffer a similar fate if she decided to join [the applicant].” The AAO notes that the record fails to contain documentary evidence, e.g., country conditions reports on the Philippines, that demonstrates that the applicant or his wife would be unable to obtain employment upon relocation. Further, the record fails to demonstrate that the applicant’s wife has no transferable skills that would aid her in obtaining a job in the Philippines. Without supporting documentation, the assertions of counsel

are not sufficient to meet the burden of proof in these proceedings. The 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). Additionally, the AAO notes that the applicant's wife is a native of the Philippines, who spent her formative years in the Philippines. Further, it has not been established that she does not speak Tagalog or that she has no family ties to the Philippines. The record also fails to demonstrate that the applicant's wife has any medical condition, physical or mental, that would affect her ability to relocate. Neither does the record establish that conditions in the Philippines would pose a risk to the safety of the applicant's wife. Accordingly, the AAO finds that the applicant has failed to establish that his wife would suffer extreme hardship if she joined him in the Philippines.

In addition, the record fails to establish extreme hardship to the applicant's wife if she remains in the United States, maintaining her employment. The applicant asserts that his wife would suffer extreme hardship if his waiver is denied. In a letter dated February 26, 2007, counsel contends that the applicant and his wife are in a "desperate financial situation." The applicant claims that if his wife became ill, she would be unable to work and "would become a public charge." In support of these claims, the applicant lists his wife's income and expenses, showing that her expenses total more than her income. While the record contains tax returns for the applicant and his wife, as well as Form 1099s and W-2s for the applicant's wife, it fails to document any of the expenses indicated by the applicant. Accordingly, the AAO is unable to assess how the applicant's removal would affect his wife's financial situation. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See *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)).

In a statement dated March 15, 2007, the applicant also reports that his wife "is frequently depressed." However, other than the applicant's statement, the AAO finds no documentary evidence, e.g., psychological evaluations for the AAO to review, that demonstrates that the applicant's wife is suffering from any emotional and/or psychological problems as a result of their separation. The AAO also notes that there is no evidence in the record that the applicant's wife suffers from any physical conditions that would limit her ability to live independently or to care for her daughter. Additionally, the AAO notes that the applicant is a mechanic and the record fails to establish that he would be unable to rely on his skills to obtain employment in the Philippines and, thereby, financially assist his family from outside the United States.

Although counsel acknowledges that the applicant's child is not a qualifying relative in this proceeding, he asserts that the Acting OIC erred in failing to consider the emotional, educational and psychological problems experienced by the applicant's child as any hardship to her collectively increases the hardship to her mother. The applicant states that when he was in the United States he "was responsible in assisting [his daughter] with her school homework and education;" but that in his absence her grades in school have suffered. The applicant states that he was the caregiver and the separation has been very hard on his daughter. He further states that "children from father-absent homes have been found to be at increased risk for suicide and other social problems." The applicant claims that his wife wants to put his daughter into counseling but she cannot afford the cost of the treatment.

The AAO acknowledges the applicant's claims regarding the hardship being experienced by his daughter but does not find the record to support them. It notes that other than the applicant's statement, the record contains no evidence that his daughter's grades have suffered since he departed the United States. Neither is there documentary evidence that addresses the mental or emotional impact of separation on the applicant's daughter. The applicant has also failed to submit documentary evidence to establish how any hardship that his daughter might be encountering as a result of separation is affecting his wife, the only qualifying relative in this matter. Based on the record before it, the AAO does not find the applicant to have established that his wife would experience extreme hardship if his waiver application were to be denied and she remained in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely 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.