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U.S. Department of Justice
Immigration and Naturalization Service

PUBLIC COPY

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



File: [Redacted] Office: SAN FRANCISCO, CA

Date: **JAN 13 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)

IN BEHALF OF APPLICANT:



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

The applicant is a native and citizen of El Salvador who 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 is the spouse and father of United States citizens and is the beneficiary of an approved petition for alien relative. He seeks a waiver of this permanent bar to admission as provided under section 212(h) of the Act, 8 U.S.C. 1182(h) in order to remain in the United States and adjust his status to that of a lawful permanent resident.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and had failed to establish that the favorable factors outweigh the unfavorable ones. Accordingly, the application was denied.

On appeal, counsel asserts that the district director's summation of the evidence concerning hardship does not do justice to the considerable evidence submitted in support of the application. Counsel also asserts that the district director failed to consider important factors, distorted others, applied a rationale which contravenes the concept of hardship when applied to a spouse, and failed to consider hardship to the applicant's children. Counsel concludes that the applicant has established that his United States citizen spouse and children would suffer extreme hardship if he were removed and that a waiver is warranted in the exercise of discretion.

The record reflects that the applicant initially entered the United States without inspection in or about January 1990. Subsequent to his unlawful entry, he remained without authorization and was employed without Service authorization. The applicant's criminal history follows:

On November 4, 1992, he was arrested for grand theft with the intent to commit larceny or any felony. He made a negotiated plea and pled nolo contendere to a charge of grand theft.

On December 23, 1993, he was arrested for burglary and knowingly receiving stolen property. The case was dismissed due to the prosecutor's choice not to pursue a conviction.

On October 4, 1995, he was arrested for burglary, conspiracy to commit a crime, and theft. It was

determined that there were insufficient grounds for making a criminal complaint.

On January 13, 1996, he was arrested for theft, knowingly receiving stolen property, and tampering with a vehicle. He made a negotiated plea and pled nolo contendere to the charge of theft.

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 for 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 fifteen years have elapsed since the applicant was convicted of a crime involving moral turpitude. Therefore, he is ineligible for the waiver provided by section 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 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).

On appeal, counsel is correct in noting that the district director's decision contains a misstatement that the applicant is applying for a waiver of inadmissibility under section 212(i), not (h) of the Act. However, the district director appears to have considered hardship to the applicant's children as evidenced by his statement that ". . . although the applicant's spouse or children might suffer the normal separation of family hardship, . . ." It is determined that while the district director's decision reveals a misstatement of law, it did, in fact, include a consideration of hardship to the applicant's children.

The record reflects that the applicant and his spouse were married in January 1996. They have two sons born in the United States in May 1996 and February 1998. At the time of their marriage, the applicant's spouse was aware of the applicant's criminal convictions.

The record also contains documentation including declarations from the applicant and his spouse and information concerning the couple's finances. The applicant describes the circumstances surrounding his involvement in crime and states that his life as a husband and father is now very different. He is the family's primary breadwinner and the couple are in the process of buying a home. The couple's tax records for 2000 indicate that the applicant is employed as a detailer earning approximately \$30,000 annually, and that his spouse is employed as an administrative assistant earning a combined annual income of approximately \$8,000.

The applicant's spouse states that she has lived all of her life in the United States and cannot imagine living in El Salvador. She states that if the applicant were removed from the United States, she and her children would have to relocate with him or remain in the United States separated from him. She also indicates that she could not make it financially without the applicant's contribution to the family's income, his emotional support, and his help around the house and with the children.

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. Further, the common results of deportation are insufficient to prove extreme hardship. See Hassan v. INS, 927 F.2d 465 (9th Cir. 1991).

It is noted that there are no laws that require the applicant's spouse and children to depart the United States if the applicant is removed. 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."

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.

A review of the documentation in the record, when considered in its totality, fails to establish the existence of hardship to a qualifying relative over and above the normal disruptions involved in the removal of a family member that reaches the level of extreme as envisioned by Congress if the applicant is not allowed to remain in the United States. It is concluded that the applicant has not established the qualifying degree of hardship in this matter.

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 section 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.