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

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[redacted]

FILE: [redacted] Office: CHICAGO, IL Date: JAN 13 2009

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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Mexico 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 son of a naturalized United States citizen.[1] He now seeks a waiver of inadmissibility so that he may reside in the United States with his father.

The Director concluded that the applicant was not eligible for a waiver, as his crime constitutes an aggravated felony. *Decision of the Acting District Director,* dated May 10, 2006.

On appeal, counsel asserts that the applicant has demonstrated extreme hardship to his qualifying relative and should be granted the waiver as a matter of discretion. *Form I-290B; Attorney's statement.*

In support of these assertions, counsel submits a statement. The record also includes, but is not limited to, a statement from the applicant's spouse; employment letters for the applicant; a statement from the applicant's mother-in-law; a statement from the applicant's friend; criminal records for the applicant; tax statements for the applicant's father; and earnings statements for the applicant's father. The entire record was considered in rendering a decision on the appeal.

The applicant has the following criminal history. On February 21, 2001 the applicant was convicted of 2nd Degree Sexual Assault of a Child for which he received a sentence of imprisonment of six months and was placed on probation for five years. *Judgment of Conviction, Court for Sheboygan County, State of Wisconsin.* Counsel states that the applicant is requesting that United States Citizenship and Immigration Services (USCIS) make an exception in the case of his inadmissibility. *Attorney's statement*, dated June 7, 2006. He notes that the applicant's wife is the person whom he sexually assaulted. *Id.* He states that at the time of the incident, the applicant and his now wife were dating and they were very close in age, with the applicant being 19 years old and his now spouse being a couple of years younger. *Id.; Motion to Reopen/Reconsider*, dated October 18, 2004. The applicant's spouse states that she and the applicant fell in love in high school and she became

[1] The AAO notes that the applicant states on his Form I-601, Application for Waiver of Ground of Excludability that he has a United States citizen daughter. The record does not include documentation, such as a birth certificate, to support this assertion. Additionally, counsel for the applicant states that the applicant is married to a United States citizen. Again, the record does not include documentation, such as a birth certificate or naturalization certificate, to support this assertion. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See 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)). As the record is not properly documented, the AAO will not consider the applicant's spouse or daughter to be qualifying relatives for purposes of this case.

pregnant. *Statement from the applicant's spouse*, dated May 31, 2006. She notes that she consented to having sexual relations with the applicant. *Id.* A therapist told the applicant's spouse to report the applicant or the therapist would report him to the authorities. *Id.* The applicant's spouse reported the applicant to the authorities, thinking it would help him, but it did not. *Id.* The applicant and his spouse have now been together for more than seven years, married for over a year, and they have a five-year-old daughter. *Id.* While the AAO acknowledges the circumstances pertaining to this case, it notes that statutory rape is a crime involving moral turpitude. *Matter of Dingena*, 11 I&N Dec. 723 (BIA 1966). The AAO does not have discretion to find the applicant's conviction as one which does not render him inadmissible. As such, the AAO finds that the applicant's conviction is for a crime involving moral turpitude.

The AAO notes that the Acting District Director erred in finding the applicant ineligible for a waiver because his conviction constitutes an aggravated felony. Aggravated felonies do not serve as bars for grounds of inadmissibility. As such, the Acting District Director's decision will be withdrawn and the AAO finds that the applicant is eligible to seek a waiver under section 212(h) of the Act.

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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant. The plain language of the statute indicates that hardship that the applicant would experience if the applicant's waiver request is denied is not directly relevant to the determination as to whether the applicant is eligible for a waiver under section 212(i). The only relevant hardship in the present case is the hardship that would be suffered by the applicant's father if the applicant were to be removed. If 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems 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 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.

The AAO notes that extreme hardship to the applicant's father must be established whether he resides in Mexico or the United States, as he is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

If the applicant's father travels with the applicant to Mexico, the applicant needs to establish that his father will suffer extreme hardship. The applicant's father is a native of Mexico. *Naturalization certificate.* Although the record is unclear as to the amount of time the applicant's father has resided in the United States, the AAO notes that he naturalized on November 21, 1998. *Id.* The parents of the applicant's father reside in Mexico. *Form G-325A, Biographic Information sheet, for the applicant's father.* The record does not address how the applicant's father would be affected if he traveled with the applicant to Mexico. There is nothing in the record to demonstrate that the applicant's father has a significant health condition for which he would not be able to receive appropriate treatment in Mexico, nor does the record document the Mexican economy and what type of job opportunities the applicant's father would have in Mexico. When looking at the aforementioned factors, the AAO does not find that the applicant has demonstrated extreme hardship to his father if he were to reside in Mexico.

If the applicant's father resides in the United States, the applicant needs to establish that his father will suffer extreme hardship. Counsel states that the applicant's father would suffer immensely if he

were not admitted to the United States, that the resulting hardship would exceed the normal economic and social disruptions. *Attorney's statement*, dated June 7, 2006. While the AAO acknowledges counsel's assertions, it notes that counsel does not specify nor document how the applicant's father would be affected if he remained in the United States and the applicant was removed to Mexico. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO acknowledges that the applicant's father would suffer hardship if he were to be separated permanently from the applicant. However, it notes that 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). *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 AAO recognizes that the applicant's father will endure hardship as a result of separation from the applicant. However, the record does not distinguish his situation, if he remains in the United States, from that of individuals separated as a result of removal and therefore, it does not rise to the level of extreme hardship. When looking at the aforementioned factors, the AAO does not find that the applicant has demonstrated extreme hardship to his father if he were to reside in the United States.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

ORDER: The appeal is dismissed.