U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

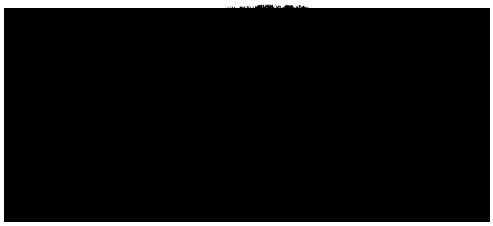
U.S. Citizenship and Immigration Services

FILE: Office: CHICAGO, ILLINOIS Date:

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, Director
Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Mexico. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted for the offense of possession of a controlled substance. The applicant is the beneficiary of an approved petition for alien relative filed by his U.S. citizen spouse. He seeks 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 to reside with his U.S. citizen spouse and child.

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 according. In his decision the District Director notes that even if he had found that extreme hardship would be imposed on a qualifying relative the unfavorable factors in the applicant's case outweighed the favorable factors, and he would have denied the application as a matter of discretion. *See District Director's Decision* dated February 28, 2003.

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-
>
> . . . .
>
> > (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

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

> (h) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D) and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relate to a single offense of simple possession of 30 grams of less of marijuana if -
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> > (1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-
> >
> > > (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or 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, and
> > >
> > > (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

> (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 . . . .

To recapitulate, the record reflects that on September 17, 2002, in the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, the applicant was convicted of the crime of Unlawful Possession of a Controlled Substance, to wit cannabis, in violation of 720 ILCS 550. The applicant was sentenced to twelve months court supervision and a fine of $650.00. The applicant is, therefore, inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act.

The documentation presented by the applicant from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois does not indicate the amount of cannabis found in the applicant's possession. On appeal counsel states that the applicant was charged with unlawful possession of cannabis under Chapter 720, Section 550/4(a) of the Illinois Compiled Statutes (ILCS) and submits a criminal complaint from the Circuit Court that charged the applicant with unlawful possession of cannabis (class A misdemeanor) in violation of Chapter 720, Section 550/4(a) of the ILCS, 1999. Chapter 720, Section 550/4(a) of the ILCS States that unlawful possession of 2.5 grams of any substance containing cannabis is guilty of a Class C misdemeanor. According to ILCS a Class A misdemeanor refers to a person who possesses more than 10 grams but not more that 30 grams of any substance containing cannabis. Although it is not clear from the documentation how many grams of cannabis the applicant was in possession of, it is clear that he was in possession of less that 30 grams of cannabis and therefore is eligible to file an Application for Waiver of Grounds of Inadmissibility (Form I-601).

Section 212(h) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. 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).

In the present case, the applicant must demonstrate extreme hardship to his U.S. citizen spouse or child.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the BIA deemed 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.

On appeal, filed on April 3, 2003, counsel asserts that the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) failed to consider the favorable discretionary factors, failed to correctly assess extreme hardship to the applicant's spouse, [redacted] and child and misapplied the legal standard relating to a waiver of inadmissibility under section 212(h) of the Act. In support of this assertion, counsel submits a brief, an affidavit from [redacted] and other documentation.

Before the AAO can weigh the favorable and unfavorable factors in this case it must first determine if the qualifying family member would suffer extreme hardship if the applicant's waiver application were not approved. Counsel states that CIS misapplied the legal standard related to a waiver under section 212(h) because in the decision dated February 28, 2003, CIS states: "... waiver authorized under 212(h) of the INA only applies to the spouse of the alien and does not allow the Service to directly consider your children." Furthermore counsel states that CIS erred, as a matter of law in requiring the applicant to show rehabilitation as an element for a waiver of inadmissibility under section 212(h)(1)(B) of the Act.

The AAO agrees with counsel and finds that the District Director erred in stating that a waiver under section 212(h) of the Act does not allow the service to consider children as qualifying family members. As stated above section 212(h)(1)(B) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the qualifying family member, citizen or lawfully resident spouse, parent, son, or daughter of such alien. Additionally the District Director erred in stating that rehabilitation of the applicant is required in order for a waiver to be authorized. Rehabilitation is required under section 212(h)(1)(A) of the Act when the crime for which the applicant is inadmissible was committed more than 15 years ago and the admission of the applicant is not contrary to the national welfare, safety, or security of the United States. This is not the case in the instant application.

Although the District Director erred in the above statements, the record of proceedings contains a decision in which the applicant's child is being considered as a qualifying family member and the issue of rehabilitation is not taken in consideration.

In her affidavi[redacted] states that she and her child would suffer extreme hardship if her spouse's waiver application were not approved. She further states that she and her child are unable to relocate to Mexico and that she and the child would suffer from the separation. [redacted] states that if she and her child were to relocate to Mexico it would affect their lives since she does not speak Spanish as well as she speaks English, and that her child would not receive proper medical attention or proper education. Counsel and [redacted] state that if the applicant is removed from the United State[redacted] would become a single parent, required to care for and support her child and both would suffer financially due to her own limited financial resources. In the alternative, counsel states that if the applicant's spouse and child relocate to Mexico [redacted] and her child would suffer separation from family members who reside in the United States.

If [redacted] and her child were to relocate with the applicant to Mexico, it would be expected that some economic, linguistic and cultural difficulties would arise. No evidence exists that this will impact her of the child at a level commensurate with extreme hardship.

There are no laws that require [redacted] or her child to leave the United States and live abroad. In *Silverman v. Rogers*, 437 F. 2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more that to say that the residence of one of the marriage partners may not be in the United States." The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represent the type of inconvenience and hardship experienced by the families of most aliens being deported. *See Shooshtary v. INS*, 39 F. 3d 1049 (9th Cir. 1994).

In the instant the case the assertion of financial hardship to and child is contradicted by the fact that she is employed full time and earns $10 an hour plus overtime, an income above the poverty level for a family of two. No evidence has been provided to substantiate the claim that her husband's financial contribution is critical to her or her child's lifestyle or well being.

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 U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

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 or child would suffer extreme hardship if he were 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.