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

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FILE: [REDACTED] Office: MANILA, PHILIPPINES Date: **JAN 11 2011**

IN RE: [REDACTED]

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

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael J. Rhew
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Manila, Philippines. 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 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 applicant has a U.S. citizen spouse, mother, father, and child. He seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated June 3, 2008, the field office director found that the applicant failed to establish extreme hardship to his qualifying relatives as a result of his inadmissibility. The application was denied accordingly.

In a Notice of Appeal to the AAO dated June 24, 2008, counsel states that the applicant's spouse and child are residing in the United States and that the applicant's spouse, mother, and father are suffering emotionally from being separated from the applicant.

The record indicates that the applicant entered the United States with a C1 visa on October 20, 2000 with an authorized period of stay until November 9, 2000. On August 21, 2002 the applicant filed an Application to Register Permanent Residence of Adjust Status (Form I-485), which was denied on July 6, 2004. On that same day the applicant was issued a Notice to Appear before an immigration judge. On March 11, 2005 the immigration judge granted the applicant voluntary departure until July 10, 2005. On July 5, 2005 the applicant departed the United States.

The Adjudicator's Field Manual states that as a matter of United States Citizenship and Immigration Services policy there are circumstances where an applicant will not accrue unlawful presence. These policy exceptions are outlined in Chapter 40.9.2(b)(3). Chapter 40.9.2(b)(3) states in pertinent part:

(A) Aliens with Properly Filed Pending Applications for Adjustment of Status or Registry...

Accrual of unlawful presence stops on the date the application is properly filed pursuant to 8 CFR 103 and the regulatory filing requirements governing the particular type of benefit sought.

Note that, if the application is properly filed according to the regulatory requirements, the applicant will not accrue unlawful presence, even if it is ultimately determined that the applicant was not eligible for the benefit in the first place. The accrual of unlawful presence is tolled until the application is denied.

Therefore, the applicant accrued unlawful presence from November 10, 2000, the date his authorized stay expired, until August 21, 2002, the date the applicant filed his Form I-485. In applying for an immigrant visa, the applicant is seeking admission within ten years of his July 5, 2005 departure from the United States. Therefore, the applicant is 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.

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.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

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 . . . 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 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 or his child can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse, mother, and father are the only qualifying relatives 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).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying

relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

[W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (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 deportation, 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. at

631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation,

particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The record of hardship contains: counsel's brief, a letter from the applicant's spouse's employer, a letter from the applicant's spouse's manager, a psychological evaluation for the applicant's spouse, a letter from the applicant's spouse's doctor, and additional medical documentation for the applicant's spouse and child.

In a brief dated July 18, 2008, counsel states that the applicant's spouse is a registered nurse and it would be difficult for her to rebuild her career in the Philippines. Counsel also states that the record indicates that the applicant's spouse is suffering Major Depressive Disorder from being separated from the applicant. Counsel also states that because of the applicant's spouse's work schedule and emotional state her son has gone to live with the applicant in the Philippines. In addition, counsel states that the applicant's parents have been residing in the United States for twenty years and have health insurance under Medicaid and Medicare.

In a letter dated June 23, 2008, [REDACTED] states that the applicant's spouse was hired as a registered nurse on July 14, 2003 and that with current and anticipated nursing shortages, if the applicant's spouse were to leave her position her employer would have difficulty and incur significant cost in recruiting and training a new nurse. In a letter dated June 18, 2008, [REDACTED] the nurse manager at the applicant's spouse's place of employment, states that the applicant has recently exhibited workplace behaviors inconsistent with her employment history. [REDACTED] states that the applicant has missed several scheduled work shifts, demonstrated difficulty concentrating, and become tearful. [REDACTED] states that the applicant's spouse has also indicated that she is unable to take a required certification exam because outside stressors in her life are making it too difficult for her to study. [REDACTED] states that the applicant's spouse has told her that she is under the care of a physician and psychologist for a diagnosis of severe depression.

The AAO notes that the record also includes a letter from the applicant's spouse's primary care physician and a letter from a psychologist. In a letter dated June 10, 2008, [REDACTED]

states that the applicant's spouse is suffering from severe depression, insomnia, and significant weight loss. The letter states that the applicant weighs 81 pounds.

In a psychological evaluation, dated June 10, 2008, [REDACTED] diagnoses that applicant's spouse with a moderate range of depression, but states that her significant weight loss of 30 pounds is suggestive of full blown depression. She states that the applicant's spouse was offered an anti-depressant but declined it, yet it seems as though her depressive symptoms will continue to get worse.

The AAO finds that the applicant has shown that his spouse is suffering extreme hardship as a result of separation. The record includes significant documentation regarding the applicant's emotional state and the way this hardship is affecting her everyday life. However, the AAO cannot find that the applicant's spouse would suffer extreme hardship as a result of the applicant's inadmissibility because the record does not show that the applicant or any other qualifying relatives would suffer extreme hardship as a result of relocation. The AAO notes that the psychological evaluation indicates that all of the applicant's spouse's family members are living in the Philippines and although rebuilding a nursing career in the Philippines may be difficult, the current record does not indicate that the difficulty would rise to the level of extreme hardship. In addition, the record does not include any documentation regarding the conditions the applicant's spouse would face in the Philippines nor does it include any supporting documentation regarding the applicant's parent's ability to relocate to the Philippines. Going on record without supporting evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). 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).

Therefore, the AAO finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) 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.

The AAO notes that the record indicates that the applicant has a criminal record from the United States and from the Philippines. In a questionnaire dated June 28, 2008, the applicant stated that in October 2002 he was convicted of driving while under the influence in Minnesota and that in August 1996 he was charged with "frustrated murder", but the charge was dismissed. The AAO notes that the Board of Immigration Appeals has indicated in *In Re Lopez-Meza* that a single conviction for a simple driving while intoxicated charge would not likely be a crime involving moral turpitude. *In Re Lopez-Meza, Id.* 3423 (BIA Dec. 21, 1999). *See also, Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001). Thus, as the applicant's conviction for driving under the influence is not a crime involving moral turpitude and the applicant's other charge was

dismissed, the AAO finds that the applicant is not subject to the grounds of inadmissibility under section 212(a)(2)(A)(i)(I) of the act for being convicted of a crime involving moral turpitude.

The AAO also notes that the field office director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision. The Form I-212 was denied solely based on the denial of the Form I-601. The AAO finds that the applicant does not require permission to reapply for admission as he was never deported or removed from the United States.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

On March 11, 2005 the applicant was granted voluntary departure in lieu of removal by an immigration judge and was required to depart the United States no later than July 10, 2005. The applicant complied with his voluntary departure and departed the United States on July 5, 2005.

Thus, the applicant was never deported and is not inadmissible under section 212(a)(9)(A) of the Act. He is not required to file an Application for Permission to Reapply for Admission or Form I-212.

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.