

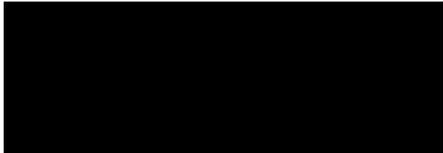


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U.S. Department of Justice

Immigration and Naturalization Service

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



File: [Redacted] Office: MIAMI, FL

Date: MAY 17 2001

IN RE: Applicant: [Redacted]

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

IN BEHALF OF APPLICANT:
[Redacted]

Public Copy

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

Robert P. Wiemann, Acting Director
Administrative Appeals Office

1

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

The applicant is a native and citizen of Cuba who is inadmissible to the United States under § 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is married to a naturalized United States citizen and has applied for adjustment of status pursuant to Section 1 of the Act of November 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966). He seeks a waiver of this permanent bar to admission as provided under § 212(h) of the Act, 8 U.S.C. 1182(h), in order to remain in the United States and reside with his spouse and children.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the application accordingly.

On appeal, counsel asserts that the district director's decision misapplied pertinent case law as well as the statutory construction of the 1966 Act. Counsel also asserts that the decision failed to take into consideration the present country conditions in Cuba, a pertinent factor which must be considered in making the waiver determination.

The record reflects that the applicant last entered the United States in parole status on September 4, 1970. His criminal history, as contained in the record, indicates the following:

(1) On August 27, 1982, the applicant was arrested for obstructing a police officer, resisting arrest without violence, and possession of a controlled substance (quaaludes). The dispositions of these charges are not specified in the record.

(2) On December 31, 1982, the applicant was arrested for burglary of an unoccupied structure, grand theft, and resisting arrest without violence. The dispositions of these charges are also not specified in the record.

(3) On January 26, 1987, the applicant was convicted in the Circuit Court in and for Dade County, Florida, of the offense of aggravated battery (a crime involving moral turpitude) for which he received eighteen months probation.

(4) On April 27, 1989, the applicant was arrested for disorderly conduct, a misdemeanor. The disposition of this charge is not specified in the record.

(5) On May 21, 1990, the applicant was convicted in the Circuit Court in and for Dade County, Florida, of the offense of aggravated assault (a crime involving moral turpitude) for which he was imprisoned for two days and ordered to pay \$250.00 in fines.

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

* * *

(2) CRIMINAL AND RELATED GROUNDS.-

(A) CONVICTION OF CERTAIN CRIMES.-

(i) IN GENERAL.- Except as provided in clause (ii), an alien convicted of, or who admits having committed, or who admits committing such acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, is inadmissible.

Section 212(h) of the Act states:

The Attorney General may, in his discretion, waive application of subparagraphs (A) (i) (I), ...if-

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-

(i) ...the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse,

parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

Here, fewer than 15 years have elapsed since the applicant committed his last crime involving moral turpitude. Therefore, he is ineligible for the waiver provided by § 212(h) (1) (A) of the Act.

Section 212(h) (1) (B) of the Act provides that a waiver of the bar to admission resulting from inadmissibility under § 212(a) (2) (A) (i) (I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. The key term in the provision is "extreme." Therefore, only in cases of great actual or prospective injury to the qualifying relative(s) will the bar be removed. Common results of the bar, such as separation or financial difficulties, in themselves, are insufficient to warrant approval of an application unless combined with much more extreme impacts. Matter of Ngai, 19 I&N Dec. 245 (Comm. 1984). "Extreme hardship" to an alien himself cannot be considered in determining eligibility for a § 212(h) waiver of inadmissibility. Matter of Shaughnessy, 12 I&N Dec. 810 (BIA 1968).

Both the district director and counsel have cited case law relating

to the issue of "extreme hardship" as that term applied in matters involving suspension of deportation under § 244 of the Act, 8 U.S.C. 1254, prior to its amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and recodification under § 240A of the Act, 8 U.S.C. 1230A, and redesignation as "cancellation of removal." Matter of Piltch, 21 I&N Dec. 627 (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, 21 I&N Dec. 296 (BIA 1996). In those matters, the alien was seeking relief from removal. In the matter at hand, the alien is seeking relief from inadmissibility. It is more suitable to use case law references relating to the application of the term "extreme hardship" as found in case law relating to waivers of grounds inadmissibility under § 212 of the Act than in case law relating to cancellation of removal.

The Associate Commissioner does not suggest 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. 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 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 § 212(h) 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.

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 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.

On appeal, counsel states that if he were returned to Cuba, the applicant would be incarcerated for having applied for adjustment of status in the United States and having departed Cuba without

permission. Counsel states that the fact that the applicant has applied for adjustment of status under the 1966 Act, establishes in and of itself that extreme hardship would be suffered not only by the applicant but by his spouse and children as well.

There are no laws, however, that require the applicant's spouse and children 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. See Shoostary 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, fails to establish the existence of hardship to the applicant's spouse over and above the normal social and economic disruptions involved that reaches the level of extreme as envisioned by Congress if the applicant is not allowed to reside in the United States. Hardship to the applicant himself or his children is not of consideration in § 212(h) proceedings.

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. Since the applicant has failed to establish the existence of extreme hardship, no purpose would be served in discussing a favorable exercise of discretion at this time.

In proceedings for application for waiver of grounds of inadmissibility under § 212(h), the burden of establishing that the application merits approval remains entirely with the applicant. Matter of Ngai, supra. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.