U.S. Department of Justice

Immigration and Naturalization Service

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PUBLIC COPY

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

[redacted]

FEB 28 2003

FILE: [redacted] Office: San Francisco Date:

IN RE: Applicant: [redacted]

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

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 that 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 that 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, 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 Administrative Appeals Office (AAO). The matter is before the AAO 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 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 admission into the United States by fraud or willful misrepresentation on February 23, 1997. The applicant remarried, [redacted] (hereafter referred to as [redacted] a native of the Philippines and naturalized U.S. citizen on March 1, 1997, and he is the beneficiary of an approved Petition for Alien Relative filed on March 19, 1997. The applicant seeks a waiver of this ground of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i).

The district director reviewed the documentation relating to [redacted] medical history including her lumpectomy in September 2000, and a psychological evaluation in January 2001. 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 AAO affirmed that decision on appeal.

On motion, counsel states that [redacted] is undergoing monthly medical check-ups and various medical examinations. Counsel indicates that the results of the CT scan done in August 13, 2001, show that cysts have developed in [redacted] left liver and left ovaries. A Bone scan done on August 17, 2001, shows that although there is no evidence of bone metastases, there is somewhat patchy activity in the calvarium and probable degenerative changes in the left shoulder. Counsel asserts that a consideration of [redacted] health along with the hardships caused by the applicant's removal resulting in economic hardship for her to raise three children, would be an extreme hardship. Counsel states that the newly detected cysts are progressions of her cancer, and she needs continued medical monitoring and treatment. Therefore, she cannot afford to be without medical insurance coverage.

The applicant initially married [redacted] on March 17, 1989, in the Philippines and they had three children born in 1986, 1988 and 1989. [redacted] left for the United States on July 5, 1990, and the applicant and [redacted] divorced on November 20, 1990. [redacted] married [redacted] on December 17, 1990 [redacted] indicates that [redacted] became a drunkard and they divorced on December 28, 1995.

The record reflects that the applicant applied for and was issued a crewman's visa and used that visa with his own Philippine passport to procure admission into the United States on February 23, 1997, as a nonimmigrant crewman in transit to Costa Rica. He then returned the passport to an unidentified woman at the Los Angeles airport and took a Greyhound bus to San Francisco.

Section 212(a)(6)(C) of the Act provides that:

> (i) 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 provides that:

> (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-Moralez*, 21 I&N Dec. 296 (BIA 1996).

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 section 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, section 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 crewman's visa by fraud or willful misrepresentation and presented his Philippine passport containing that crewman's visa and used that document to procure admission into the United States in 1997 as a nonimmigrant crewman in transit when he intended to remain in the United States, a felony.

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 section 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 section 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.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (the Board) 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 Board noted in *Cervantes-Gonzalez* that the alien's wife knew that he was in deportation proceedings at the time they were married. The Board stated that this factor goes to the wife's expectations at the time they were wed. The alien's wife was aware that she may have to face the decision of parting from her husband or following him to Mexico in the event he was ordered deported. The alien's wife was also aware that a move to Mexico would separate her from her family in the United States. The Board found this to undermine the alien's argument that his wife will suffer extreme hardship if he is deported. The Board then refers to *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), where 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 Board in *Cervantes-Gonzalez, supra*, also referred to *Silverman v. Rogers*, 437 F.2d 102 (1st Cir. 1970), cert. denied 402 U.S. 983 (1971), where 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."

There are no laws that require a United States citizen to leave the United States and live abroad. 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.

The newly submitted documents in the record including the new medical reports when considered in their totality, now establish 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 *Carnalla-Muñoz v.INS*, 627 F.2d 1004 (9th Cir. 1980), the Ninth Circuit Court of Appeals 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 entered the United States in February 1997 by fraud and remarried his spouse in March 1997. He now seeks relief based on that after-acquired equity.

As the Board noted in *Matter of Cervantes-Gonzalez*, the 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 in deciding whether or not to grant a favorable exercise of discretion. *See Matter of Cervantes-Gonzalez*, at p. 12. The AAO 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 record reflects that [redacted] divorced [redacted] on December 28, 1995. She returned to the Philippines on April 21, 1996, to visit her children living there, and she remained until May 9, 1996. Visa petitions were filed for the three children in 1996, and the applicant consented to letting them join [redacted] in the United States. On January 13, 1997, [redacted] returned to the Philippines to fetch her

three children and remained until January 18, 1997, when the children were lawfully admitted to the United States.

The favorable factors include the applicant's family ties, and extreme hardship to the qualifying relative.

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

The applicant's actions in this matter cannot be condoned. His equity (marriage entered into following entry into the United States by fraud) can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

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. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the order dismissing the appeal will be affirmed.

**ORDER:** The order of August 9, 2001, dismissing the appeal is affirmed.