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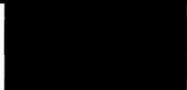


U.S. Citizenship
and Immigration
Services

H2



FILE:



Office: NEWARK, NJ

Date: **AUG 05 2008**

IN RE: Applicant:



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:



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 waiver application was denied by the District Director, Newark, New Jersey and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of Portugal, was found 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 sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse and child, born in February 1989.

The district director concluded that that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated October 18, 2005.

In support of the appeal, counsel submits Form I-290B, Notice of Appeal (Form I-290B); an addendum to Form I-290B; a Form I-797C, dated June 7, 2002, confirming receipt of the applicant's Form I-90, Application to Replace Alien Registration Card; financial documentation relating to the applicant and his spouse; and school records with respect to the applicant's child. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A)(i)(I) of the Act provides, in pertinent part:

[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 (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:

The Attorney General [now Secretary, Homeland Security, (Secretary)] may, in his discretion, waive the application of subparagraphs (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 . . .¹

Regarding the applicant's grounds of inadmissibility, the record reflects the commission of a crime involving moral turpitude. In July 1994, the applicant was convicted of Aggravated Assault in the Third Degree, a violation of section 2C:12-1b(2) of the New Jersey Code of Criminal Justice, based on a May 1994 incident. The applicant was placed on probation for a period of one year; no prison sentence was imposed. As the aforementioned crime was committed after the applicant's eighteenth birthday, the district director correctly found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.² The applicant is eligible for a section 212(h) waiver of the bar to admission.

A section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the inadmissibility bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship the applicant himself experiences upon removal is irrelevant to section 212(h) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's U.S. citizen spouse and child.

¹ The AAO notes that section 212(h) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. If extreme hardship is established, CIS must then assess whether to exercise discretion.

² Counsel contends on appeal that since the applicant was convicted of only one crime to which no prison term was imposed, his conviction meets the requirements set forth for a petty offense exception under section 212(a)(2)(A)(ii) of the Act.

Section 212(a)(2)(a)(ii) of the Act states in pertinent part, that:

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

(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).

In the present case, as referenced above, the applicant was convicted of Aggravated Assault in the Third Degree. Pursuant to section 2C:43-6 of the New Jersey Code of Criminal Justice, the maximum penalty for a crime of the third degree is five years. As such, despite counsel's assertions to the contrary, the AAO concludes that the evidence in the record does not establish that the applicant's conviction falls within the petty offense exception set forth in the Act.

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, 565 (BIA 1999). In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted) the BIA held that:

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.

Counsel first contends that the applicant's spouse will suffer financial hardship if the applicant were removed. As stated by counsel,

...While it is true that the applicant's wife is employed, it is their combined income which supports the family....

Addendum to Form I-290B, dated November 15, 2005.

Courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS*, 794 F.2d 491, 497 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient."); *Shoostary v. INS*, 39 F.3d 1049 (9th Cir. 1994) (stating, "the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy. The uprooting of family, the separation from friends, and other normal processes of readjustment to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances."); *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); *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

In this case, counsel has provided no evidence with the appeal that establishes the applicant's current financial contributions to the household, and thus has failed to show that the applicant's absence, and the subsequent loss of the applicant's income, will cause extreme financial hardship to the applicant's spouse. Moreover, counsel does not explain why the applicant would be unable to obtain employment abroad and assist in supporting his spouse were he removed. Finally, it has not been established that the applicant's child, nineteen years old at this time, would be unable to assist the applicant's spouse financially should the need arise. While the applicant's spouse may need to make alternate arrangements with respect to her job, the household finances and the care of her daughter, it has not been shown that such alternate arrangements would cause her extreme hardship.

The applicant's spouse further states that she will suffer emotional hardship were the applicant removed from the United States. As she states,

... We are a very close family unit and we do the normal things that a family does and we love and rely on each other daily for strength and support. This support is not only financial but emotional for all of us. It will be a great hardship for me if my husband is forced to return to Portugal.... My daughter and I would face extreme hardship without the daily presence of my husband.

Affidavit of [REDACTED] dated September 12, 2005.

No documentation has been provided that further outlines, in detail, the emotional hardships the applicant's spouse would face were the applicant removed from the United States. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, it has not been established that the applicant's spouse and/or child would be unable to travel to Portugal on a regular basis, as they have done from 1995 to 2003 when the applicant resided abroad, to visit with the applicant.³

Although the depth of concern and anxiety over the applicant's immigration status is neither doubted or minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. 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 current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship be above and beyond the normal, expected hardship involved in such cases.

The AAO notes that extreme hardship to a qualifying relative must also be established in the event that he or she relocates with the applicant abroad based on the denial of the applicant's waiver request. In this case, the only statement made with respect to this prong is the following:

³ The record indicates that the applicant was granted lawful permanent resident status in March 1990. The applicant subsequently relocated abroad from 1995 to 2003. Due to such a lengthy absence from the United States, the applicant relinquished his lawful permanent resident status.

In August 2003, the applicant attempted to reenter the United States by presenting evidence of his lawful permanent resident status. Due to the abandonment of his lawful permanent resident status, the applicant was given a deferred inspection appointment and his Alien Registration Card was retained. He was ultimately placed in removal proceedings based on his conviction for a crime involving moral turpitude.

...Our daughter is well entrenched in her school and has a close circle of friends. It would be such a hardship for her to have to now leave during this tenuous time as a teenager entering high school....

Id. at 2.

No documentation has been provided that specifically delineates the hardships the applicant's spouse and/or child would face were they to relocate to Portugal to reside with the applicant. As previously referenced, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings

As such, a review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that his U.S. citizen spouse and/or child would suffer extreme hardship if he were removed from the United States, and moreover, the applicant has failed to show that his U.S. citizen spouse and/or child would suffer extreme hardship were they to relocate to another country were the applicant removed from the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

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. The waiver application is denied.