



U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

HR

[Redacted]

FILE: [Redacted] Office: San Francisco

Date: AUG 22 2000

IN RE: Applicant: [Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(i) of the Immigration and Nationality Act, 8 U.S.C. 1521(i)

Public Copy

IN BEHALF OF APPLICANT:
[Redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy.

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

J. P. O'Reilly

Terrence M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is before the Associate Commissioner on a motion to reopen. The motion will be dismissed and the order dismissing the appeal will be affirmed.

The applicant is a native and citizen of the Philippines who was found to be inadmissible to the United States under § 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 into the United States by fraud or willful misrepresentation in March 1992. The applicant married a native of the Philippines and naturalized United States citizen in June 1997 and she is the beneficiary of an approved petition for alien relative. The applicant seeks the above waiver in order to remain in the United States and reside with her spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. The Associate Commissioner affirmed that decision on appeal.

On motion, counsel presents a psychological evaluation of the applicant's spouse [REDACTED] which indicates that he has symptoms consistent with Major Depressive Disorder Recurrent. Counsel states that [REDACTED] is in grave danger of becoming suicidal again if his spouse has to return to the Philippines. Counsel states that [REDACTED] would lose his family if he followed his wife to the Philippines as all other family members have immigrated except his own son. Counsel discusses the unfavorable political climate in the Philippines and states that [REDACTED] would be in danger there as an ethnic Chinese. Counsel further argues that the applicant's marriage does not constitute an "after acquired equity" because it was not acquired after a deportation order has been issued.

The record reflects that the applicant's spouse had severe emotional problems and bouts of depression prior to his meeting the applicant. In 1994 he cut his wrist and took some drugs in an attempt commit suicide on two occasions after having a quarrel with a former girl friend. The documentation in the record fails to show that [REDACTED] problems stem only from the possible separation from his wife. The documentation indicates that his parents are divorced, he has four siblings and none of them get along, he has no friends and he has an estranged relationship with his family. [REDACTED] was seeing a therapist for two months in 1994 but stopped. The present evaluation dated December 30, 1999 indicates that separation from his wife will be detrimental to the psychological and/or physical health of [REDACTED]

The record reflects that the applicant procured admission into the United States as a nonimmigrant visitor in March 1992 by presenting a fraudulent passport in another person's name.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are

inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-

(C) MISREPRESENTATION.-

(i) IN GENERAL.-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) ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

(1) The Attorney General may, in the discretion of the Attorney General, 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 Attorney General 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.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Sections 212(a) (6) (C) and 212(i) of the Act were amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. 104-208, 110 Stat. 3009. There is no longer any alternative provision for waiver of a § 212(a) (6) (C) (i) violation due to passage of time. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. See Matter of Soriano, Interim Decision 3289 (BIA, A.G. 1996).

If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George and Lopez-Alvarez, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

In 1986, Congress expanded the reach of the ground of inadmissibility in the Immigration Marriage Fraud Amendments of 1986, P.L. No. 99-639, § 6(a), 100 Stat. 3537, redesignated as § 212(a) (6) (C) of the Act by the Immigration Act of 1990 (Pub. L. No. 101-649, Nov. 29, 1990, 104 Stat. 5067). In 1986, Congress imposed the statutory bar on (a) those who made oral or written misrepresentations in seeking admission into the United States; (b) those who have made material misrepresentations in seeking entry admission into the United States or "other benefits" provided under

the Act; and (c) it made the amended statute applicable to the receipt of visas by, and the admission of, aliens occurring after the date of the enactment based on fraud or misrepresentation occurring before, on, or after such date. This feature of the 1986 Act renders an alien perpetually inadmissible based on past misrepresentations.

In 1990, § 274C of the Act, 8 U.S.C. 1324c, was inserted by the Immigration Act of 1990 (P.L. 101-649, Nov. 29, 1990, 104 Stat. 5059), effective for persons or entities that have committed violations on or after November 29, 1990. Section 274C(a) provided penalties for document fraud stating that it is unlawful for any person or entity knowingly-

(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act, ... (or to obtain a benefit under this Act). The latter portion was added in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

In 1994 Congress passed the Violent Crime Control and Law Enforcement Act (P.L. 103-322, September 13, 1994), which enhanced the criminal penalties of certain offenses, including 18 U.S.C. 1546:

(a)...Impersonation in entry document or admission application; evading or trying to evade immigration laws using assumed or fictitious name...knowingly making false statement under oath about material fact in immigration application or document....

(b) Knowingly using false or unlawfully issued document or false attestation to satisfy the Act provision on verifying whether employee is authorized to work.

The penalty for a violation under (a) increased from up to 5 years imprisonment and a fine or both to up to 10 years imprisonment and a fine or both. The penalty for a violation under (b) increased from up to 2 years imprisonment or a fine or both to up to 5 years imprisonment or a fine, or both.

To recapitulate, the applicant knowingly obtained a Philippine passport in an assumed name and used that document to procure admission into the United States in 1992.

In 1996, Congress expanded the document fraud liability to those who engage in document fraud for the purpose of obtaining a benefit under the Act. Congress also restricted § 212(i) of the Act in a number of ways with the recent IIRIRA amendments. First, immigrants who are parents of U.S. citizen or lawful permanent resident children can no longer apply for this waiver. Second, the immigrant must now show that refusing him or her admission would cause extreme hardship to the qualifying relative. Third, Congress eliminated the alternative 10-year provision for immigrants who failed to have qualifying relatives. Fourth, Congress eliminated

judicial review of § 212(i) waiver decisions, and Fifth, a child is no longer a qualifying relative.

After reviewing the amendments to the Act and to other statutes regarding fraud and misrepresentation from 1957 to the present time, and after noting the increased impediments Congress has placed on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar and eliminating children as a consideration in determining the presence of extreme hardship, it is concluded that Congress has placed a high priority on reducing and/or stopping fraud and misrepresentation related to immigration and other matters.

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from § 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Although extreme hardship is a requirement for § 212(i) relief, once established, it is but one favorable discretionary factor to be considered. See Matter of Mendez, Interim Decision 3272 (BIA 1996).

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board of Immigration Appeals (BIA) stipulated that the factors deemed relevant in determining whether an alien has established extreme hardship pursuant to § 212(i) of the Act include, but are not limited to, the following: 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 finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

In Perez v. INS, 96 F.3d 390 (9th Cir. 1996), the court stated that "extreme hardship" is hardship that is unusual or beyond that which would normally be expected upon deportation. The common results of deportation are insufficient to prove extreme hardship.

The court held in INS v. Jong Ha Wang, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

There are no laws that require a United States citizen to leave the United States and live abroad. The applicant's spouse is employed in the United States and his roots are in this country. He is not required to leave and go to the Philippines. Further, the common results of deportation are insufficient to prove extreme hardship. See Hassan v. INS, 927 F.2d 465 (9th Cir. 1991). The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. See Shooshtary v. INS, 39 F.3d 1049 (9th Cir. 1994). In Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right

either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that the qualifying relative would suffer extreme hardship over and above the normal economic, emotional and social disruptions involved in the removal of a family member.

The grant or denial of the above waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Attorney General and pursuant to such terms, conditions, and procedures as she may by regulations prescribe.

In Matter of Cervantes-Gonzalez, the Board also held that the underlying fraud or misrepresentation may be considered as an adverse factor in adjudicating a § 212(i) waiver application in the exercise of discretion. Matter of Tijam, Interim Decision 3372 (BIA 1998), followed. The Board declined to follow the policy set forth by the Commissioner in Matter of Alonso, 17 I&N Dec. 292 (Comm. 1979); Matter of Da Silva, 17 I&N Dec. 288 (Comm. 1979), and noted that the United States Supreme Court ruled in INS v. Yueh-Shaio Yang, 519 U.S. 26 (1996), that the Attorney General has the authority to consider any and all negative factors, including the respondent's initial fraud.

It is noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity (referred to as an after-acquired family tie) in Matter of Tijam, Interim Decision 3372 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter entered the United States in 1988 by fraud and married her spouse in 1996. She now seeks relief based on that after-acquired equity. However, as previously noted, a consideration of the Attorney General's discretion is applicable only after extreme hardship has been established.

In its analysis conducted in Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), a § 212(i) matter, the BIA found cases involving suspension of deportation and other waivers of inadmissibility to be helpful given that both forms of relief require extreme hardship and the exercise of discretion. The BIA continued in Cervantes-Gonzalez to state that, "Although extreme hardship is a requirement for § 212(i) relief, once established, it is but one favorable discretionary factor to be considered." See Matter of Mendez, Interim Decision 3272 (BIA 1996). The Associate Commissioner is bound by that decision.

The favorable factors include the applicant's family tie, the absence of a criminal record, and general hardship to the qualifying relative.

The unfavorable factors include the applicant's procuring admission into the United States by fraud and her lengthy unauthorized stay in the United States.

The Board stated in Matter of Cervantes-Gonzalez, that United States Supreme Court ruled in INS v. Yueh-Shaio Yang, that the Attorney General has the authority to consider any and all negative factors, including the alien's initial fraud, in deciding whether or not to grant a favorable exercise of discretion. The Associate Commissioner does not deem it improper to give less weight in a discretionary matter to an alien's marriage which was entered into in the United States following a fraudulent entry and after a period of unlawful residence in the United States as opposed to a marriage entered into abroad followed by a fraudulent entry.

In the latter scenario the alien who marries abroad legitimately gains an equity or family tie which may result in his or her obtaining an immigrant visa and entering the United States lawfully even though the alien may fraudulently enter the United States after the marriage and before obtaining the visa. Whereas in the former scenario the alien who marries after he or she fraudulently enters the United States and resides without Service authorization does gain an after-acquired equity or family tie that he or she was not entitled to without the perpetration of the fraud.

Notwithstanding that the decision in Carnalla-Muñoz v. INS, related to an alien in removal or deportation proceedings, the alien's equity was gained subsequent to a violation of an immigration law, and when considering an issue as a matter of discretion an equity gained contrary to law should receive less weight than an equity gained through legal and legitimate means.

The applicant's actions in this matter cannot be condoned. The unfavorable factors in this matter outweigh the favorable ones. In proceedings for application for waiver of grounds of inadmissibility under § 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the order dismissing the appeal will be affirmed.

ORDER: The order of December 6, 1999 dismissing the appeal is affirmed.