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U.S. Citizenship  
and Immigration  
Services

[Redacted]

FILE:

[Redacted]

Office: LOS ANGELES, CA

Date **NOV 20 2004**

IN RE:

[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]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director  
Administrative Appeals Office

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**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**DISCUSSION:** The waiver application was denied by the Interim District Director, Los Angeles, 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 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 of a United States citizen and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse and children.

The interim district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Interim District Director*, dated September 23, 2003.

On appeal, counsel states that the decision of the interim district director fails to use the appropriate standard for extreme hardship and is incorrect as a matter of law. Counsel further contends that the decision is arbitrary and improper and is therefore a denial of the applicant's rights under the Constitution of the United States. *Form I-290B*, dated October 9, 2003.

In support of these assertions, counsel submits a brief, dated October 8, 2003. The record also contains a declaration of the applicant's spouse, undated and a psychological evaluation for the applicant and his family, dated July 2, 2003. The entire record was considered in rendering this decision.

The record reflects that on May 13, 1992, the applicant was convicted of Second Degree Robbery, a felony.

Section 212(a)(2)(A) of the Act states in pertinent part:

- (i) [A]ny 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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.
- (ii) Exception – Clause (i)(I) shall not apply to an alien who committed only one crime if –
  - (I) the crime was committed when the alien was under 18 years of age, and the crime was committed . . . more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States . . .

Section 212(h) of the Act provides, in pertinent part:

- (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

....

(1)(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 [Secretary] 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 . . .

Counsel asserts that as a “policy issue,” the AAO should consider that the applicant has a fundamental right to keep his family together as guaranteed by the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment of the Constitution. *Appeal of the Denial of Application to Waive Inadmissibility Ground*, dated October 8, 2003. The AAO finds the assertion of counsel unpersuasive as counsel fails to provide precedent to support his contention and fails to establish how this supposed constitutional right should be construed by the AAO as a “policy issue.”

A section 212(h) waiver of the bar to admission resulting from section 212(a)(2)(A) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, child or parent of the applicant. Any hardship suffered by the applicant himself is irrelevant to waiver proceedings under section 212(h) of the Act. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

*Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen spouse or parent in 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 significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

Counsel asserts that the applicant’s spouse and children would suffer extreme hardship if they relocated to El Salvador to remain with the applicant. *Appeal of the Denial of Application to Waive Inadmissibility Ground* at 4. The record fails to establish whether or not the applicant’s spouse has family ties in El Salvador or anywhere outside of the United States. Counsel contends that the applicant will be unable to financially provide for his family in El Salvador because his skills as a maintenance worker are not well compensated in his home country. *Id.* at 6. Further, counsel indicates that the applicant’s stepdaughter suffers from Attention-Deficit/Hyperactivity Disorder and requires care available to her only in the United States. *Psychological Evaluation of Jonathan H. Greene, PhD*, dated July 2, 2003. Counsel generally and vaguely contends that the applicant’s children would be deprived of quality of life factors by leaving the United States. *Appeal of the Denial of Application to Waive Inadmissibility Ground* at 6-7.

Further, counsel states that the inadmissibility of the applicant will cause extreme financial hardship to the applicant’s spouse and children if they remain in the United States in the absence of the applicant. *Id.* The record establishes that the applicant’s spouse has completed her education only through the seventh grade and

has not worked outside of the home in over six years. *Declaration of Anel Fernandez Rivera*, undated. The record therefore establishes that the loss or diminution of the applicant's income as a result of his relocation to El Salvador coupled with the limited employment prospects of the applicant's spouse impose extreme financial hardship on the applicant's spouse and children, particularly the applicant's stepdaughter who suffers from AD/HD and requires additional expenditure for treatment. *Psychological Evaluation of Jonathan H. Greene, PhD* ("She requires specific educational and psychological services, available only in this country, to compensate for her AD/HD. The special services [REDACTED] needs have monetary costs. And, [REDACTED] provides [REDACTED] with the financial support to meet these costs.") In addition to the financial difficulties associated with the applicant's departure, therefore, the applicant's spouse will be confronted with the emotional hardship of being unable to provide adequate treatment for her daughter's medical condition if the waiver of inadmissibility is denied. Further, the applicant's daughter will suffer long-term physical, emotional and psychological hardship as a result of suffering from untreated AD/HD. The combination of types of hardship and their extent leads the AAO to find extreme hardship to the applicant's spouse and children as a result of the applicant's inadmissibility to the United States.

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 Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe.

The favorable factors in this matter are the extreme hardship to the applicant's spouse and children and the passage of over 12 years since his violation of the criminal laws of this country. Further, the record reflects that the applicant has not violated the immigration laws of this country.

The unfavorable factor in this matter is the applicant's conviction for Second Degree Robbery in 1992.

It is concluded that the favorable factors outweigh the unfavorable ones. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for 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. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained. The previous decision of the interim district director is withdrawn and the application is approved.