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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: SAN SALVADOR, EL SALVADOR Date: SEP 23 2005

IN RE: [redacted]

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:

[redacted]

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, San Salvador, El Salvador. The matter is now before the AAO on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of El Salvador 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 a crime involving moral turpitude (both criminal sexual assault and aggravated criminal sexual abuse were cited by the officer in charge). *Decision of the Officer in Charge*, dated October 8, 2003. The applicant was also found to be inadmissible pursuant to section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B) for having multiple criminal convictions. *See Id.* The record indicates that the applicant has a U.S. citizen spouse and two U.S. citizen sons. The applicant seeks a waiver of inadmissibility in order to reside with his family in the United States.

The officer in charge found that based on the evidence in the record, the applicant had failed to establish extreme hardship to his U.S. citizen spouse and admission of the applicant would be contrary to the safety, security and welfare of the United States. *Id.* at 3.

On appeal, counsel asserts that the legacy Immigration and Naturalization Service (INS) erred in its' finding of facts regarding the applicant's conviction, erred in its legal conclusion of the grounds of inadmissibility and issued a boilerplate decision without considering the evidence. *Brief in Support of Appeal*, dated November 3, 2003. Counsel also asserts that the denial of the waiver will result in extreme hardship to the qualifying family members. *Id.* at 5.

The record contains the aforementioned brief, copies of immigration documents and previously submitted documents including, but not limited to, an attorney memorandum of law, affidavits from the applicant's spouse, mother-in-law, father-in-law and friends, letter of prospective employment for the applicant, medical and psychological reports for the applicant's spouse and the applicant's criminal history data. The entire record was reviewed and considered in arriving at a decision on the appeal.

Counsel's first assertion is that the legacy INS erred in its finding of facts regarding the applicant's conviction. *Brief in Support of Appeal*, at 1. The officer in charge stated that the applicant admitted having committed a criminal sexual assault and aggravated criminal sexual abused [sic] for which he was found guilty and sentenced to incarceration. *Decision of the Officer in Charge,* at 1. However, the record reflects that the applicant has only been convicted of aggravated criminal sexual abuse and a criminal sexual assault charge was dismissed through a state motion. *Criminal History Data*, dated January 17, 2002.

Counsel's second assertion is that the legacy INS erred in its legal conclusion of the grounds of inadmissibility. *Brief in Support of Appeal*, at 2. The officer in charge states that the consular officer found the applicant to be inadmissible under sections 212(a)(2)(A) and 212(a)(2)(B) of the Act. *Decision of the Officer in Charge*, at 1.

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

> (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.

Therefore, the decision was correct in citing to section 212(a)(2)(A) of the Act as aggravated criminal sexual abuse is a crime involving moral turpitude which makes the applicant inadmissible.

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

> (B) Multiple criminal convictions --- Any alien convicted of 2 or more offenses . . . for which the aggregate sentences to confinement were 5 years or more is inadmissible.

As the record only reflects one conviction for the applicant, section 212(a)(2)(B) of the Act does not apply to the applicant.

Counsel's third assertion is that the legacy INS issued a boilerplate decision without considering the evidence in the record. *Brief in Support of Appeal*, at 3. Counsel points to the decision of the officer in charge which states that the applicant poses a threat to the national welfare, safety and security of the United States. The AAO notes that the officer in charge refers to section 212(h)(1) of the Act which provides, in pertinent part, that:

> (h) 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)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that ---
>
> (i) [T]he 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.

The activity for which the applicant is inadmissible, aggravated criminal sexual abuse, occurred less than 15 years before the date of his application for admission. Therefore, this waiver does not apply to the applicant. However, the officer in charge analyzes the case under this incorrect section of the Act. *See Decision of the Officer in Charge*, at 2.

Lastly, counsel contends that denial of the applicant's waiver will result in extreme hardship to his qualifying family members. *Brief in Support of Appeal*, at 5.

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

> (h) 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.

The officer in charge mentions extreme hardship in his decision, without citing the relevant provision of the Act or the precedent case of *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), but fails to address any of the facts specific to this case in the analysis. The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included the presence of a lawful permanent resident or United States citizen family ties to 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.

Therefore, an analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The record indicates that the mother, father and two sons of the applicant's spouse are U.S. citizens. The applicant's spouse has three brothers, one sister and two half-brothers, but their legal status is not mentioned in the record. The record does not indicate that the applicant's spouse has any family ties outside of the United States.

The record includes numerous articles on the country conditions in El Salvador which detail political violence, high rates of small arms-related violence, high cost of health care, high murder rates, high levels of gang violence and frequent droughts and natural disasters which cause crop failures and food shortages. In addition, El Salvador is currently designated under the Temporary Protected Status (TPS) program due to a series of severe earthquakes that left over a quarter of the country's population without housing and significantly damaged the infrastructure of the country. *Federal Register*, Vol. 67, No. 133, pp. 46000, Thursday, July 11, 2002, Notices. Under the TPS program, citizens of El Salvador are allowed to remain in the United States temporarily due to the inability of El Salvador to handle the return of its nationals due to the disruption of living conditions. The record indicates that the applicant's spouse tried on two different

occasions to live with the applicant in El Salvador. The applicant was socially isolated due to her inability to speak or learn to speak Spanish. *Brief in Support of Appeal*, at 5-6. The record reflects that it will be difficult for the applicant's spouse to learn Spanish as she has been evaluated to have marked impairment in the cognitive development/function domain and a low intelligence quotient. *Psychological Exam*, dated May 29, 1997. The AAO notes that this exam was taken before the applicant and his spouse were even married. Furthermore, the applicant's residence was broken into while the applicant's spouse and her first son were inside the house and the applicant's spouse witnessed a gang fight at a local art exhibition. *Statement of Applicant's Spouse*, at 7,9 dated March 27, 2003. These statements reflect the general country conditions mentioned in the various articles submitted by counsel. Lastly, the applicant's spouse does not have any ties to El Salvador besides the applicant.

The record reflects that the applicant and his spouse had a cleaning company before the applicant departed the United States which brought in a modest level income for the family. *2001 Federal Form 1040*, dated January 16, 2002. The applicant's spouse states that she has received federal assistance in the form of food stamps due to her financial situation since the applicant has left the United States. *Statement of Applicant's Spouse*, at 12. The record indicates that the applicant's spouse had worked two days a week as a housekeeper at $7.00 per hour. *Id.* at 14. However, she was unemployed at the time counsel submitted a response to a Request for Evidence. *Counsel's Response to Request for Evidence*, dated September 8, 2003. The record indicates that the applicant is making anywhere from $25 to $300 month selling cemetery plots. *Statement of Applicant's Spouse*, at 11. The applicant has a prospective offer of employment with Galena Cellars Winery in Galena, Illinois. *Letter from* [redacted] *Owner Galena Cellars Winery*, dated January 3, 2003. The AAO notes that, with the exception of the employer letter and tax return, no other evidence has been provided to verify the statements made in the record.

The record indicates that the applicant's spouse has had a wide variety of psychiatric, emotional and social problems throughout her life. These problems are documented through a variety of letters from various healthcare professionals which show a period of ongoing treatment and relationships. The most recent therapist for the applicant's spouse, who saw her for two years and listed a significant number of mental and social problems, states that the applicant's spouse seemed to settle down and gained stability once she married the applicant. *Letter from* [redacted] *M.A.*, dated October 8, 2002. The record indicates that the applicant's spouse had a bleak future due to behavioral problems, non-compliance with school and family directives, impulse control problems, clinical depression, borderline personality disorder, drug usage and legal problems. *See Id.* However, the record reflects that the applicant's spouse changed after her marriage in that she was working with the cleaning company, she had two children and appears to be more focused in her life. Furthermore, the parents of the applicant's spouse believe she will revert to her old ways in the event of separation from the applicant.

Based on the totality of the record, the AAO finds that the applicant's spouse would suffer extreme hardship if the applicant is refused admission to the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The main adverse factor in the present case is the applicant's conviction for aggravated sexual abuse of a minor in violation of 720 ILCS 5/12-15(d) which defines aggravated sexual abuse of a minor where the accused commits an act of sexual penetration or sexual conduct with a victim between the ages of 13 and 17 and the accused is more than 5 years older than the victim. The statute does not require the use of force or threatened force. The record reflects that the applicant engaged in consensual relations with a 16 year old prior to his marriage to his current spouse and was sentenced to six months of periodic imprisonment and two years of probation. The record also reflects that the applicant has three traffic violations.

The favorable factors include the presence of the U.S. citizen spouse and children, the isolated nature of his criminal act, the successful completion of his probation, extreme hardship to the applicant's family, and several detailed affidavits from the applicant's in-laws and friends attesting to the applicant's good character and their belief that he did not knowingly commit the criminal violation.

The AAO finds that the crime committed by the applicant is serious in nature and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.