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

H2

[redacted]

FILE: [redacted] Office: SEOUL Date: JAN 12 2005

IN RE: [redacted]

PETITION: 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 PETITIONER:

SELF-REPRESENTED

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 Officer in Charge (OIC), Seoul, Korea, and is now before the Administrative Appeals Office (AAO), on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Korea who was found to be 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 is the spouse of a United States citizen and the parent of a United States citizen child, and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his wife and child.

The OIC, in originally considering the requested waiver, 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 Officer in Charge*, dated October 16, 2003. The applicant then filed the instant appeal.

On appeal, the applicant has submitted a statement which elaborates further on his contention that the waiver should be granted. The applicant recounts his criminal past and explains the support he has received from his wife over the lengthy period of his incarceration and states that he hopes to establish a life with his wife and daughter in the United States. The applicant also asserts that his wife suffers from medical conditions which have prevented her from working. Overall, the applicant's contentions center on the hopes that the applicant and his wife have for establishing a new life for themselves in the United States with their young daughter, and the difficulty he believes that his family will experience in the United States without him. *See Statement of Young Sin Kang,* dated October 21, 2003.

The AAO notes that the record contains various documents submitted in support of the application for a waiver of inadmissibility, and additionally contains the applicant's statement submitted on appeal. The entire record was considered in rendering a decision on the current appeal.

The record reflects that the applicant is a forty-eight-year-old native and citizen of Korea. He has been residing in Korea with his U.S. citizen wife and daughter. The applicant's inadmissibility stems from the applicant's conviction on October 4, 1980, for several very serious offenses. The record reflects that he was convicted of : 1) organizing a crime group; 2) joining a crime group; and 3) attempted murder; and 4) violation of punishment of violence action by the Army General Court Martial. *See Conviction Records from the Court Martial by Martial Law Of Army Headquarter[s],* various dates 1980. The record reflects that the applicant was sentenced to life in prison for these offenses, but the sentence was later commuted to 20 years in prison, and the applicant was released from prison in February 2002. *See Statement of Young Sin Kang,* dated June 28, 2003.

The record reflects that the applicant married his spouse, [redacted] on December 9, 1993, while still incarcerated. According to the applicant's statement, his spouse had been raised in the United States and lived with her parents. Her sister and brother-in-law had introduced her to the applicant while he was still in prison. *See Statement of Young Sin Kang,* dated June 28, 2003. The applicant's spouse came to Korea in June 29, 1992, for the purpose of remaining close to the applicant and caring for him. They ultimately married, but were separated for over ten years due to his incarceration and according to the applicant, "went through many hardships and pain as a couple." Ultimately, the applicant was released from prison in February 2002, and the couple began to prepare the documents for his visa. The record reflects that the applicant's spouse filed a Petition

for Alien Relative (Form I-130) on June 20, 2002, which was approved the same day. *See Form I-130,* dated June 20, 2002. During the pendency of the proceedings, the applicant's wife gave birth to their daughter on October 13, 2002. According to the applicant, this wife has indicated that regardless of the outcome, she will return to the United States with the couple's daughter. *See Statement of Young Sin Kang*, dated June 28, 2003.

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 the crimes specified above which resulted in his subsequent imprisonment for approximately twenty years. The applicant does not contest the fact that he has been convicted of crimes involving moral turpitude and requires a waiver of inadmissibility in order to pursue adjustment of status.

Although not specifically raised by the applicant, the AAO finds upon a review of the record that the OIC considered the applicant's eligibility for a waiver under section 212(h)(1)(B) of the Act concluding that he had failed to establish extreme hardship to a qualifying family member as required under that subsection. However, it does not appear that the District Director considered whether the applicant qualified for a waiver under the alternative ground of section 212(h)(1)(A) of the Act relating to offenses committed more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status. The AAO finds that

the applicant's waiver application should have been considered under this subsection in addition to its consideration under section 202(h)(1)(A) of the Act. The AAO will therefore consider the applicant's eligibility for a waiver of inadmissibility under section 212(h)((1)(B) pursuant to our de novo authority. *See Spencer Enterprises, Inc. v. United States,* 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS,* 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The record reflects that the applicant meets the technical time related requirements for the subsection (A) waiver. The applicant's convictions occurred in 1980. The applicant began the process of applying for a visa in 2002, approximately twenty-two years after the commission of his offenses. The convictions are of a sufficient age that he qualifies for the waiver. However, the applicant must still meet the two additional requirements, i.e., that his admission to the United States would not be contrary to the national welfare, safety or security of the United States, and that he has been rehabilitated. The AAO will address these two criteria in reverse order.

The record contains little evidence addressing the applicant's rehabilitation. The AAO begins its analysis by reviewing the statements submitted by the applicant. *See Statements of Young Sin Kang*, dated July 28, 2003, and October 21, 2003. The applicant's statement addresses his criminal past in only very generalized terms, noting that he was sentenced to life in prison due to the use of violence resulting from joining a band of bad friends in his early 20's. *See Statement of Young Sin Kang,* dated October 21, 2003. The statements contain very little addressing any remorse or rehabilitation that the applicant has experienced, noting simply that although he has committed offenses, he has spent precious time repenting his wrongdoing, and asserting that if permitted to immigrate, he would benefit the United States, would obey the law and be a good influence on others. *See Statements of Young Sin Kang,* dated July 28, 2003 and October 21, 2003.

Aside from the applicant's own statements, the record is devoid of any other information addressing the applicant's rehabilitation. It is particularly noteworthy that the record does not contain any statement at all from the applicant's wife, the person who perhaps knows him best, and has, according to the applicant, stood by him throughout ten years of imprisonment, and even remained in Korea awaiting his release from prison in the hopes of bringing him to the United States. Furthermore, the documents in the record reflect that the applicant owns and operates a construction business in Korea. As such, it is reasonable to believe that he is known in the community, yet the record does not contain any statements from any members of the community addressing his standing in the community, and how, if at all, the applicant has demonstrated his rehabilitation. Given the seriousness of the applicant's conviction for attempted murder, it is reasonable for Citizenship and Immigration Services (CIS) to expect to see significant evidence of rehabilitation from which it may conclude that the applicant is truly remorseful for his past criminal conduct, and has a very low risk of engaging in additional criminal activity. Consequently, the AAO finds that the evidence in the record does little to meet the applicant's burden of establishing that he has expressed remorse for his prior criminal history or has been fully rehabilitated.

The AAO turns next to the remaining issue in evaluating the applicant's eligibility for a waiver under section 212(h)(1)(A), i.e., whether the applicant's admission would not be contrary to the national welfare, safety, or security of the United States. An examination of the conviction documents submitted by the applicant reveals that he was involved with others in a criminal syndicate engaged in extortion activities related to its operation

of nightclubs in Korea. According to the conviction records, the applicant's attempted murder involved the applicant's effort to stab to death another individual who was seeking to leave the criminal organization. It appears that the applicant was charged with the most serious offense and received the stiffest sentence among those involved in the offense. The conviction documents relate a series of violent offenses connected to the criminal organization to which the applicant belonged. The nature of those activities, and particularly the applicant's own criminal conduct, support a finding that the applicant has not satisfied his burden to demonstrate that his admission would not be contrary to the national welfare, safety, or security of the United States. This is particularly so given the complete absence of any evidence on the applicant's behalf demonstrating what factors mitigate his violent past and demonstrate that he has truly reformed his life. It is also noted that the applicant has only fairly recently completed his lengthy sentence. Consequently, the AAO finds that the applicant has not satisfied the remaining requirement for the grant of a waiver under section 212(h)(1)(A).

The AAO turns now to the OIC's decision addressing the applicant's eligibility for a waiver under section 212(h)(1)(B). The applicant's eligibility under this subsection, depends upon whether the evidence demonstrates that extreme hardship that would befall a qualifying relative, in this case his U.S. citizen wife and daughter. The applicant's submissions assert that the applicant's wife would suffer extreme hardship.[1]

A waiver of the bar to admission to the United States is dependent upon the alien's showing that the bar imposes an extreme hardship on a qualifying family member. Congress provided this waiver but limited its application. By this limitation, it is evident that Congress did not intend that a waiver be granted merely due to the fact that a qualifying relationship exists. The key term in the provision is "extreme." Therefore, only in cases of great actual or prospective injury to the United States citizen or permanent resident will the bar be removed. Common results of the bar, such as separation, financial difficulties, and such, in themselves are insufficient to warrant approval of an application unless combined with more extreme impacts. *See Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968).

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien had established extreme hardship. The factors included 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. In *Matter of Ige,* 20 I&N Dec. 880, 882, (BIA 1994), the BIA held that "relevant [hardship] factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists."

In this case, the applicant asserts that his wife has experienced tremendous hardship due their inability to lead a normal life due to his incarceration and the difficulties it has caused them. In addition to the difficulties the

[1] While not specifically addressed by the applicant, the AAO will assume that the applicant is also asserting that many of the factors that indicate a hardship to his U.S. citizen spouse will likewise pose a hardship to his U.S. citizen daughter and will consider the applicant's position on appeal to encompass a claim that the OIC failed to consider the evidence of hardship to his U.S. citizen daughter.

couple has experienced as a result of the applicant's criminal conviction, he asserts that his wife has experienced medical difficulties which made it impossible for her to support herself financially in Korea while she was awaiting his release from prison. Specifically, the applicant asserts that after arriving in Korea in 1992, his wife "was diagnosed with thyroiditis, which caused her a lot of physical pain." *See Statement of Young Sin Kang.* Dated June 28, 2003. He further states that his wife was unable to work as a result, and that the illness will also keep her from working when she returns to the United States.

The AAO considers the applicant's statements regarding his wife's illness to be an assertion that she will suffer extreme hardship if the waiver is denied both due to her physical illness and because of the financial difficulties she will experience. In support of this assertion, the applicant has submitted a single medical record. It is a medical certificate dated June 30, 2003, indicating that the applicant's wife, was examined on May 23, 2003, and diagnosed with "Nontoxic Goiter.NOS." *See Medical Certificate from Song Jong Lee, M.D.,* dated June 30, 2003. The medical certificate identifies "synthyroid therapy" as the treatment and indicates that the proposed duration of treatment is six months. Although the applicant's statements indicate that his wife became ill in 1992, the medical certificate provided makes no reference to such diagnosis, nor are any other medical records related to any earlier diagnosis and treatment. The AAO notes that while the medical certificate does indicate that his wife has a medical condition for which treatment was recommended, there is nothing in the medical certificate which supports the applicant's contention that his wife is unable to work on account of her condition. Indeed, there is nothing explaining the nature of her illness, a prognosis, or whether any restrictions at all on her activities exist. Without such evidence the AAO will not accept the applicant's assertions that his wife has been, or continues to be seriously ill and unable to work to support herself and the couple's U.S. citizen child. The AAO notes that the record contains no submission from the applicant's wife directly asserting that she is ill and unable to work, and thus dependent upon the applicant for her financial well-being.[2]

According to the applicant's own statement, his spouse has been unable to work since being diagnosed with her hyperthyroidism in 1992. Nevertheless, she apparently managed to support herself during the subsequent ten-year period that the applicant was incarcerated. It is reasonable to conclude that it was because she worked to support herself, the applicant had sufficient resources that he made available for her support despite his incarceration, or because she had resources available to her from some other source such her family members residing in the United States. Therefore, it is reasonable for the AAO to conclude that the applicant's spouse and child will be likely to obtain support despite being separated from the applicant. Furthermore, the evidence suggests that the applicant has been the owner and operator of a construction firm in Korea since 2002. *See Applicant's Statement in Support of his Visa Application,* dated May 30, 2003. Consequently, the financial well-being of his spouse and child can only be seen as improving.

Aside from the applicant's claim that his wife and child would experience extreme hardship due to their inability to support themselves, he also asserts that they would suffer extreme hardship due the family's separation, made worse because of the significant distance involved. *See Statement of Young Sin Kangm*, dated June 28, 2003.

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[2] The record reflects that the applicant was given several opportunities to present evidence supporting his waiver application. He was first notified by the OIC on June 20, 2003, that the information he had submitted in support of the waiver appeared to be insufficient. *See Letter from the OIC to Young Sin Kang,* dated June 20, 2003. Subsequently, the OIC issued a Notice of Intent to Deny on July 25, 2003, advising the applicant of the deficiencies in the record, citing applicable case law, and giving the applicant an additional thirty days to submit additional evidence. *See Notice of Intent to Deny,* dated July 25, 2003. Finally, the applicant was again notified through the OIC's decision that the information in the record was deficient, yet supplemented the record on appeal with only the single medical report and an additional statement which was largely repetitive of the information contained in his initial statement.

However, the applicant does not present any evidence regarding any unique difficulties that they would encounter as a result of such separation. While the AAO acknowledges that any separation of the family would impose a hardship, it cannot be considered to be an extreme hardship without an explanation of the unique factors that exist. The AAO further notes that it appears that the applicant's wife has been able to adapt to living both in the United States and in Korea for lengthy periods of time and has the ability to travel to Korea to spend time with her husband. It is also likely that should the applicant's wife indeed choose to return to the United States, she will continue to have the support of her parents and other family members who live there, thus lessening the adverse effects.

U.S. court decisions have repeatedly held, however, 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, in *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit Court of Appeals defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Ninth Circuit emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court 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.

In this case, the applicant has failed to establish that the stress of separation that his daughter and wife experience is other than a normal consequence of exclusion or deportation. He has also submitted no evidence to support the assertion that his presence in the United States is necessary for his spouse's financial or physical well-being. If anything, the evidence in the record indicates that the applicant's spouse has been able to manage without his financial support for extended periods of time.

A review of the record, when considered in its totality, reflects that the applicant has failed to show that his wife or daughter would suffer extreme hardship if his waiver of inadmissibility application were denied. Having found the applicant 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(a)(2)(A) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* 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.