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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

Office: NEWARK DISTRICT OFFICE

Date:

OCT 30 2007

IN RE:

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

ON BEHALF OF APPLICANT:

SELF-RESPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Newark, New Jersey. The matter 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 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 crimes involving moral turpitude. The record indicates that the applicant has a U.S. citizen spouse. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his spouse in the United States.

The AAO notes that the applicant appears to be represented; however the record does not contain a Form G-28, Notice of Entry of Appearance as Attorney or Representative. Therefore, all representations will be considered but the decision will be furnished only to the applicant.

The record reflects that on October 4, 1989, the applicant was convicted of Aggravated Assault, Possession of a Weapon for an Unlawful Purpose, and Unlawful Possession of a Weapon for events that occurred on December 4, 1987. He was sentenced to 7 years imprisonment with a minimum parole ineligibility of 3 years. The applicant served a total of 3 years. He was paroled on April 27, 1992 and on February 25, 1994 he was removed from the United States and returned to Mexico. The applicant returned to the United States sometime after February 1994 and married his spouse on [REDACTED]

The district director found that the applicant had not shown that his spouse would suffer extreme hardship as a result of his inadmissibility. The application was denied accordingly. *District Director's Notice of Intent to Deny*, dated May 26, 2005 and *District Director's Decision*, dated November 2, 2005.

On appeal, counsel asserts that the district director's decision was erroneous and that the danger to the health of the applicant's spouse is, in fact, sufficient to establish extreme hardship. *Counsel's Brief*, undated.

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.

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 applicant was convicted of Aggravated Assault, Possession of a Weapon for an Unlawful Purpose, and Unlawful Possession of a Weapon for events that occurred on December 4, 1987. Therefore, the crimes 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 a waiver under section 212(h)(1)(A). The record reflects that the applicant has not been charged with any additional crimes since his conviction in 1989. The record establishes that the applicant is a valuable employee with Choice Management, LLC and an important part of his spouse and step-daughter's lives. *Letter from Employer*, dated January 11, 2004 and *Letter from Spouse and Step-Daughter*, undated. 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." Accordingly, the applicant has satisfied the statutory requirements for a waiver of inadmissibility under section 212(h)(1)(A) of the Act. However, the applicant's waiver application will not be granted as the AAO finds that the applicant is not deserving of a favorable exercise of the Secretary's discretion.

The regulation at 8 C.F.R. § 212.7(d) states in pertinent part:

(d) Criminal grounds of inadmissibility involving dangerous or violent crimes. The Attorney General [now, Secretary, Homeland Security, "Secretary"], in general, will not favorably exercise discretion under section 212(h)(2) of the Act...in cases involving violent or dangerous crimes, except...in cases in which the alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship.

Section 16 of Title 18 of the United States Code states:

The term "crime of violence" means-

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The record reflects that the applicant was convicted of aggravated assault under section 2C:12-1b of the New Jersey Code of Criminal Justice. Section 2C:12-1b states that:

- (b) A person is guilty of aggravated assault if he:

- (1) Attempts to cause serious bodily injury to another, or causes such injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury; or
- (2) Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon; or
- (3) Recklessly causes bodily injury to another with a deadly weapon; or
- (4) Knowingly under circumstances manifesting extreme indifference to the value of human life points a firearm, as defined in section 2C:39-1f., at or in the direction of another, whether or not the actor believes it to be loaded

In that the statute under which the applicant was convicted indicates that he was found guilty of an offense involving the use, attempted use, or threatened use of physical force against the person of another, the applicant was convicted of a crime of violence under section 16 of Title 18 of the United States Code and is subject to the language of 8 C.F.R. § 217.2(d).

The current record does not establish that the denial of the applicant's admission to the United States would result in exceptional and extremely unusual hardship. Counsel states that the danger to the health of the applicant's spouse is sufficient to establish extreme hardship. *Counsel's Brief*, undated. He states that she has asthma and has trouble breathing, which is exacerbated by stress. *Id.* The record, however, provides no evidence to support counsel's claims. Without supporting documentary evidence, the assertions of counsel will not meet the applicant's burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Two letters from the applicant's spouse's doctor and other medical documentation indicate that the applicant suffers from "GERD." *Letters from* [REDACTED] dated April 10 and June 16, 2003; *Pathologist Report from Cooper Hospital*, dated May 8, 2003. While the AAO finds these documents to establish that the applicant spouse's suffers from "GERD" or acid reflux disease, they do not constitute proof that this condition, in the applicant's absence or in the event she relocated to Mexico, would cause the applicant's spouse to suffer exceptional and extremely unusual hardship.

The AAO notes that the applicant, after being removed from the United States on February 24, 1994, re-entered without inspection. This re-entry makes him inadmissible under section 212(a)(9)(A)(ii) and (C)(i)(II) of the Act. To seek a waiver of these inadmissibilities, the applicant must file the Form I-212, Application for Permission to Reapply for Admission After Deportation or Removal.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. 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.