U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

FILE: [redacted] Office: MANILA, PHILIPPINES Date: DEC 13 2001

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. 1182(i)

IN BEHALF OF APPLICANT:

[redacted]

Public Copy

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

Helen E. Crawford for

Robert P. Weimann, Acting Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Manila, Philippines, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The Associate Commissioner affirmed that decision on two motions to reopen and reconsider. The matter is now before the Associate Commissioner on a third motion. The motion will be granted and the decision dismissing the appeal will be reaffirmed. The application will be denied.

The applicant is a native and citizen of Philippines who was found to be inadmissible to the United States by a consular officer under 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 a nonimmigrant visa and admission into the United States by fraud or willful misrepresentation in 1993. The applicant married a naturalized citizen of the United States in 1994 and is the beneficiary of an approved petition for alien relative. She seeks the above waiver in order to travel to the United States to reside with her spouse and children.

The officer in charge 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 and on two subsequent motions to reopen.

On appeal, counsel stated that the applicant's spouse had suffered extreme emotional hardship due to separation from the applicant and their three children since 1995. Counsel asserted that the applicant's husband suffered from a back injury and was in serious need of someone to take care of him, and suffered from acute insomnia, depression and anxiety which adversely affected his job performance. Counsel also stated that the couple's separation was causing serious financial hardship on the applicant's spouse because his earnings were insufficient to support his wife and three children in the Philippines.

On first motion, counsel submitted a statement from the applicant's spouse in which he detailed the extreme hardship that he and his three U.S. citizen children would suffer if the applicant was not allowed to enter the United States. Counsel submitted a psychological evaluation of the applicant's spouse, letters from relatives, financial documents, a medical report on the applicant's mother-in-law, and various reports regarding the economic and political situation in the Philippines. Counsel asserted that the applicant had proved that her husband would suffer extreme hardship as a result of economic hardship, family separation, and emotional strain to the couple's children.

On second motion, counsel asserted that the decision affirming dismissal of the applicant's appeal was inconsistent with existing case law; was not in consonance with precedent decisions; improperly applied the narrow interpretation of extreme hardship as used in suspension of deportation cases; and should not have considered the applicant's initial entry fraud.

On third motion, counsel reasserts that the decision affirming the dismissal of the applicant's appeal improperly applied the narrow interpretation of extreme hardship as used in suspension of relief cases. Counsel also argues that the Associate Commissioner's decision on second motion disregarded existing case law in finding that the applicant had failed to establish extreme hardship to a qualifying relative. Counsel further asserts that pursuant to precedent decisions decided upon by the Associate Commissioner, the favorable factors established by the applicant warrant a reversal of the prior decision(s) denying her request. It should be noted that the decisions referred to by counsel are in fact non-precedent and therefore non-binding decisions.

The record reflects that the applicant was initially admitted to the United States as a nonimmigrant visitor in November 1990 with authorization to remain until May 1991. She remained longer than authorized and did not depart the United States until September 1993. Upon her return to the Philippines, she bribed a Philippine Immigration Officer to backdate her arrival in the Philippines by placing a stamp in her passport showing an arrival date of December 1990. She applied for a second nonimmigrant visa in October 1993 and falsely represented that she had only been absent for one month during her last visit to the United States. After being issued the second nonimmigrant visa, the applicant was admitted to the United States in October 1993, married her spouse in 1994, and again remained longer than authorized. She subsequently departed the United States in September 1995.

Section 212(a) of the Act states:

> 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:
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> * * *
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> (6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-
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> * * *
>
> (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) of the Act states:

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).

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from section 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 section 212(i) relief, once established, it is but one favorable discretionary factor to be considered. See Matter of Mendez, 21 I&N Dec. 296 (BIA 1996).

Counsel has cited case law relating to the issue of "extreme hardship" as that term is applied in matters involving suspension of deportation under section 244 of the Act, 8 U.S.C. 1254, prior to its amendment by IIRIRA, and recodification under section 240A of the Act, 8 U.S.C. 1230A, and redesignation as "cancellation of removal." Matter of Piltch, 21 I&N Dec. 677 (BIA 1996); Matter of Anderson, 16 I&N Dec. 596 (BIA 1978). In Matter of Marin, 16 I&N Dec. 581 (BIA 1978), the Board stated that, for the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. See also Matter of Mendez, supra. In those matters, the alien was seeking relief from removal.

Although the former application for suspension of deportation and the present and past applications for waiver of grounds of inadmissibility require a showing of "extreme hardship," the parameters for applying such hardship are somewhat narrower in waiver of grounds of inadmissibility application proceedings. In such proceedings, the applicant may only show that such hardship would be imposed on a spouse, parent, or child who is a citizen or lawful permanent resident of the United States. In former suspension of deportation proceedings, the alien could show hardship to himself or herself as well as the condition of his or her health, age, length of residence beyond the minimum requirement of seven years, family ties abroad, country conditions, etc. In the present amended cancellation of removal proceedings, hardship to a nonpermanent resident alien is no longer a consideration, the alien must have been physically present for a continuous period of not

less than 10 years, and the hardship to the spouse, parent, or child must be exceptional and extremely unusual.

The Associate Commissioner has not suggested that the term "extreme hardship" has two different meanings. However, application of that term in what was formerly called exclusion and deportation proceedings is different. In the former exclusion proceedings the burden of proof was on the alien. In the former deportation proceedings, the burden of proof was on the government. Under the IIRIRA amendments the process is basically the same. The alien must prove admissibility, and the government must prove deportability. Hypothetically, some aliens who are ineligible for a section 212(i) waiver due to fewer qualifying elements, may be able to establish their eligibility in subsequent cancellation of removal proceedings, which would lessen the impact of a denial of such waiver.

Counsel has also cited Salcido-Salcido v. INS, 138 F.3 1292 (9th Cir. 1997), as holding that separation is the single most important factor in determining hardship. However, as previously discussed by the Associate Commissioner, 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 section 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.

The record reflects that the applicant's spouse is also a native of the Philippines. In 1994, the couple were married and in 1995, the spouse naturalized as a U.S. citizen. Shortly after her marriage, the applicant returned to the Philippines with the couple's children and has since given birth to another child. The record indicates that all of the children are citizens of the United States.

The record contains a medical report reflecting that the applicant's spouse had a central herniated disc with left paracentral protrusion in 1990. In 1995, the disc protrusion had slightly progressed, producing an acquired spinal stenosis. A medical examination report reflects that in April 1996, the applicant's husband had occasional back pain, no longer had leg pain, and had been doing some jogging, running, and weight lifting.

The record also contains a job-counseling form dated August 1998, which indicates that the spouse's productivity was down, his work was unsatisfactory, and he had received some complaints from

customers. As a result, his employer reduced his work load and recommended that he see a doctor.

In July 1999, the applicant's spouse was interviewed by a psychologist. The spouse reported being under great stress from the beginning of his relationship with the applicant due to her immigration status. The psychologist reports that the spouse has suffered significant stress due to separation from his wife and family, that such separation has had a negative impact on his performance at work, and strongly recommends that the applicant be granted permission to return to the United States.

There is no evidence contained in the record that the spouse has a significant condition of health for which treatment would be unavailable in the Philippines.

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. 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).

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.

It is also 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, supra, need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter initially violated immigration laws by remaining in the United States longer than authorized after her admission in 1990. Upon her eventual return to the Philippines, she bribed an official to obtain a fraudulent stamp in her passport. She then procured admission into the United States in 1993 by fraud or willful misrepresentation. She again remained longer than authorized. In 1994, she married her spouse and 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.

A review of the factors presented, and the aggregate effect of those factors, indicates that the applicant's spouse would suffer hardship due to separation. The applicant has failed, however, to show that the qualifying relative would suffer extreme hardship over and above the normal social and economic disruptions involved in the removal of a family member. Hardship to the applicant herself or her children is not a consideration in section 212(i) proceedings. It is concluded that the applicant has not established the qualifying degree of hardship in this matter.

As noted by counsel, 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 he may by regulations prescribe. However, having found the applicant statutorily ineligible for relief, no purpose would be served at this time in discussing the favorable or unfavorable exercise of the Attorney General's discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 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 prior orders dismissing the appeal will be reaffirmed. The application will be denied.

ORDER: The Associate Commissioner's decisions of June 21, 1999, December 22, 1999, and February 2, 2001 dismissing the appeal are reaffirmed. The application is denied.