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FILE:



Office: LOS ANGELES

Date: MAY 17 2006

IN RE:



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

ON BEHALF OF PETITIONER:



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, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Los Angeles, California, denied the waiver application, and it 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 pursuant to sections 212(a)(2)(A)(i)(I) and 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) and 1182(a)(6)(C)(i), for having been convicted of a crime involving moral turpitude and for attempting to procure admission to the United States by fraud or willful misrepresentation. The applicant is the spouse of a U.S. citizen and father of three U.S. citizen children. He seeks a waiver of inadmissibility pursuant to sections 212(h) and 212(i) of the Act, 8 U.S.C. §§ 1182(h) and 1182(i), in order to reside 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 on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated August 31, 2004.

The record reflects that, on September 30, 1989, the applicant applied for admission into the United States by presenting a fraudulent I-688 Temporary Resident Card. The applicant was found inadmissible and was paroled into the United States for the purpose of criminal prosecution. On October 2, 1989, the applicant was convicted of conspiracy to elude inspection and was sentenced to 60 days in jail. On January 27, 1993 the applicant pled guilty to theft of personal property and was sentenced to 270 days in jail, 180 days of which were suspended with 2 years of probation. On April 16, 2002, this conviction was vacated. On October 31, 1996, the applicant married his spouse, [REDACTED] who was a lawful permanent resident of the United States. On August 19, 1999, [REDACTED] became a naturalized citizen of the United States.

On June 14, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on an approved Petition for Alien Relative (Form I-130) filed by [REDACTED]. The record shows that the applicant appeared at Citizenship and Immigration Services' (CIS) Los Angeles District Office on October 18, 2002. The applicant was informed that he needed to file Form I-601 because he had attempted to procure admission to the United States by fraud or willful misrepresentation of a material fact and had been convicted of a crime involving moral turpitude. On January 7, 2003, the applicant filed the Form I-601 with documentation to support his claim that the denial of the waiver would result in extreme hardship to his family members.

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

- (1) Criminal and related grounds. —
 - (A) Conviction of certain crimes. —
 - (i) In general. — 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 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) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] 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 [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 . . .

The district director based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's admission to and conviction for theft of personal property, a crime involving moral turpitude. Counsel does not contest the district director's determination of inadmissibility.

The record reflects that, the activities for which the applicant was found inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act occurred on July 5, 1989, even though the applicant was not convicted until 1993. On August 8, 1996, the applicant pled guilty to driving a vehicle while having greater than 0.08 percent of alcohol in his blood and was sentenced to 3 years of probation, 40 hours of community service and 3 months of alcohol treatment/counseling. The record reflects the applicant completed these requirements. On March 4, 1997, the applicant pled nolo contendere to driving while his license was suspended due to a conviction for driving under the influence (DUI) and was sentenced to 12 months probation with 30 days in jail. On March 4, 1997, the applicant also pled nolo contendere to a second charge of driving a vehicle while having greater than 0.08 percent of alcohol in his blood and was sentenced to 36 month of probation, 4 days in jail and completion of DUI school. The record reflects that the applicant completed these requirements. The

applicant and his spouse, [REDACTED] have a 15-year old daughter, a 10-year old son and a 4-year old daughter who are all U.S. citizens by birth. [REDACTED] is a native of Mexico who became a lawful permanent resident in 1991 and a naturalized U.S. citizen in 1999. The record reflects further that the applicant is in his 30's, [REDACTED] is in her 40's, and [REDACTED] and the children do not have any health concerns. The record also reflects that the applicant pays federal taxes.

The record reflects that the applicant applied for adjustment of status on June 14, 2001. An application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). No final decision has been made on the applicant's Form I-485, so the applicant, is still seeking admission by virtue of adjustment of status. Therefore, the crime involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the applicant's application for adjustment of status.

The AAO finds that the district director erred in failing to consider the eligibility of the applicant for waiver under section 212(h)(1)(A). The record reflects that the applicant has not been convicted of any crimes involving moral turpitude since his conviction for burglary in 1993. The record establishes that, since 1997, the applicant does not possess a criminal record in the United States and the record does not establish that the admission of the applicant to the United States would be "contrary to the national welfare, safety, or security of the United States."

The record reflects that the applicant meets the requirements for a waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act. Further, the AAO notes that, as discussed blow, even though the applicant's family would not suffer *extreme* hardship, they would suffer emotional and financial hardship as a result of their separation from the applicant. The applicant does contribute to the household income, the applicant and [REDACTED] have been married for over approximately ten years, the applicant and [REDACTED] have three children together and it would be an emotional hardship for the family to be separated if the applicant were removed from the United States. Additionally, it would be a hardship for [REDACTED] and the children to accompany the applicant to Mexico because they would face adjustment to a lower standard of living and separation from friends and family.

The unfavorable factors presented in the application are the applicant's conviction for conspiracy to elude inspection in 1989, conviction for theft of personal property in 1993, conviction for DUI in 1996 and conviction for driving on a suspended license and DUI in 1997. The AAO notes that the applicant has not been charged with a crime since 1997 and the applicant's crime involving moral turpitude occurred more than 15 years ago, demonstrating the applicant's rehabilitation. The applicant has a U.S. citizen spouse to whom he has been married for approximately ten years, as evidenced by a letter from his employer, he has been steadily employed since 1997, he has paid taxes during this employment, he is settled in the community, as evidenced by letters of recommendation from family and friends and provides emotional and financial support to family members in the United States.

The applicant has established that the favorable factors in his application outweigh the unfavorable factors. As such, the applicant has met his burden of proving his eligibility for discretionary relief pursuant to section 212(h) of the Act. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976).

However, the district director and the AAO finds that the applicant is also inadmissible pursuant to section 212(a)(6)(C) of the Act. The district director's finding of inadmissibility under section 212(a)(6)(C) of the Act is based on the applicant's Record of Deportable Alien (Form I-213) indicating the applicant attempted to procure admission into the United States by presenting a fraudulent document in 1989. Counsel does not contest the district director's determination of inadmissibility.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

....

- (iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

On appeal, counsel contends that the district director erred in finding that the applicant's spouse would not experience extreme hardship if the applicant were to be removed to Mexico. *Brief in Support of Applicant's Appeal*, dated September 29, 2004. In support of this assertion, counsel submitted the above-referenced brief, new affidavits from the applicant and his spouse, 2002 tax documents for the applicant and his spouse, affidavits of recommendation and documentation previously submitted to support the applicant's claim. The entire record was reviewed and considered in rendering a decision on the appeal.

Hardship to the alien himself is not a permissible consideration under the statute. A section 212(i) waiver is therefore dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. It is noted that Congress specifically did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 at 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an

alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

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).

Counsel asserts that [REDACTED] would suffer financial hardship if she were to remain in the United States without the applicant. Counsel contends that [REDACTED] would be unable to support the family financially without welfare assistance or moving in with her parents, who reside in the immediate vicinity. Financial records indicate that since the marriage the applicant has been the primary source of financial support for the family but that in recent years, [REDACTED] has begun to work on at least a part-time basis. Financial records also indicate that from January 1987 until January 1993, [REDACTED] was employed as a packaging clerk, earning sufficient income to support herself. The financial documentation contained in the record does not indicate that [REDACTED] is incapable of earning sufficient income to support her and her children without the applicant's income. Moreover, the record indicates that [REDACTED] has family members in the immediate vicinity, including her father and siblings, who may be able to provide financial assistance in the absence of her husband. The record does not support a finding of financial loss that would result in an extreme hardship to [REDACTED] if she had to support her and her children.

Counsel asserts that [REDACTED] would suffer emotional hardship if she remained in the United States and the applicant returned to Mexico. In her affidavit, [REDACTED] indicates that she "cannot even begin to imagine [her] life without [the applicant] . . . [and] would be emotionally and psychologically devastated if he were forced to return to Mexico . . . [she] cannot survive in the United States without him." There is no evidence in the record to indicate that [REDACTED] suffers from a physical or mental illness that would cause her to suffer emotional hardship beyond that commonly suffered by aliens and families upon deportation. [REDACTED] in her affidavit, contends that her three U.S. citizen children will suffer emotional hardship if the applicant is returned to Mexico. However, as discussed above, hardship to the applicant's children is not a permissible factor in determining extreme hardship under section 212(i) of the Act. Thus, hardship to the applicant's U.S. citizen children cannot be considered in this decision. While it is unfortunate that [REDACTED] would essentially become a single parent and professional childcare may involve an added expense and not equate to the care of a parent, this is not a hardship that is beyond those commonly suffered by aliens and families upon deportation. Additionally, [REDACTED] has family members in the United States who may be able to assist her emotionally in the absence of her husband.

Counsel contends that [REDACTED] would suffer extreme hardship if she followed the applicant to Mexico because she would miss her immediate family members in the United States and would not have the income or health insurance to cover her and her children in Mexico. There is no evidence in the record that the applicant and [REDACTED] would be unable to obtain employment in Mexico, or that any money they earned would be insufficient to support the family. Counsel contends that [REDACTED] would suffer emotional hardship if she were to live in Mexico due to the fact that most of her family members reside in the United States. The record indicates that [REDACTED] mother resides in Mexico and that the applicant also has family in Mexico who may be able to assist them financially and emotionally. While the hardships [REDACTED] faces are unfortunate, the hardships faced by her with regard to adjusting to a lower standard of living and separation from friends and family, are what would normally be expected with any spouse accompanying a deported alien to a foreign country. Additionally, the AAO notes that, as a U.S. citizen, the applicant's spouse is not required to reside outside of the United States as a result of denial of the applicant's waiver request.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse would face extreme hardship if the applicant were refused admission. Rather, the record demonstrates that [REDACTED] will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(i) of the Act, be above and beyond the normal, expected hardship involved in such cases. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. See *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(i) of the Act, 8 U.S.C. § 1186(i). Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.