



U.S. Department of Justice

Immigration and Naturalization Service

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

FILE: [REDACTED] Office: SAN FRANCISCO, CA

Date: FEB 27 2003

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)

ON BEHALF OF APPLICANT: [REDACTED]

**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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was admitted to the United States on January 6, 1989, as a nonimmigrant visitor with authorization to remain temporarily. The applicant failed to depart at the end of his temporary stay. He was found to be inadmissible to the United States under section 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 married a United States citizen in San Francisco on March 4, 2001, while being unlawfully present, and he is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), to remain in the United States with his spouse and children.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed upon his qualifying relatives. The district director also concluded that the applicant had failed to establish that he warranted a favorable exercise of the Attorney General's discretion and denied the application accordingly.

On appeal, counsel states the district director acknowledged the applicant's daughter's diagnosis of acute lymphoblastic leukemia in April 2002. Counsel asserts that the Service failed to consider the undue mental anguish resulting from the separation of the spouse's companionship as held in *Matter of Mansour*, 11 I&N Dec. 306 (1965), and that the district director failed to view cumulatively, the factors which contribute to the applicant's claim of extreme hardship. Amongst other things, counsel states that the applicant's wife quit her part-time job in order to provide full-time care to their ill daughter, and that the applicant's employer provides the sole means of medical coverage, which the applicant's wife and daughter receive. Counsel further asserts that medical evidence establishes the applicant's daughter could die if her chemotherapy treatments cease or terminate early and the treatment is not available in Mexico. Lastly, counsel asserts that the applicant admits to his criminal past and mistakes, and that he has not had any other arrests or convictions since February 1996. Counsel submits several affidavits from the applicant's wife, friends, church and medical providers indicating that the applicant is now a responsible man who is a law-abiding, reliable and devoted family man.

The record reflects the following:

1. On April 8, 1992, the applicant was convicted of the offense of Petty Theft committed on March 5, 1992.
2. On June 1, 1995, the applicant was convicted of the offense of Grand Theft committed on June 1, 1994. He was sentenced to 45 days in jail, 2 years of probation and restitution. On August 12, 1996, a bench warrant was issued for failure to pay restitution. The applicant's probation was extended to September 29, 1998.
3. On May 1, 1996, the applicant was convicted of the offense of Carrying a Concealed Weapon committed on February 25, 1996. He was sentenced to 2 years probation and 5 days in jail.
4. On June 21, 1996, the applicant was convicted of the offense of Hit & Run committed on February 3, 1996. He was sentenced to probation for 30 months.

Section 212(a)(i) of the Act states in pertinent part, that:

(A)(i) Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing 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 provides, in part, that: - The Attorney General may, in his discretion, waive the application of subparagraph (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 . . .

(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 for adjustment of status . . . . 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 the last violation. Therefore, the applicant is ineligible for the waiver provided by section 212(h)(1)(A) of the Act. The question remains whether the applicant qualifies for a waiver under section 212(h)(1)(B) of the Act.

Nothing could be clearer than Congress' desire in recent years to limit, rather than extend, the relief available to aliens who have committed crimes involving moral turpitude. In addition to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, this intent was recently seen in the provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, which relates to criminal aliens. 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).

The record in this case contains the applicant's 1992 petty theft, 1995 grand theft, 1996 hit and run and 1996 carrying a concealed weapon convictions. The record also includes a declaration by the applicant which explains the circumstances of his four criminal convictions. The applicant states that the 1992 petty theft conviction happened when he was 17-years-old and stole a pair of \$10.00 shorts. The applicant acknowledges that what he did was foolish and wrong and he states he is sorry. The 1994 grand theft conviction occurred out of high school, when the applicant worked as a gas station cashier and unlawfully cashed several checks and credit card charges for friends without asking for their identification. The applicant

states that he knew what he was doing was wrong, but he did it anyway. He stated further that upon spending 45 days in jail without a single visit from his friends he made a vow to himself to do the right thing and not allow himself to be influenced by trouble-making friends. See *Applicant's declaration* at 2. The applicant stated that the June 1996 hit and run conviction occurred after he damaged the front bumper of a car while leaving a tight parking spot. The applicant stated he realized he should have waited for the owner of the car to come so he could pay for the damage, but that he drove off instead. Lastly, the applicant stated that he bought a gun for protection after being robbed at gunpoint in 1994. In order to pay for the hit and run fines, the applicant planned to sell his gun to his cousin. However, while driving to his cousin's home the applicant was pulled over by the police and charged with carrying a concealed weapon in his car.

The applicant's declaration states:

I know that I made mistakes in the past and now my family has been made to suffer for those mistakes.

I am not the same as I was before, a young man who liked to hang around the wrong friends and who only wanted to have fun. Perhaps I didn't realize the valuable things that life has to offer. . . .

I belong to a prayer group and bible [sic] studies group . . . I am closer to God and I wish to live in peace and to do good things . . . I cannot bear to think [my wife] [redacted] and [my daughter]

[redacted] are to suffer for my stupid and thoughtless mistakes that I made in the past. . .

. I am sorry for everything. I will never do the stupid things I did in the past. Please forgive me for the sake of my wife and daughter.

See *Applicant's Declaration* at 2-3.

Section 212(h)(1)(B) of the Act provides that a waiver of the bar to admission resulting from inadmissibility under section 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 section 212(h) waiver of inadmissibility. *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999),

[REDACTED]

the Board of Immigration Appeals (Board) refers to *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> 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. A review of the record reflects strong evidence showing that both the applicant's U.S. citizen daughter and wife would suffer extreme hardship if the applicant were removed to Mexico.

The record contains three medical letters written by doctors at Kaiser Permanente, documenting the medical condition of the applicant's daughter, [REDACTED]. Dr. Emily Wu states that [REDACTED] was diagnosed with Acute Lymphocytic Leukemia in April 2002.

[REDACTED] has had to endure frequent hospitalizations for chemotherapy as well as many doctors' office visits. I strongly believe that she has been able to endure her medical treatments due to the fact that both her parents were actively involved in her care. Our medical staff cannot comfort her like her parents can after she has had a spinal tap and a chemotherapy treatment. Mr. [REDACTED] has been a very responsible and loving father to [REDACTED]. In addition, Mr. Hernandez has paid for Kaiser Permanente insurance for his entire family. If Mr. [REDACTED] is forced to leave his family, this will have major dire consequences for [REDACTED] and her mother.

See September 27, 2002 Kaiser Permanente letter written by Dr. Emily Wu. A letter written by Dr. Daniel Kronish of the Permanente Medical Group, Inc. states:

[REDACTED] is an almost five year old girl with acute lymphoblastic leukemia diagnosed in April, 2002. She is in remission on chemotherapy. Currently the majority of children remain in long remissions with chemotherapy and some may be cured. [REDACTED] chemotherapy program entails treatment for over two years. She is very likely to have a relapse of her leukemia and die should therapy be terminated early . . . . Life threatening infections can occur at any time, and [REDACTED] requires easy access to emergency treatment facilities. Even when she is on maintenance chemotherapy next year, she is seen monthly and gets a spinal tap with intra-spinal medication every three months. Even maintenance chemotherapy has the potential for frequent transfusions, infections, and frequent emergency visits. The expertise and medical availability is not present in Mexico.

See September 26, 2002 Permanente Medical Group, Inc. letter written by Dr. Daniel Kronish at 1. Dr. Kronish states further that:

Mr. [REDACTED] has been a helpful, loving, and interested parent. He has spent time with Samantha when she has been hospitalized and participates fully with her mother in the routine mouth, skin, and port care we expect of all parents. He is clearly a very involved and dedicated parent. *Id.*

The applicant's wife, [REDACTED] states in her declaration of support:

I am now terrified for the fact that my daughter has been diagnosed with this illness. . . . The fear of losing the two dearest persons in my life has been devastated [sic]. I am currently taking anti-depressants . . . . I beg you to forgive my husband for all the problems he has had with the law. The family that we have now is providing stability for him and he has become a very responsible husband, father and friend.

See May 18, 2002 Declaration in Support written by [REDACTED] at 1.

An October 15, 2002 letter written by Ms. [REDACTED] psychotherapist states that the applicant's wife is on two psychiatric medications to help her anxiety and worry about her daughter's leukemia and her husband's possible deportation.

The [REDACTED] daughter has to be at home most of the time as she cannot be around other people or children so that she won't get an infection. Mrs. Hernandez is home schooling her upon doctor's orders. Their daughter has to take steroid medications for several weeks at a time and this medication changes her behavior so that she becomes very belligerent, uncooperative and demanding. That medication also increases their daughter's appetite so that she is demanding food all day long and hardly sleeping . . . . Mrs. Hernandez spends practically all day and night with her daughter [when] she is hospitalized. Mr. [REDACTED] also has spent countless nights and evenings at the hospital with them. He is the one hope that [REDACTED] has to look forward to during her day of getting some relief with her daughter . . . . If [REDACTED] were] to be deported, this would be an extreme hardship for

Mrs. [REDACTED] and their daughter.

See October 15, 2002 Permanente Medical Group, Inc. letter written by Dr. Judie L. Boman at 1.

Based on the above factors, the applicant has established that his daughter and wife would suffer extreme hardship if he were ordered removed from this country. The applicant also established that his daughter and wife would suffer extreme hardship if they moved to Mexico with the applicant. The applicant's daughter suffers from a life-threatening illness that requires medical treatment unavailable to her in Mexico. Additionally, the applicant's wife has no family-ties in Mexico and is currently unable to work.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the Board held that establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factors in this case consist of the following:

The applicant entered the United States in 1989 as a nonimmigrant visitor and remained longer than authorized;  
The applicant engaged in unauthorized employment;  
The applicant committed and was convicted of four crimes involving moral turpitude between 1992 and 1996.

The positive factors in this case include:

The applicant has strong family ties to the United States;  
The record establishes that both the applicant's wife and ill daughter would suffer extreme hardship if the applicant were removed from the United States or if they accompanied him to Mexico;  
The applicant explained the circumstances of his criminal convictions and he took responsibility for his criminal past and acknowledged the mistakes he made;  
Since 1996 the applicant has had no further arrests or convictions;  
In addition to his own declaration stating he would stay out of trouble, several declarations from friends, his church, his wife and medical providers indicate that the applicant has become a law-abiding and responsible husband and father.

Although the applicant's criminal past and unlawful presence in the United States cannot be condoned, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

**ORDER:** The appeal is sustained.