

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H2

FILE:

Office: LOS ANGELES, CA

Date:

JUL 14 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, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, [REDACTED], 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 committed a crime involving moral turpitude. The applicant is married to Ms. [REDACTED], a citizen of the United States. The applicant sought a waiver of inadmissibility under section 212(h) of the Act, which the district director denied, finding that the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the District Director*, dated September 26, 2005. The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility.

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

(A)(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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Here, the record reflects that in October 1995 the applicant was charged with committing a violation of section 273.5(a) of the California Penal Code. The applicant pled nolo contendere to the charge, the court found him guilty, and he was convicted. Imposition of the sentence was suspended by the court, and the applicant was placed on summary probation for 36 months, ordered to serve 30 days in jail, pay restitution, and stay away from the victim.

The record shows that in December 2000, the applicant was charged with committing a theft of property, section 484(a) of the California Penal Code, on November 24, 2000. The applicant pled nolo contendere to the charge, the court found him guilty, and he was convicted. Imposition of the sentence was suspended by the court, and the applicant was placed on summary probation for one year, ordered to serve 30 days in jail, pay restitution and a fine, and stay away from the victim.

The AAO finds that the applicant's crimes involve moral turpitude. In *Grageda v. INS*, 12 F.3d 919 (9th Cir.1993), the Ninth Circuit found that spousal abuse under Cal. Penal Code § 273.5(a) is a crime of moral turpitude. The Ninth Circuit in *U.S. v. Esparza-Ponce*, 193 F.3d 1133, 1135-37, stated that theft is a crime of moral turpitude. Thus, the district director was correct in finding the applicant inadmissible under section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i).

The AAO will now consider the finding that the grant of a waiver is not warranted.

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

(h) The Attorney General 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 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

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case are the applicant's U.S. citizen wife and children. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The 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. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565-566.

In *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

The record contains a court judgment, letters, photographs, medical records, a marriage certificate, birth certificates, income tax records, and other documents.

In her undated letter submitted on appeal _____ states the following. Her daughter from a prior relationship lives with her biological father, and visits her in accordance with court orders. She cannot take

her daughter out of the country and will not abandon her. Her daughter has been in the applicant's life since the age of 3 and she is now almost 13. She and the applicant have two children and she is pregnant with a third child. She was raised without a father because her parents separated. She had been molested and raped by her aunt's husband. Her children need the applicant, who means everything to them. She has been married to the applicant for 10 years and has not been abused or assaulted by him; the applicant keeps her happy and strong.

The letter by the High Risk Prenatal Clinic at Memorial Care, Long Beach Memorial Medical Center, conveyed that [REDACTED] is under medical care and will be seen throughout her pregnancy. Her estimated date of confinement is April 26, 2006.

The Judgment Establishing Parental Relationship filed on April 11, 2000, indicated that [REDACTED] and [REDACTED] have joint legal custody of their minor child, who was born on January 21, 1993; Mr. [REDACTED] was granted primary responsibility of the child; and the judgment sets forth the periods of time in which [REDACTED] has the physical care and control of the child.

In an undated letter the applicant stated that he has a close relationship with his family. He acknowledged past mistakes and describes the incident that resulted in his arrest for domestic violence. He stated that his son was shot in front of his house and was in critical condition in January 16, 2005; he had a severed colon, requiring a colostomy bag, and a severed sciatic nerve that permanently damaged his left leg, making it very weak. He stated that his son needs him and that it would be devastating to his children not to have him in their lives.

The medical records of the applicant's son, [REDACTED], reflect the surgery and care he received for gunshot wounds. The records indicate that the applicant's wife provided care for her stepson while he was hospitalized. The March 28, 2005 letter by [REDACTED] M.D., conveyed that the applicant's son has normal movement of his left leg, but has patchy numbness of the posterior part of the leg. The June 7, 2005 letter by [REDACTED] M.D., conveyed that the applicant's son may have sciatic nerve injury. He recommended an imaging study of the lumbosacral plexus and lumbosacral spine to rule out spinal etiology.

In a letter dated October 5, 2005 by the applicant's son, [REDACTED], stated that he is handicapped and would be affected by the absence of his father, who he enjoys having around.

The birth certificates show the applicant has four children with the birth dates as follows: [REDACTED] Jr., October 24, 1987; [REDACTED], April 24, 1990; [REDACTED], July 28, 1999; and [REDACTED], November 14, 2002.

The affidavit of support indicates that the applicant's wife's income does not meet the poverty guideline requirement for sponsorship of an intending immigrant; it shows that she is unemployed or retired since September 2003. The income tax records for 2003 show her income as \$12,953, and for 2002 it was \$14,604.

The marriage certificate shows the applicant and his wife were married on March 15, 2001.

The declaration of the applicant dated November 22, 2004 conveyed that the applicant has been in the United States since he was 17 years old, that his wife has helped him overcome problems, and that he has a close relationship with her and his children. It stated that the applicant's wife and children do not speak Spanish and will therefore not be able to assimilate to life in Mexico. It stated that he cannot imagine how he will provide for his family if they lived in Mexico; that his children will be forced to work instead of attend school; that he will not be able to afford a college or university education for them; and that his children will be stripped of their American culture and way of life. The declaration conveyed that the applicant cannot imagine how he will provide for his family from Mexico if they remained in the United States without him. He stated that he is now gainfully employed and able to provide for them, but that if he left the United States his wife would not fare well because she her education and skills are limited.

The declaration of the same date by the applicant's wife is similar in content to that of her husband. Additionally, she stated that she has a comfortable lifestyle in the United States and a close relationship with her husband and children. She stated that all of her friends and attachments are in the United States and that her children need both their parents. She stated that there are no jobs in Mexico and they would not be able to sustain their family there, and their children would have an inferior education there. She stated that Mexico has a lot of crime and violence and she does not want that for her family.

An undated letter by Dave Chamberlain of Century 21 Chamberlain & Associates stated that the applicant is employed there earning \$25.00 per hour, working 48 hours each week.

The U.S. Department of State, Bureau of Democracy, Human Rights and Labor, report describes human rights practices in Mexico in 2002. The report conveyed that approximately 30 percent of youths between 15 and 20 years of age attend school.

In rendering this decision, the AAO has carefully considered the documentation in the record.

Applying the *Cervantes-Gonzalez* here, extreme hardship to the applicant's qualifying relative must be established in the event that he or she remains in the United States without the applicant, and in the alternative, that he or she joins the applicant. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record establishes extreme hardship to the applicant's wife or children if they remained in the country without the applicant.

The evidence in the record shows that the income of the applicant's wife is not sufficient to meet the poverty guideline requirement for sponsorship of an intending immigrant. The undated letter by [REDACTED] of Century 21 Chamberlain & Associates stated that the applicant is employed there earning \$25.00 per hour, working 48 hours each week. Thus, the applicant's family would experience extreme financial hardship if they were without the applicant's income.

The record establishes that a qualifying relative of the applicant would experience extreme hardship if he or she were to join the applicant to live in Mexico.

The conditions in the country where the applicant's wife and children would live if they joined the applicant are a relevant hardship consideration. "While political and economic conditions in an alien's homeland are relevant, they do not justify a grant of relief unless other factors such as advanced age or severe illness combine with economic detriment to make deportation extremely hard on the alien or his qualifying relatives." *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994), citing *Matter of Anderson*, 16 I & N Dec. 596 (BIA 1978).

The applicant and his wife claim that their eight-year-old son, [REDACTED], and five-year-old daughter, [REDACTED] do not speak Spanish and are unfamiliar with life in Mexico. U.S. courts have held that the consequences of deportation imposed on citizen children of school age must be considered in determining extreme hardship. For example, *In Re. Kao & Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to transition to life in Taiwan; she had lived her entire life in the United States, was completely integrated into an American lifestyle, and uprooting her at this stage in her education and her social development would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the court indicated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether "extreme hardship" has been shown. And, in *Prapavat v. INS*, 638 F. 2d 87, 89 (9th Cir. 1980) the court found the BIA abused its discretion in concluding that extreme hardship had not been shown in light of the fact that the aliens' five-year-old citizen daughter, who was attending school, would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

The record shows that the applicant's oldest son may have sciatic nerve injury and that he will need to undergo an imaging study to rule out spinal etiology. In *Prapavat v. INS*, 638 F.2d 87 (9th Cir. 1980), the court indicated that a child's health must be considered in determining hardship.

[REDACTED] states that she would be abandoning her 15-year old daughter if she were to live in Mexico. The court judgment relating to [REDACTED]'s daughter indicates that she has alternating weekends and specific holiday and vacation periods to spend with her daughter. In *Mejia-Carrillo v. INS*, 656 F.2d 520 (9th Cir.1981), the court indicated that separation of a teenage son from his divorced father must be considered in determining hardship.

In considering the aforementioned hardship factors collectively, the AAO finds that they demonstrate extreme hardship to the applicant's wife and children if they were to join the applicant to live in Mexico.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in removal has been met so as to warrant a finding of extreme hardship. Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do in this case constitute extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The grant or denial of the above waiver does depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's spouse and his U.S. citizen children, his employment, and the passage of approximately 5 years since the applicant's most recent criminal conviction. The unfavorable factors in this matter are the applicant's criminal convictions and his periods of unauthorized presence. The AAO notes that the applicant does not appear to have any additional convictions.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's criminal convictions, they are at least partially diminished by the fact that 5 years have elapsed since the applicant's most recent conviction. The AAO finds that the hardship imposed on the applicant's spouse and children as a result of his inadmissibility outweighs the unfavorable factors in the application. 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(hi), 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. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.