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U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: DENVER (SALT LAKE CITY) Date: MAR 09 2009

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (INA), 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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).

Michael Grissom

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The applicant, a native and citizen of Mexico, 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. The record indicates that the applicant has a U.S. citizen spouse and four U.S. citizen children. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his family in the United States.

The district director based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's conviction for burglary of a vehicle, committed on or about April 19, 1994. The district director also found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *District Director's Decision,* dated February 2, 2006.

On appeal, counsel states that according to the Tenth Circuit Court of Appeals' decision in *Cruz-Garza v. Ashcroft*, 396 F.3d 1125, 1127 (2005), the applicant's reduced conviction should fall under the petty offense exception. *Counsel's Brief,* dated March 29, 2006.

The record indicates that on December 7, 1994 the applicant pled guilty to a Class A Misdemeanor charge for burglary of a vehicle. *Court Disposition*, dated December 7, 1994. He was sentenced to one year in prison, but served only one year of probation. On January 14, 2005, the applicant filed a "Motion to Enter Conviction for Lower Degree of Offense Pursuant to U.C.A. § 76-3-402." In this motion, the applicant asked the court to lower the degree of his offense from a Class A misdemeanor to a Class B misdemeanor. The motion was granted on March 31, 2005. According to U.C.A. § 76-3-402, a court in Utah may properly reduce the degree of an offense for which a defendant was convicted to the next lower degree of offense and impose a sentence accordingly. The Court can take this action where it concludes that it would be unduly harsh to record the conviction at the original degree of offense established by statute. In making its decision, the court may consider the nature and circumstances of the offense as well as the history and character of the defendant. Counsel asserts that the Tenth Circuit Court of Appeals held in *Cruz-Garza* that the reduction of the degree of an offense authorized by (U.C.A. § 76-3-402) was not an impermissible rehabilitative mechanism because the state court had to consider the nature and circumstances of the offense and the history and character of the defendant. *Cruz-Garza v. Ashcroft*, 396 F.3d at 1131.

The Tenth Circuit analyzed the facts in *Cruz-Garza* based on *In re Roldan-Santoyo*, 22 I. & N. Dec. 512, 523 (BIA 1999). In *In re Roldan-Santoyo* the Board of Immigration Appeals partially changed its position on vacated or expunged convictions to allow removal of the convicted alien, "notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure." *In re Roldan-Santoyo*, 22 I. & N. Dec. 512, 523 (BIA 1999) (en banc), *order vacated sub nom, on other grounds by Lujan-Armendariz, 222 F. 3d 728.* In *Cruz-Garza*, the Tenth Circuit found that the granting of a Motion to Enter

Conviction for Lower Degree of Offense Pursuant to U.C.A. § 76-3-402 was not a rehabilitative procedure. *Cruz-Garza v. Ashcroft*, 396 F.3d 1125 (2005). The Court reasoned that neither the motion for reduction nor the order affecting the motion mentioned probation or immigration consequences as reasons for granting the motion. Noted by the Court to be a more critical consideration was the actual language of the Utah statute under U.C.A. § 76-3-402. The Court stated that because the conviction was reduced to a Class B Misdemeanor, the controlling subsections are § 76-3-402(1) & (3), under which an offense may be reduced by two degrees if the court concludes that it is, "unduly harsh" in light of, "the nature and circumstances of the offense" and "the history and character of the defendant." The Court stated that such offense and offender characteristics are traditional subjects of prejudgment sentencing proceedings, which clearly focus on matters leading up to and encompassed within the judgment of the conviction, not on post-conviction events relating to the subsequent success or failure of the rehabilitation. Moreover, the Court stated that the statutory linkage of undue harshness to these offense and offender characteristics undercut the speculation that the undue harshness in the petitioner's conviction was due to the immigration hardships, which resulted from the conviction. *Id.*

The Court held that given the vagaries in the evidentiary record and, more importantly, the plain implication of the state statute authorizing reduction of the petitioner's felony conviction to a Class B Misdemeanor, they find that the Immigration and Naturalization Service had not proven by clear, unequivocal and convincing evidence that the petitioner was convicted of a qualifying felony. *Id.*

The applicant's case is similar to that of the petitioner in *Cruz-Garza* in that he was convicted of a Class A Misdemeanor, which was reduced to a Class B Misdemeanor under U.C.A. § 76-3-402. However, the applicant's evidentiary record is not vague. Unlike the petitioner in *Cruz-Garza* who in his motion never mentioned the immigration consequences of his conviction as the reason that the conviction was unduly harsh, the applicant stated that he was requesting a motion to reduce his conviction because he had successfully completed his probation and the reduction of the offense might assist him in his efforts to obtain the benefits of U.S. citizenship. The applicant did not argue that the conviction was unduly harsh given the nature and circumstances of the offense. Unlike prejudgment sentencing proceedings, the applicant's motion is solely focused on post conviction events relating to the subsequent success of the applicant's rehabilitation, stating that the applicant is married with four children, recently purchased a home and works the night shift so that he can care for his children during the day while his wife is at work. Furthermore, the court stated that the applicant's motion be granted, "based on the motion of counsel, the Defendant's successful completion of probation, and the circumstances of this case..." *Order Reducing Degree of Offense Pursuant to U.C.A. §76-3-402.*

Thus, because the applicant's conviction was reduced based on his successful completion of probation, post conviction events relating to his rehabilitation and the immigration consequences of his conviction, the AAO finds that, for immigration purposes, the record is clear that the applicant was convicted of a Class A Misdemeanor and the reduction in his conviction was a rehabilitative procedure not affecting his initial conviction for the purposes of inadmissibility under 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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

> 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) . . . it is established to the satisfaction of the Attorney General 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 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 record indicates that the events leading to the applicant's conviction occurred on April 19, 1994. His current application for adjustment of status is less than 15 years after those activities; he is therefore statutorily ineligible for a waiver pursuant to section 212(h)(1)(A) of the Act. He is, however, eligible to apply for a waiver of inadmissibility pursuant to section 212(h)(1)(B) of the Act.

A section 212(h)(1)(B) waiver of inadmissibility is dependent upon a showing that the bar to admission imposes an extreme hardship on a "qualifying relative," *i.e.*, the U.S. citizen or lawfully resident spouse, parent or son or daughter of the applicant. Hardship to the applicant is not considered in section 212(h) waiver proceedings unless it is shown that hardship to the applicant is

causing hardship to a qualifying relative in the application. If extreme hardship to a qualifying relative is established, in this case [redacted] U.S. citizen wife or children, or his lawful permanent resident mother, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(h) of the Act; *see also Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

The AAO notes that extreme hardship to qualifying relatives must be established in the event that they accompany the applicant and reside in Mexico and in the event that they remain in the United States, as qualifying relatives are not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record of hardship in the applicant's case consists of a statement from his spouse. The applicant's spouse states that the applicant is everything to her and her four children. *Spouse's Statement*, dated September 6, 2005. She states that the applicant cares for her children during the day while she is at work and then works part-time at night. The applicant's spouse states that her children depend on the applicant to be in their lives emotionally and financially and would be devastated to have him taken from them. She states that to take the applicant away from her and her children would be extremely harsh and would result in extreme hardship. She states that statistics show that children who do not grow up with both parents are more likely to be involved in gang related and criminal activity. The applicant's spouse also states that without the applicant she would lose her home and would not be able to financially support her four children. She states that removing the applicant from their lives would cause emotional distress, mental anguish and extreme hardship. The applicant's spouse asserts that the applicant has not been charged with any further crimes since 1994 and has been a productive member of society.

The AAO finds that the current record is not sufficient to meet the applicant's burden of proof in establishing extreme hardship to a qualifying relative. Going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. *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)). The AAO also notes that there is no indication in the record that the applicant's spouse and children would experience extreme hardship if she relocated to Mexico. Thus, the applicant has not shown that his qualifying relatives would suffer hardship beyond that normally expected from inadmissibility or removal.

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.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to 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(a)(9)(B) 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.