



U.S. Citizenship
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Services

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FILE:

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Office: PHOENIX

Date: NOV 14 2005

IN RE:

[REDACTED]

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

ON BEHALF OF PETITIONER:

[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

DISCUSSION: The waiver application was denied by the District Director, Phoenix, Arizona and is now before the Administrative Appeals Office (AAO), on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico 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 the parent of four United States citizen children. He 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 wife and children.

The district director concluded that the applicant had failed to establish that he was eligible for a waiver of inadmissibility, finding that the hardship factors raised in the application did not rise to the level of extreme hardship. Accordingly, the applicant's request for a waiver was denied. *See Decision of the District Director*, dated March 4, 2004.

On appeal, counsel has submitted the Notice of Appeal (Form I-290B), which contains a brief paragraph in support of the appeal making various contentions including: 1) the applicant's criminal conviction did not constitute a crime involving moral turpitude and thus he was not inadmissible; 2) the offense should be covered under the petty offense exception as it was his first and only offense and occurred in 1991; 3) the offense to which the applicant pled guilty, facilitation to commit burglary, has since been expunged; and 4) the district director erred in concluding that the evidence did not establish extreme hardship. *See Form I-290B*, dated April 5, 2004. Although counsel indicated that a brief and/or evidence would be submitted within 30 days, none has been submitted. The entire record was reviewed and considered in rendering a decision.

Before addressing the merits of counsel's specific arguments on appeal, the AAO will briefly review the applicant's immigration and criminal history. The record reflects that the applicant is a thirty-five-year-old native and citizen of Mexico who appears to have resided in United States since approximately 1986. The applicant is married to a U.S. citizen and is the father of four U.S. citizen children.¹ The applicant is the beneficiary of a Petition for Alien Relative (Form I-130) filed May 23, 1997. He filed an Application for Adjustment of Status (Form I-485) on the same date. The record reflects that the applicant was convicted of a burglary offense in 1991, after he was arrested on August 28, 1991, and charged with burglary in the second degree, a class 3 felony. On October 17, 1991, the applicant pled guilty to facilitation to commit burglary in the second degree, a class 6 felony. He was placed on probation for three years. The primary evidence establishing the convictions consists of an FBI criminal history report obtained in connection with the applicant's adjustment of status application, and documents submitted by counsel in connection with the adjustment of status application.

Counsel makes several contentions on appeal related to the ability of Citizenship and Immigration Service (CIS), to rely upon the applicant's conviction to determine the applicant's inadmissibility. Unfortunately, counsel's contentions are not accompanied by a brief or any statement of authority in support of this assertion,

¹ The record reflects that the applicant and his spouse have three children together, ages, 11, 10, and 9. In addition, the applicant's wife has custody of a child from her first marriage. That child is now 17 years old.

which is being raised for the first time on appeal. Nonetheless, the AAO will address each issue based upon its review of the evidence in the record and an examination of the relevant statutory provisions.

The Applicant's Conviction as a Crime Involving Moral Turpitude

The first argument raised by counsel is that the applicant's conviction was not for a crime involving moral turpitude, and as such does not require a waiver of inadmissibility. *See Notice of Appeal (Form I-290B)*, dated April 5, 2004. While counsel contends that applicant's offense is not a crime involving moral turpitude, counsel does not reference any cases that have made such a finding.

As noted, the applicant was convicted in 1991 of Facilitation to Commit Burglary in the Second Degree in violation of Arizona Revised Statutes 13-1004 and 13-1507. Facilitation is defined in the Arizona Revised Statutes as "acting with knowledge that another person is committing or intends to commit an offense, the person knowingly provides the other person with means or opportunity for the commission of the offense." In addition, *Black's Law Dictionary*, Seventh Edition, West Group, 1999, defines facilitation as, "The act or an instance of aiding or helping; esp., in criminal law, the act of making it easier for another person to commit a crime."

In general, burglary offenses, which have as their basis, an unlawful entry designed to permanently deprive another of their property, are considered to be crimes involving moral turpitude. *Phong Nguyen Tran*, Interim Decision 3271 (BIA 1996). The Board of Immigration Appeals (BIA) has recognized, however, that there are burglary offenses that are not considered to be crimes involving moral turpitude if they involve situations where they are not accompanied by the intent to commit a morally turpitudinous crime, such as larceny, after entering the building. *See, In re Miguel Antonio Brieva-Perez*, 23 I & N Dec. 766 citing, *Matter of M--*, 2 I & N Dec. 721, 723 (BIA, A.G. 1946) (interpreting the offense of unlawful breaking and entering under New York law, to not constitute a crime involving moral turpitude although generally classified as a burglary offense). It is the crime accompanying the breaking and entering that determines moral turpitude. *Toutounjian v. INS*, 959 F. Supp. 598, 605 (W.D.N.Y 1997).

Examining the statutory provisions under which the applicant was convicted, and the underlying documents relating to that conviction, it is clear that the offense for which the applicant was convicted was a crime involving moral turpitude. The applicant's conviction was for facilitating, or assisting, in the commission of a burglary in the second degree, which is defined in the Arizona Statutes as the act of remaining unlawfully in or on a residential structure with the intent to commit theft or any felony therein. Arizona Revised Statutes 13-1507. Furthermore, the documents submitted by counsel reflect that the offense involved the burglary of a residence owned by an elderly couple, and that it involved the taking and destruction of their property. Reviewing the evidence in the record, and in the absence of any countervailing evidence or authority offered by counsel, the AAO finds that the applicant's offense does constitute a crime involving moral turpitude.

The Applicant's Conviction as an Offense Classifiable as a Petty Offense

Counsel also contends that the applicant's offense does not render him inadmissible, and thus in need of a waiver as the offense, which counsel stresses was committed in 1991, even if a crime involving moral turpitude, satisfies the petty offense exception contained in the statute. Other than making the assertion in the

I-290B, counsel has not offered any additional support for this assertion. The relevant statute provides as follows regarding the petty offense exception:

(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 (and the alien released from any confinement to a prison or correctional institution imposed for the crime) 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, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Reviewing the documents in the record, it is clear that the applicant does not satisfy either criterion for the offense to be considered to fall within the petty offense exception. First, the applicant committed the offense when he was twenty-one years of age, and thus does not meet subsection (I). Second, the applicant's conviction records demonstrate that the sentencing range for the applicant's offense was from a minimum sentence of .75 years to a maximum sentence of 1.875 years with the presumptive sentence being 1.5 years. *See Waiver of Preliminary Hearing with Plea Agreement*, dated October 17, 1991. Thus, the offense does not satisfy the criteria for a petty offense exception as the maximum penalty possible exceeds one year. Moreover, the record reflects that the applicant received a probationary sentence of three years for the offense.

Counsel's Contention that the Applicant's Conviction Has Been Expunged

The next claim made by counsel is that the applicant's conviction has been expunged, and thus cannot form the basis of the applicant's inadmissibility. As with counsel's other contentions regarding the applicant's inadmissibility, no details or authority have been provided in support. However, an examination of the record as well as the relevant BIA case law, makes clear that counsel's contention is erroneous both as a matter of law and fact.

First, the documents submitted by counsel relating to the applicant's conviction, include two documents issued in 1993. The first of the documents is entitled, *Petition for Early Termination of Probation or Summary Probation*, dated May 19, 1993, and the second document is entitled, *Order of Discharge from Probation*, dated, June 10, 1993. These are the most recent documents in the record relating to the applicant's conviction and the only post-conviction documents. A review of those documents indicates that neither of them purports to expunge the applicant's conviction or even evidences the initiation of expungement proceedings. The first document is a petition submitted by a deputy probation officer recommending that the applicant's probation be terminated due to the fact that he had successfully completed eighteen months of his three-year probationary grant. The officer expresses his belief that the applicant no longer required probation

supervision and thus recommended its early termination. Such recommendation was accepted by the court on May 20, 1993, which ordered that the probation would be terminated fifteen days later, barring a written objection filed with the court.

The probation discharge order likewise does not support counsel's contention. It appears that it is the follow-up document to the court's acceptance of the probation officer's recommendation to terminate the applicant's probation early. The document also serves to give the applicant notice that following his discharge from probation the Arizona Revised Statutes provide several restorative and remedial measures to individuals in the applicant's position. Specifically, the applicant was advised that he could seek restoration of civil rights under section 13-905; he could set aside his judgment of conviction upon the submission of a petition pursuant to section 13-907; and finally, he was advised that pursuant to section 13-908, the restoration of civil rights and setting aside of the conviction would be in the discretion of the superior court judge by whom the person was sentenced, or his successor in office.

There is nothing in the record demonstrating that the applicant pursued the option of setting aside the judgment of conviction, let alone that such a request was granted. Consequently, the documents submitted by counsel do not support the contention that the applicant's conviction has been expunged or otherwise set aside. However, even if the documents did demonstrate such a development, or if the applicant is able to pursue such a remedy at a later time, it is still necessary to determine that under the law, the applicant would be considered to have had his conviction eliminated pursuant to immigration law. A review of relevant case law indicates that the applicant would remain convicted of a CIMT under the immigration law. The following is a brief review of recent immigration case law addressing post conviction remedies and immigration proceedings.

The case law regarding the effect of post-conviction remedies and their effect on an individual's immigration status has developed considerably in recent years. The BIA in *Matter of Roldan*, 22 I & N Dec. 512 (BIA 1999), determined that notwithstanding the grant of an expungement, an alien's conviction still exists for immigration purposes. *Matter of Roldan*, involved an alien who had had his guilty plea vacated pursuant to section 10-2604(1) of the Idaho code, a state rehabilitative statute. The BIA rejected the alien's argument that he no longer stood convicted of a crime for immigration purposes and was therefore not removable, holding that, "[s]tate rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes." *Matter of Roldan*, at p.528.

The BIA has sought to clarify and further expand on this holding in subsequent cases involving post-conviction relief orders obtained by aliens subject to removal proceedings. In its most recent published decision on the issue, the BIA, in *Matter of Pickering*, 23 I & N Dec. 621 (BIA 2003), clarified that it was drawing a distinction between state court actions to vacate a conviction where the reasons were solely related to rehabilitation or to ameliorate immigration hardships, as opposed to state court actions based upon having found procedural or substantive defects in the underlying criminal proceedings. The BIA found that where the action is taken to address a procedural or substantive defect in the criminal proceedings, the conviction ceases to exist for immigration purposes, but where the underlying purpose is to avoid the effect of the conviction on an alien's immigration status, the court's action does not eliminate the conviction for immigration purposes. *Matter of Pickering*, at p.624. The BIA further noted that although it would normally

examine the law pursuant to which the order was issued, the record in Pickering's case did not reference the law under which the conviction was vacated. However, an examination of the language of the order and the alien's request for post-conviction relief indicated that neither document questioned the integrity of the underlying criminal proceedings or conviction. The BIA observed that the affidavit submitted to the court alleged that the conviction would pose a bar to the alien's ability to obtain permanent residence. Consequently, the BIA determined that it would still consider the alien to have a conviction because the order was issued solely for immigration purposes.

In contrast, the BIA had previously held, in *Matter of Rodriguez-Ruiz*, 22 I & N Dec. 1378 (BIA 2000), that a conviction that had been vacated on the merits pursuant to Article 440 of the New York Criminal Procedure Law was not a conviction for immigration purposes. The BIA found that the state law at issue in that case authorized vacation of a conviction based on the merits of the underlying proceedings, and was not an expungement or rehabilitative statute.

In addition to the BIA, a number of federal courts have also address the issue. As noted in *Matter of Pickering*, those decisions have generally adopted the same approach as the BIA, finding that court orders vacating convictions for reasons unrelated to validity of the guilty plea will not be given effect for immigration purposes. See generally *Matter of Pickering* at 624-625. The decisions out of the Ninth Circuit, the circuit under which this case arises, have taken a similar position to the BIA with respect to the affect of convictions dismissed or vacated for ameliorative purposes. See generally *Murillo-Espinoza v. INS*, 261 F.3d 771, 773-74 (9th Cir. 2001); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003); *Bakerian v. INS*, 2004 WL 724946 (N.D. Cal. 2004).

The AAO will next apply the principles from these cases to the facts in the instant case. As noted previously, there is no order of expungement of the applicant's conviction. Moreover, there is every indication that the post-conviction remedies specified in the order are rehabilitative in nature. The notice provided to the applicant sets forth remedies available to individuals convicted of crimes and who have successfully completed probation that appear to be targeted as facilitating their re-integration into society. As such, they are rehabilitative in nature. The post-conviction remedies referenced in the documents submitted by counsel have nothing to do with the merits or validity of the underlying conviction.

Consequently, the AAO finds that the applicant's evidence does not support counsel's argument on appeal, and the documents that have been submitted, appear to indicate, at most, that the applicant has certain post-conviction remedies available to him that are rehabilitative in nature. While this does not mean that post-conviction remedies addressing the merits of his conviction may not be available to the applicant, there is no indication that any such remedies have been pursued, let alone granted.

Finally, the AAO will turn briefly to the remaining issue, which is whether the evidence supports a finding of extreme hardship. *Matter of Cervantes-Gonzalez*, 22 I & N Dec. 560 (BIA 1999) provides a list of factors the BIA 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. The record contains various items of evidence submitted in support of a finding of extreme hardship. The submissions generally fall into the following three categories: 1) affidavits from the applicant and his spouse; 2) statements submitted by employers and friends of the couple; and 3) country condition information.

The applicant states that he married his wife in 1997, after living with her since 1990. *Statement of Gregorio Najera Loya*, dated March 26, 2001. He states that the couple has four children, ranging in age from twelve to five years of age, who have known only the United States and would be "devastated if they were to move to Mexico." *Id.* The applicant states that he is the sole means of financial support for his family, and fears that if he were unable to remain in the United States his family would be left in the streets or on welfare. *Id.* The applicant states that while he would want his children to join him in Mexico, they would experience difficulties in terms of their health and education due to their limited proficiency in Spanish and the conditions of poverty prevalent in that country. The applicant expresses concern about his ability to support his family if he were to return to Mexico, noting that he is able to currently support his family as well as his mother in Mexico. He also expresses concern about the affect of his removal on his family's close relationship as evidenced by their frequent family outings and camping trips which he asserts demonstrates their close relationship. The applicant further notes that there are close family ties in the United States noting that his brothers and sisters reside here. *Id.*

The record also contains an affidavit from the applicant's spouse, noting that the family would experience hardship due to the close relationship of the applicant to his family. The spouse asserts that the family is financially dependent upon the applicant, and that if they were to accompany the applicant to Mexico, "it will be only a matter of time before mentally or emotionally [I would] lose control, because I do not even know the country." *Affidavit of Christina Marie Amarillas*, dated March 26, 2001. Both the applicant and his wife indicate that the applicant's crime was a mistake made several years earlier and that the family would experience extreme hardship if the applicant's waiver were denied.

In addition to the statements submitted by the couple, the record also contains numerous letters from friends and supporters of the couple, the vast majority of which are from individuals for whom the applicant—who appears to work for a construction company—has performed construction work, or from individuals associated with the applicant's employer. Overall, the letters indicate that the applicant is a good worker and good family man and that if he were not permitted to remain in the United States, it would impose a significant hardship upon his family. However, the letters are generic in nature, and while generally supportive, do not provide specific information or details from which a determination of extreme hardship could be made. In general, the letters serve more to indicate that the applicant may merit an exercise of discretion in his favor. Furthermore, the letters do not reflect that the writers know the applicant outside of his performance of work for them. To the extent that they are offered to support a favorable exercise of discretion, they are some value, but it is noted that none of the letters expresses an awareness of the applicant's criminal past, and a determination by the author to support the applicant nonetheless.

Finally, the evidence also includes various country condition reports and other documents to support the claim that Mexico is a poor country with much more limited educational and health services. While this may be true, and the applicant's family may experience some hardship if they accompany him, the hardships are what

normally be expected in a situation such as the applicant's. In addition, there is nothing that requires that the applicant's family return with him to Mexico, because as United States citizens, they can elect to remain in remain in the United States.

The applicant alternatively asserts that if his spouse and children remain in the United States without him, his spouse would be unable to support the family and they would be left on the streets or on welfare. *Statement of Gregorio Najera-Loya*, at p. 1. The applicant states that he is the sole financial support for the family and has been able to provide for them through his work as a construction worker where he earns \$29,000 a year. He states that his wife does not work because the couple decided in 1986 that she would stay home to take care of the children and the family home. *Id.* The AAO does not find this to be a sufficient showing of extreme hardship. It is apparent that the couple made a lifestyle choice which involved having the spouse remain home to raise the children instead of working. While it might pose some hardship to her, the fact that she may need to leave the home to support the family is similar to what is experienced by many single parent households in the United States and cannot be seen as an extreme hardship absent a showing of hardship beyond what has been asserted here. The AAO notes that her hardship may be lessened by the fact that it appears that the couple has family in the area that may be able to assist. The applicant's statement indicates that his siblings live in the United States with two residing in the Phoenix metropolitan area. *Id.* In addition, information contained in the Biographic Information (Form G-325A) submitted by the applicant's spouse when she petitioned for the applicant indicates that both her mother and father reside in the Phoenix metropolitan area. Finally, even if it were established that the applicant's spouse would be unable to work, it is noted that the applicant's children are United States citizens and, as such, would be entitled to the various social welfare benefits which the applicant asserts they would be forced to rely upon. While that may be undesirable, the hardship is one for the taxpayers of the United States, rather than an extreme hardship to the applicant's spouse or her children.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra*, held further that 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. The AAO recognizes that the applicant's husband and children will endure hardship as a result of separation from the applicant should they elect to remain in the United States. However, their situation is typical of individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship. It is further noted that the applicant has indicated that the family has numerous relatives in the United States who would likely provide at least some temporary support for any of the applicant's family members who remain the United States. Consequently, the AAO reaches the same conclusion as the district director regarding the issue of extreme hardship, that while the applicant's family members will experience hardship should the waiver be denied, the hardship cannot be considered extreme hardship.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.