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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

[REDACTED]

File: [REDACTED] Office: MIAMI, FLORIDA

Date: **JAN 31 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:

[REDACTED]

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, Miami, Florida, and an appeal was dismissed by the Associate Commissioner for Examinations. Subsequently, the Associate Commissioner granted a motion to reopen and reconsider the matter and affirmed the dismissal of the appeal. The matter is now before the Associate Commissioner on a second motion to reopen and reconsider. The second motion will be granted and the prior orders dismissing the appeal will be reaffirmed. The application will be denied.

The applicant is a native and citizen of Venezuela 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 married to a citizen of the United States 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), to remain in the United States and reside with his spouse.

The district director concluded that the applicant's criminal convictions were extremely serious and very recent and that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative. The district director denied the application and the Associate Commissioner affirmed that decision on appeal and on a first motion to reopen and reconsider.

The record reflects that the applicant was convicted on September 2, 1998 in the Circuit Court in and for Dade County, Florida of the offense of aggravated battery with a deadly weapon and of the offense of grand theft in the third degree. He was sentenced to a term of thirty days imprisonment followed by two years of probation. In April 2000, his probation was terminated.

In the initial appeal, counsel cited a Supreme Court of Florida decision, Peart vs. State, 756 So. 2nd 42 (Florida 2000), holding that a defendant who gained knowledge of the threat of deportation prior to the filing date of the decision in that case (April 13, 2000) had two years from the date of that decision to file a motion alleging a claim for relief. Counsel stated that the applicant was never advised by his criminal defense attorney of the immigration consequences of his plea and did not voluntarily or intelligently enter into the plea knowing of those consequences. Counsel stated that the applicant had until September or October 2002 to review his sentencing for post conviction relief based on the fact that he was not advised of the immigration consequences of his plea. Counsel asserted that if those consequences had been known, the applicant could have pleaded not guilty or attempted to obtain a better plea agreement that may not have affected his immigration status.

In dismissing the applicant's appeal, the Associate Commissioner cited Matter of Roldan-Santoyo, Interim Decision 3377 (BIA 1999), wherein the Board of Immigration Appeals held that the policy exception in Matter of Manrique, which accorded Federal First Offender treatment to certain drug offenders is superseded by the enactment of section 101(a)(48)(A) of the Act, 8 U.S.C. 1101(a)(48)(A). The Associate Commissioner also noted that under the statutory definition of the term "conviction," no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Once an alien is subject to a "conviction" as that term is defined in section 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure.

On first motion, counsel stated that if an alien remains subject to a "conviction," as defined in section 101(a)(48) of the Act, then there is no reason for the Florida Supreme Court to allow an applicant to attempt to vacate a judgement to remove a guilty plea from his record. Counsel stated that there is a conflict of law and that the case of Matter of Roldan-Santoyo was decided prior to the decision of Peart vs. State. Counsel cited Matter of Toro, 17 I&N Dec. 340 (1980), as holding that the BIA may entertain due process of fundamental fairness challenges to procedures as applied; and Matter of Cazares, 21 I&N Dec. 188 (BIA 1996), as holding that the BIA has traditionally acquiesced to the decision of the Circuit Court or a Supreme Court.

On first motion, counsel concluded that the substantial evidence test is applicable by a statute to review visa decisions and requires that there must be substantial evidence on the record as a whole to support a particular finding. Counsel asserted that in applying the substantial evidence test, it was an abuse of discretion to deny the applicant his right to seek further relief from the Florida State Court, which resulted in the denial of the applicant's visa and waiver applications.

On dismissal of the applicant's first motion, the Associate Commissioner noted that it was clear from the record, and uncontested by counsel, that the applicant had been convicted of a crime involving moral turpitude; that neither the district director nor the Associate Commissioner had denied the applicant his right to seek relief from the Florida State Court regarding his conviction; and that the applicant had not yet filed a motion to vacate his conviction and his conviction had not yet been vacated.

Upon the initial submission of his second motion on February 20, 2002, counsel asserted that the applicant had filed a motion to vacate judgement and set aside plea regarding his convictions and

requested an additional 120 days in which to submit evidence of the court's decision on that motion. Counsel also stated that the applicant had more equities to demonstrate extreme hardship, but would wait until his convictions were vacated before filing additional documentation concerning hardship. Counsel subsequently submitted, on May 6, 2002, evidence that motions to vacate judgement and sentence with regard to the applicant's convictions were granted on March 7, 2002 (for the Grand Theft 3rd Degree conviction) and on April 16, 2002 (for the Aggravated Assault with a Deadly Weapon conviction).

As more than ten months have passed and no additional documentation regarding extreme hardship to the applicant's spouse has been received on second motion, a decision will be rendered based on the present record.

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 violation. 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).

The record reflects that the applicant and his spouse were married in December 1998. On submission of the initial waiver request, applicant's prior counsel submitted a brief asserting that the applicant's spouse would suffer extreme emotional, economic, and educational hardship if the applicant were removed from the United States. Counsel asserted that the applicant's spouse is not employed, has no marketable skills and would have virtually no visible means of support if the applicant is required to depart the United States. Counsel also asserted that the applicant's spouse is in the process of completing her education in photography and if she were compelled to depart the United States with the applicant in order to maintain their marital relationship, she would be forced to terminate her education and would be emotionally devastated due to separation from her family members in the United States.

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.

It is further noted that there are no laws that require the applicant's spouse to leave the United States and live abroad. 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 Shooshtary 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 over and above the normal economic and social 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(i) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the prior orders dismissing the appeal will be reaffirmed. The application will be denied.

ORDER: The Associate Commissioner's orders dated March 12, 2001 and January 22, 2002 dismissing the appeal are reaffirmed. The application is denied.