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



U.S. Citizenship
and Immigration
Services

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Date: **MAR 20 2012**

Office: MANILA, PHILIPPINES

FILE:

IN RE: Applicant:

APPLICATION: 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:

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, Manila, Philippines, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the waiver application will be approved.

The record reflects that the applicant, a native and citizen of the Philippines, entered the United States with a B-2 visa on June 15, 1986. Following a deportation hearing, in which the applicant was granted voluntary departure until March 11, 1996, the applicant accrued unlawful presence in the United States from April 1, 1997 until the date of his departure on November 23, 2005. Thus, the applicant was found to be inadmissible to the United States pursuant to 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 more than one year. The applicant does not contest this finding of inadmissibility. He seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), to reside in the United States with his U.S. citizen spouse.

The field office director found that the applicant had established that extreme hardship would be imposed on a qualifying relative. However, the field office director denied the Application for Waiver of Ground of Excludability (Form I-601) as a matter of discretion. *See Decision of the Field Office Director*, dated June 19, 2009.

The record contains the following documentation: a brief filed by the applicant's attorney, dated August 12, 2009; declarations of the applicant, the applicant's spouse, and the applicant's parents; copies of federal income tax returns filed by the applicant; evidence to indicate that the applicant's marriage to his first wife was a bona fide relationship; documentation that the applicant's elderly parents reside in the United States; medical records for the applicant's brother; medical records for the elderly parents of the applicant's spouse; and other documentation in support of the application. The entire record was reviewed and considered in rendering a decision on the appeal.

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

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 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 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. The applicant's U.S. citizen spouse and U.S. citizen parents are the applicant's 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).

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 field office director determined that the financial and professional hardships to the applicant’s wife, and the medical hardship to the applicant’s parents and the applicant’s spouse’s parents are uncommon, unusual, and go beyond the expected hardships when family members are separated. The field office director concluded that the hardships reach the level of extreme as envisioned by Congress if the applicant is not allowed to immigrate to the United States. See *Decision of the Field Office Director*, dated June 19, 2009.

The AAO concurs with the field office director 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-Moralez, 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 record shows that the applicant has strong family ties in the United States. The applicant's elderly parents are U.S. Citizens who immigrated to the United States in 1988 and 1990. The applicant's parents have serious medical problems. The applicant's mother is severely anemic, has heart problems, gout hypertension, and hyperthyroidism. The applicant's father has pulmonary disease, hypertension, hypercholesterolemia, diabetes mellitus, and a collapsed lung. The applicant's parents stated that they rely on the applicant to drive them to doctor appointments, to help around the house, and to take care of them. *See Joint Declaration of [REDACTED] and [REDACTED]* dated May 6, 2009. In addition, the applicant and his sister jointly purchased the home where their parents currently reside. *See Declaration of [REDACTED]*, submitted on May 13, 2009.

The applicant also has three U.S. Citizen siblings residing in the United States. The applicant's younger brother has a psychotic disorder. *See letter of [REDACTED]*, dated March 24, 2009. According to the applicant's parents, the applicant's brother listens best to the applicant, and only the applicant can calm his brother when his brother becomes agitated. *See Declaration of [REDACTED]* submitted on May 13, 2009.

The applicant's spouse also has her elderly U.S. Citizen parents residing in the United States. The father of the applicant's spouse has anemia, and congestive heart and renal failure. The mother of the applicant's spouse has dementia, renal failure, hypertension, anemia, gout, and hyperlipidemia. The applicant's spouse states that she takes care of her parents, supervising their medication, treatment, and diet, and coordinating all their medical needs with their doctors. *See Declaration of [REDACTED]* submitted on May 13, 2009.

The applicant had residence of long duration in the United States. The applicant entered the United States in 1986, at the age of 21, and resided in the United States until November 2005, nearly 20 years. The applicant has property interests in the United States. According to the applicant's spouse, the applicant owns their home in the United States, along with partial ownership of the home that he and his sister bought for their parents. *See Declaration of [REDACTED]* submitted on May 13, 2009.

The record includes evidence of hardship to the applicant and his family if the waiver is denied. There is no evidence that the applicant has any criminal record. As evidence attesting to the applicant's good behavior, the applicant submitted a certificate of recommendation from his church, attesting to the applicant's good moral character, and two letters of support attesting to the applicant's character. *See Certificate of [REDACTED]* dated July 8, 2008; *Statement of [REDACTED]* undated; *Statement of [REDACTED]* dated June 23, 2008.

The decision of the field office director lists misrepresentation of the applicant's immigrant intent at the time of his admission as a negative factor, stating that the applicant was charged with misrepresentation when he was issued an Order to Show Cause in April 1994 and the immigration judge sustained the charge.¹ The AAO notes that director did not find the applicant inadmissible for misrepresentation under section 212(a)(6)(C)(i) of the Act, and counsel notes that this issue was never raised before the denial of the Form I-601. Nevertheless, because the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act and demonstrating eligibility for a waiver under section 212(a)(9)(B)(v) also satisfies the requirements for a waiver for fraud or misrepresentation under section 212(i), the AAO will not determine whether the applicant is also inadmissible under section 212(a)(6)(C)(i).

The decision of the field office director listed several other unfavorable factors. These include a failure to pay taxes, a rapid succession of divorce and remarriage, a lack of remorse, and a lack of community service. *See Decision of the Field Office Director*, dated June 19, 2009. Counsel contends that although the decision goes through a list of negative factors, most of the factors occurred because the applicant was out of status. *See Brief in Support of Appeal*, dated August 12, 2009.

The applicant's counsel contends that while the applicant did not pay income taxes for the years that he did not earn enough to file returns, the applicant did pay his income taxes when required. *See Brief in Support of Appeal*. The applicant submitted copies of his federal income tax returns for the years 1993, 1994, and the four years 2000 to 2003.

The applicant's counsel contends that the applicant's marriage to his first wife was bona fide. *See Brief in Support of Appeal*. In support of this contention, the applicant submitted evidence in the form of photographs and verification of joint bank accounts and other joint activities between the applicant and his first wife. The field office director considered the fact that the applicant failed to appear at requested interviews with USCIS on January 19, 2006 and April 20, 2006, to be interviewed regarding the Form I-130 immigrant visa petition filed by the applicant's current spouse, which would have enabled USCIS to explore the applicant's rapid sequence of divorce and

¹ The AAO notes that the applicant was charged as deportable under former section 241(a)(1)(A) of the Act as excludable at the time of entry under section 212(a)(6)(C)(i) for having procured entry into the United States by fraud or by willfully misrepresenting a material fact. However, the decision of the Immigration Judge, dated October 10, 1995, indicates the applicant was charged with deportability as excludable at the time of entry as an intending immigrant without a valid immigrant visa, under section 212(a)(20) of the former Immigration and Nationality Act.

remarriage. The field office director included this as an unfavorable factor to be considered in the adjudication of the Form I-290B. *See Decision of the Field Office Director*, dated June 19, 2009. The AAO notes that the applicant had already departed the United States on November 25, 2005, and at the time of the scheduled interviews was living in the Philippines and was thus unable to attend these interviews. The AAO further notes that the applicant's Form I-130 submitted on his behalf by his current spouse has been approved and there has been no finding by USCIS that his previous marriage was not bona fide.

The applicant's attorney further contends that the applicant has shown remorse for his immigration violations. *See Brief in Support of Appeal*. As evidence, the applicant's attorney submitted a copy of the applicant's declaration of September 16, 2006, which was submitted with the Form I-601, in which the applicant declares his remorse. The record further includes a declaration by the applicant's spouse, in which she states that the applicant would like to apologize for overstaying his visa. "[REDACTED] has the total remorse for his overstay. He realizes and regrets his wrongdoing." *See Declaration of [REDACTED]* dated August 28, 2005.

The unfavorable factors in this matter are the applicant's use of a B-2 visitor visa to enter the United State when he intended to remain in the United States, and the applicant's failure to depart the United States after the immigration judge granted the applicant voluntary departure until March 11, 1996, and includes the unlawful presence in the United States that accrued following this determination until the applicant's departure from the United States on November 23, 2005.

The immigration violations committed by the applicant are serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's 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 is approved.

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