U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: SHIRLEY, PHILIP KENNETH **A087-066-710**

Date of this notice: 1/21/2011

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

File: A087 066 710 - New Orleans, LA

Date: JAN 21 2011

In re: PHILIP KENNETH SHIRLEY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lawrence B. Fabacher, Esquire

ON BEHALF OF DHS: Charlotte S. Marquez
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Adjustment of status; waivers of inadmissibility

The Department of Homeland Security (DHS) appeals from the Immigration Judge's August 20, 2009, decision granting the respondent's application for adjustment of status and his requests for waivers of inadmissibility under sections 212(h) and (i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h) and (i). The respondent opposes the appeal. The appeal will be dismissed, and the record will be remanded for a required background check.

This Board defers to an Immigration Judge's factual findings unless they are clearly erroneous, but we review pure questions of law de novo, including the application of a legal standard to the facts. 8 C.F.R. § 1003.1(d)(3). The respondent's adjustment of status application was filed after the effective date of the REAL ID Act of 2005 and therefore is subject to the provisions set forth therein. *See* section 240(c)(4) of the Act, 8 U.S.C. § 1229a(c)(4).

This appeal concerns the waivers that the respondent sought before the Immigration Judge to excuse his inadmissibility under sections 212(a)(2)(A)(i)(II) and (6)(C)(i) of the Act because of his New Zealand conviction for possession of marijuana and his subsequent failure to disclose it to United States authorities (I.J. at 3; Tr. at 27-30; Exhs. 2, Tabs A, D; 6). The sole appellate issue is whether the Immigration Judge properly determined that the respondent's spouse, a native-born United States citizen, would suffer "extreme hardship" if the respondent is removed to New Zealand (I.J. at 4, 8-9; Tr. at 43; Exh. 2, Tabs E, I).[1] *See* sections 212(h)(1)(B) and (i)(1) of the Act; DHS Brief at 4; Respondent's Brief at 2. In making this determination, the Immigration Judge

[1] The respondent is a native and citizen of the United Kingdom who resided in New Zealand before moving to the United States (I.J. at 1, 9; Tr. at 25; Exh. 2, Tab C). He designated New Zealand as the country of removal, and the DHS alternatively designated the United Kingdom (Tr. at 3).

correctly considered the respondent's wife's close ties to her family in the United States, her current employment in the United States, and the negative health effects that she would suffer if her husband is removed (I.J. at 8-9). *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999) (factors to be considered in making an extreme hardship determination include: the presence of lawful permanent resident or United States citizen family ties to the United States; the qualifying relative's family ties outside the United States; the conditions in the country of relocation and the extent of the qualifying relative's ties to that country; the financial impact of departure from the United States; and significant health conditions, particularly when tied to the unavailability of suitable medical care in the country of relocation). Upon our de novo review, we agree with the Immigration Judge that the respondent has established the requisite hardship.

We have considered all of the DHS's appellate arguments and reject the contention that this case is substantially similar to *Matter of Cervantes-Gonzalez, supra*. *See* DHS Brief at 5-7. There, the qualifying relative did not allege "any particular hardship" in returning to Mexico, the majority of her family originally was from Mexico, and she was unemployed and lacked financial ties to the United States. *Matter of Cervantes-Gonzalez, supra*, at 567-68. Here, the Immigration Judge found that the respondent's wife is "extremely close" to her family in the United States, especially to her sister who experiences mental illness[2] and her mother who is a widow (I.J. at 6-7; Tr. at 49-50; Exh. 5, Tab M). Specifically, the respondent's wife testified that due to thoughts of being "ripped away" from her family, she now requires medication prescribed by a psychiatrist for severe anxiety, depression, and an inability to sleep (I.J. at 6; Tr. at 52-53; Exhs. 3, 5, Tab M).[3] These serious physical and psychological responses indicate that the respondent's wife will suffer more than the usual emotional distress that accompanies family separation if her husband is removed. *See Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *cf. Matter of Pilch*, 21 I&N Dec. 627, 632 (BIA 1996) (insufficient hardship existed when qualifying relatives had "a strong support system of family members" abroad and there was no evidence that they suffered from physical or mental disabilities). Additionally, although financial hardship alone generally does not constitute extreme hardship, *see INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981), we note that the respondent's wife has a career in the United States (I.J. at 8; Tr. at 44-47).

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[2] The DHS asserts that "there is no evidence that [the respondent's wife's] sister has any diagnosed mental health issues," but the respondent's wife and his mother-in-law testified to this fact and the DHS conceded below that the witnesses testified credibly (I.J. at 8; Tr. at 50, 63, 69). *See* DHS Brief at 7.

[3] According to the psychiatrist's report regarding the respondent's wife: "She is tearful, has [an] increased heart rate at times and is tremulous. She has trouble eating and sleeping. I started her on Lorazepam, an anxiety medication" (I.J. at 6; Exh. 3). The DHS notes that the respondent did not allege the unavailability of Lorazepam in New Zealand; however, the unavailability of medication is simply one consideration in the hardship analysis. *See* DHS Brief at 7.

Accordingly, the following orders are entered.[4]

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

[4] We observe that by the time the Immigration Judge issues a final order, the respondent will have been married over 2 years and will not be subject to the conditions set forth in section 216 of the Act, 8 U.S.C. § 1186a.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
New Orleans, Louisiana

File No.: A 087 066 710 August 20, 2009

In the Matter of	)	
	)	
PHILIP KENNETH SHIRLEY	)	IN REMOVAL PROCEEDINGS
	)	
Respondent	)	

CHARGE: Section 237(a)(1)(B) - nonimmigrant - remained longer.

APPLICATIONS: Adjustment of status with waivers under Section 212(h) and 212(i).

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Larry Fabacher, Esquire	Charlotte Marquez Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 33-year-old male, native and citizen of the United Kingdom, to whom was issued a Notice to Appear on December 3, 2008. Respondent admitted the allegations in the Notice to Appear and conceded removability.

The only issue before the Court are respondent's applications for relief.

SUMMARY OF THE EVIDENCE PRESENTED

Exhibit 1 is the Notice to Appear.

Exhibit 2 is respondent's application for adjustment of status, including Tabs A through J.

Exhibit 3 includes medical evidence relating to respondent's wife.

Exhibit 4 are receipts.

Exhibit 5 includes respondent's biometrics and Tabs L through M.

Exhibit 6 includes amendments to the Form I-485.

Exhibit 7 is information about respondent's arrest in 1993.

Exhibit 8 is a USCIS denial of respondent's application for waivers under 212(h) and (i). That decision is dated August 14, 2008.

Respondent testified in support of his application, as did his wife Jennifer and his mother-in-law Norma.

STATEMENT OF LEGAL REQUIREMENTS

ADJUSTMENT OF STATUS

Section 245 of the Act provides that the Attorney General may in his discretion adjust the status of an alien inspected and admitted or paroled into the United States to that of an alien lawfully admitted for permanent residence if the alien applies for adjustment, the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and an immigrant visa is immediately available. An alien subject to removal proceedings may also apply for adjustment of status before the Immigration Judge and, if inadmissible under Section 212(a) of the Act, may apply for waivers of grounds of inadmissibility. See 8 C.F.R. 242.17(a).

In this case, the respondent's application for adjustment of status is based upon his marriage to a United States citizen who

has filed an immediate relative visa petition on his behalf. That application has been approved. Therefore, it appears respondent is eligible for an immigrant visa, and a visa number is immediately available to him.

However, it appears that the respondent is inadmissible under Section 212(a)(2)(A)(i)(II) because of his conviction for a controlled substance violation in 1995 in New Zealand. It also appears that he is inadmissible under Section 212(a)(6)(C)(i) of the Act for his having failed to disclose his conviction in making his application for a nonimmigrant visa for the United States and in numerous applications for admission to the United States.

Both 212(h) and 212(i) provide for waivers. The 212(h) waiver can be used for a controlled substance violation conviction, and 212(i) can be used to waive inadmissibility for having made a false representation in connection with a document for entry or entry into the United States. Both provisions provide that the Attorney General may grant these waivers in the exercise of discretion if it is established to the satisfaction of the Attorney General that refusal of admission to the United States would result in extreme hardship to the citizen or lawfully resident spouse or parent of the alien.

EXTREME HARDSHIP UNDER SECTIONS 212(h) AND 212(i)

In order to qualify for a waiver of inadmissibility, the alien must establish extreme hardship to his or her United States

citizen or permanent resident spouse or parent. Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999); Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997). See also In re Mendez-Morales, Int. Dec. 3272 (BIA 1996). The Board of Immigration Appeals has noted that the term "extreme hardship" is not a definable term of fixed and inflexible meaning, and that the elements to establish extreme hardship are dependent upon the facts and circumstances of the individual case. See Matter of Chumpitazi, 16 I&N Dec. 629 (BIA 1978).

The factors to be considered include the presence of lawful permanent resident or United States citizen family ties 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 to such countries; the financial impact of departure from this country; and the conditions of health.

FINDINGS OF FACT

The respondent and his United States citizen wife were married on October 6, 2007. They have been married to each other for slightly less than two years. Respondent met his wife-to-be in southern France in 2001. Respondent is a mechanical engineer by technical training and experience. He came to the United States and married his wife in 2007, and they lived for a period of time in Atlanta. At that time, respondent's United States citizen wife was employed as a property manager for Tishman

Speyer, a commercial real estate company. However, after a period of time respondent obtained an offer of employment with Trinity Yachts in Gulfport, Mississippi. Respondent's wife resigned from her position with the real estate company and moved to Gulfport with respondent to pursue his career in the yachting business. Respondent at that time had work authorization by virtue of a pending application for adjustment of status based on his marriage. However, in December 2008, respondent and his wife learned that his application had been denied based on the criminal conviction set forth above, and respondent's application for waivers under 212(h) and 212(i) had been denied by USCIS.

Respondent's work authorization was withdrawn when the application for adjustment of status was denied. Without work authorization, he was not authorized to be employed by Trinity Yachts and, therefore, he lost his employment. Respondent's wife had been unable to find employment because the country had gone into recession. Therefore, they relocated to an area outside Richmond, Virginia, and moved into the home of respondent's mother-in-law, his wife's mother. They resided in that home up until the present time, but are about to move out of the home into D.C. because respondent's wife has found employment with the real estate management company that she had been employed with in Atlanta. They have an office in Washington, D.C., and she is going to be working out of that office.

Respondent's wife has submitted a statement in support of

respondent's application and also testified in support of the application. She has stated that this incident has produced enormous financial and emotional strain upon the family, including herself, her husband, and her mother. Her written statement indicates that they have had to draw upon their savings from their retirement plans to live off of and hire an attorney to help the respondent in these proceedings. The wife's written statement indicates that she has had to file for unemployment for the first time in her life, and that she feared she was facing bankruptcy. Her statement also indicates that she had consulted a licensed clinical social worker at the Tucker psychiatric facility because of her severe anxiety, depression and inability to sleep. Respondent has submitted in support of the application a statement by a psychiatrist, Dr. Curtis, which appears in the record as Exhibit 3. Dr. Curtis admits that he has been treating respondent's wife and that he has prescribed medication for her. The wife testified that she had discontinued the visits to the psychiatrist because her health insurance coverage for that type of treatment had run out, but that she was continuing to take the medication.

Respondent's wife's family has had some difficulties. The wife's father and the husband of her mother, with whom they have been living, passed away from cancer in June of 1997. Respondent's wife and his mother-in-law testified that the family is a close family unit, consisting of Jennifer, respondent's

wife, his mother-in-law, and her other two children, one named Dow and one named Paige. Dow resides in North Carolina and Paige now resides in St. Louis, Missouri, although there was testimony that she has moved around quite a bit.

Respondent's wife testified that her sister, Paige, has serious issues, which she described in her statement as actually amounting to a mental illness. The description of what ails her is something like depression and anxiety. Respondent's mother-in-law testified that Paige has issues, and that respondent is often able to intervene and discuss the issues with Paige and help her to calm down and get over whatever is bothering her at the particular time.

There was testimony by both Jennifer and her mother that the family is extremely close. They see each other on holidays and other times during the year, from three to five times per year. There was also testimony that there is communication between Jennifer and her mother on a daily basis and less frequently, but perhaps as many as five times a week between Jennifer and her sister, Paige, in St. Louis.

Jennifer testified that if her husband has to go to New Zealand and she does not go with him, she would be devastated. She also indicated that she would be devastated if she and her husband have to relocate to New Zealand and separate her from her mother and her brother and her sister.

ANALYSIS AND CONCLUSION

The Court finds that the respondent has established that his removal would result in extreme hardship to his United States citizen wife. The Court notes that the wife has already sacrificed a substantial amount in this case by virtue of respondent's effort to legalize his status in the United States. At one point, she gave up her career to allow him to pursue his career in Gulfport, Mississippi, but that effort was derailed when these proceedings began. She has been fortunate in that after a period of unemployment she has managed to regain her job and she has hopes of pursuing that job and becoming a full-fledged property manager and advancing with the company. She testified that she earns approximately $69,000 a year in her new job.

The Court is satisfied that this is a close family unit and that there are medical issues that are in play here, including the wife's anxiety and depression, which are supported by medical documentation in Exhibit 3. There was no issue as to the credibility of respondent or any of the witnesses and, therefore, the Court accepts the wife and mother-in-law's testimony about the sister, Paige, having serious issues which respondent is able to help alleviate by virtue of her presence in the United States and her communication with the respondent. The Court acknowledges that telephones work in New Zealand as well as they do in the United States, and telephone calls could be made.

However, New Zealand is some 17 or 19 hours away by plane, and should a situation arise needing the respondent's presence she would certainly be a very great distance away and very much inconvenienced. The family would also not be able to associate in any manner similar to what they have done before because of the great distance that would be involved. Under the circumstances, the Court concludes that it would be an extreme hardship to remove the respondent from the United States.

EXERCISE OF DISCRETION

The Court finds that an exercise of discretion is warranted in this case. The Court notes that the criminal conviction occurred in 1995, which was some 14 years ago, and there has been no other indication of criminal misconduct since respondent left New Zealand. The Court recognizes there were two other minor incidents in New Zealand, one involving disorderly conduct and one involving drinking, but all of them appear to be minor as reflected by the fact that the punishment imposed was very, very minor. The Court is also satisfied those incidents occurred a long time ago, and there has been no repetition of the misconduct. Respondent's wife's statement indicates that respondent and his wife have been helpful and contributed to charities, and that as recently as this past December, in lieu of Christmas presents to each other, they adopted a child for the Christmas season under a Salvation Army program and considered that their gifts to the child would be in substitute gifts one

for the other, that notwithstanding their economic distress.

Under the circumstances, the Court will grant the applications for waivers under 212(h) and (i), and also the application for adjustment of status.

ORDER

IT IS ORDERED respondent's applications for waivers under Section 212(h) and 212(i) and the application for adjustment under Section 216 are granted.

W. Wayne Stogner

WILLIAM WAYNE STOGNER
U.S. Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE WILLIAM WAYNE STOGNER, in the matter of:

PHILIP KENNETH SHIRLEY

A 087 066 710

New Orleans, Louisiana

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Jane W. Gilliam, Transcriber
Free State Reporting, Inc.

November 18, 2009
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, and/or CD, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.