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U.S. Department of Justice

Immigration and Naturalization Service

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FILE

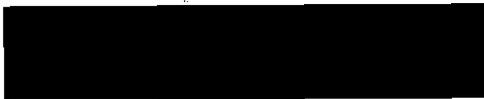


Office: Phoenix

Date:

FEB 12 2003

IN RE: Applicant:



APPLICATION:

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

IN BEHALF OF APPLICANT:



PUBLIC COPY

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, Phoenix, Arizona, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was in the United States without a lawful admission or parole as early as August 1989. An Order to Show Cause was served on him on December 23, 1992. There is no evidence in the record that the applicant was ever scheduled for a deportation hearing. The district director found the applicant to be inadmissible to the United States under sections 212(a)(2)(A)(i)(I) and 212(a)(6)(C)(i) of the Immigration and Nationality Act, (the Act), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) and 1182(a)(6)(C)(i), for having been convicted of a crime involving moral turpitude and for having obtained a benefit by fraud or misrepresentation.

The applicant married, Dawn Stika, on May 8, 1992, while still married to Meriz (Maria) Brito. He divorced, Meriz Brito, in Phoenix, on May 5, 1994. He divorced Dawn Stika on October 18, 1994, and married Rhonda Bivens, a U.S. citizen, on May 27, 1995. He is the beneficiary of an approved Petition for Alien Relative. The applicant seeks the above waiver under sections 212(h) and (i) of the Act, 8 U.S.C. §§ 1182(h) and (i).

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 states that the applicant has presented sufficient evidence of family ties, property, length of residence and other equities to support a finding of extreme hardship. Counsel states that the Service failed to consider that the applicant and his wife have been married for more than five years and they have two children. Counsel stresses the emotional ties between the applicant and his family.

The record reflects that on September 9, 1991 the applicant was convicted of the offense of Theft. Imposition of sentence was suspended for three years. On October 1, 1996, the judgement of guilt was vacated and the charges against the applicant were dismissed.

The record also reflects that the applicant purchased a fraudulent Social Security Card in August 1989 and used that document, along with a fraudulent Alien Registration Card, to obtain employment without Service authorization.

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(a)(2)(A)(i) of the Act provides that:

(I) any alien who is convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of 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 provides that 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 or she may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or for adjustment of status....

The applicant requires both a section 212(h) and a section 212(i) waiver in this matter. Although both sections 212(h) and 212(i) require a showing of extreme hardship to a qualifying relative, the application will be adjudicated first according to the standards established for section 212(i) waivers because the criteria are more stringent than those set forth in section 212(h) waiver proceedings.

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. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered.

If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. *Matter of George and Lopez-Alvarez*, 11 I&N Dec. 419 (BIA 1965); *Matter of Leveque*, 12 I&N Dec. 633 (BIA 1968).

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)(i) 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-Morales*, 21 I&N Dec. 296 (BIA 1966).

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 family ties to 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 the 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 1989 and subject to an Order to Show Cause. It must be presumed that his wife was aware of this when they married in 1995.

The BIA in *Cervantes-Gonzalez*, 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."

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.

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. In *Matter of Tijam*, p.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*, need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter entered the United States unlawfully in 1989, was convicted of theft in 1991, was served with an Order to Show Cause in December 1992, divorced his Mexican wife in 1994, married and divorced a second spouse and married his third spouse in May 1995, after the issuance of an Order to Show Cause. He 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 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 or not he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility, 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 is dismissed.

Since the applicant has failed to establish his eligibility for the granting of a waiver under section 212(i) of the Act, the appeal regarding the waiver under section 212(h) of the Act must also be dismissed as the applicant is not otherwise admissible. Accordingly, the decision of the district director will be affirmed.

ORDER: The appeal is dismissed.