U.S. Department of Justice

Immigration and Naturalization Service

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[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FILE: [redacted] Office: San Francisco Date: JAN - 8 2003

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]

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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Philippines who procured admission into the United States by fraud on December 23, 1994. Therefore, she is 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). The applicant married a naturalized U.S. citizen on July 10, 1998, 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 and U.S. citizen child.

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.

On appeal, counsel reviews the aspects of hardship previously presented with the application and discussed by the district director. Counsel then discusses the two assignment of errors that she has detected in that decision.

First, counsel states that if extreme hardship is shown, the Attorney General must perforce exercise favorable discretion and grant the waiver.

In Matter of Mendez, 21 I&N Dec. 296 (BIA 1996), the Board of Immigration Appeals (BIA) held that establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create any entitlement to that relief; extreme hardship, once established, is but one favorable discretionary factor to be considered. See also Matter of Cervantes, 22 I&N Dec. 560, 568 (BIA 1999). The Associate Commissioner is bound by these decisions.

Second, counsel states that all the factors must be taken together or "in the aggregate." Counsel then discusses the aspects of family separation if the applicant's spouse and child remain in the United States and the related economic hardship, combined with other factors. Counsel also discusses the anticipated hardships to the applicant's spouse if he accompanies her to the Philippines and the related difficulties in finding employment, health risks, terrorist activities and loss of health benefits.

Section 212(a)(6)(C) of the Act provides, in part, 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).

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 section 212(a)(6)(C)(i) violation due to passage of time. Nothing could be clearer than Congress' desire in recent years to limit, rather than extend, the relief available to aliens who have committed fraud or misrepresentation. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See Fiallo v. Bell, 430 U.S. 787 (1977); Reno v. Flores, 507 U.S. 292 (1993); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). See also Matter of Yeung, 21 I&N Dec. 610, 612 (BIA 1997).

In 1986, Congress expanded the reach of the grounds of inadmissibility in the Immigration Marriage Fraud Amendments of 1986, P.L. No. 99-639, and 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 the Act of 1990, which became effective on June 1, 1991, Congress imposed a statutory bar on those who made oral or written misrepresentations in seeking admission into the United States and on those who made material misrepresentations in seeking admission into the United States or in seeking " other benefits" provided under the Act. Congress made the amended statute applicable to the receipt of visas to, and admission of, aliens who committed acts of fraud or misrepresentation, whether those acts occurred before, on, or after the date of enactment.

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,..."

To recapitulate, the applicant knowingly obtained a Philippine passport in an assumed name and used that document to gain admission into the United States by fraud in 1994, a felony.

Congress has increased the penalties on fraud and willful misrepresentation, 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. 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 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.

In Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (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 BIA noted in Cervantes-Gonzalez that the alien's wife knew that he was in deportation proceedings at the time they were married. The BIA 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 BIA found this to undermine the alien's argument that his wife will suffer extreme hardship if he is deported. The BIA 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 applicant in the present matter had been unlawfully present in the United States since December 1994 when she procured admission by fraud. It must be presumed that her husband was aware of that when they married in July 1998.

The BIA 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."

Although the applicant alleges financial hardship in this matter, the BIA referred to Shooshtary v. INS, 39 F.3d 1049 (9th Cir. 1994), in which the court stated that the "extreme hardship requirement of section 212(h)(2) of the Act was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy."

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 section 212(i) waiver application in the exercise of discretion. Matter of Tijam, 22 I&N 408 (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.

Counsel states that the Attorney General may or may not take into account acts of fraud committed by an alien in connection with her entry into the United States. In Matter of Tijam, supra, 416, the Service contended that as a matter of policy it has decided to withdraw from Matter of Alonzo. In its supplemental brief on appeal, the Service states that it "will hereinafter consider an alien's entry fraud as an adverse factor in determining whether an alien merits a favorable exercise of discretion." The Associate Commissioner is bound by that decision.

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 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 entered the United States in December 1994 by fraud and married her spouse in July 1998. 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.

Counsel discusses the anticipated hardships to the applicant's U.S. citizen spouse if he were to go to the Philippines, including the

difficulty in finding a job, loss of health benefits, and the possibility of terrorist attacks.

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.

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 and social disruptions involved in the removal of a family member. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of 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. 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.