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FILE:



Office: LOS ANGELES DISTRICT OFFICE

Date: JAN 28 2005

IN RE:



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: 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 District Director, Los Angeles. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.¹

The record reflects that the applicant is a native and citizen of Nigeria who was found inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I). The record reflects that the applicant is the spouse of a U.S. citizen. He seeks a waiver of inadmissibility to remain in the United States and adjust status to that of a lawful permanent resident pursuant to INA § 245, 8 U.S.C. § 1255, as the beneficiary of an immediate relative petition filed on his behalf by his wife.

The district director found that the applicant failed to establish extreme hardship to his U.S. citizen spouse and denied the application accordingly. On appeal, the entire record was reviewed and considered in rendering a decision on the appeal.

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

(i) In general.—Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the 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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correction institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was

¹ The AAO notes that, although the file contains a Form G-28, *Notice of Entry of Appearance as Attorney or Representative*, signed by the applicant, it does not appear to be from an individual authorized to represent the applicant. The individual who filed the form indicated that she is an attorney and member in good standing of a bar, but failed to indicate the state in which she is licensed to practice law. All information in the record will be considered in our decision, but the incomplete entry of appearance will not be recognized in this case and the decision will be furnished only to the applicant.

convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed).

8 U.S.C. § 1182(a)(2)(A). The district director based the finding of inadmissibility under this section on the applicant's 1990 and 1992 convictions for crimes involving moral turpitude. In 1990, the applicant was convicted of felony grand theft. In 1992, the applicant was convicted of felony petty theft with a record of a prior offense.

The applicant contends that CIS should consider him to have been convicted of a single offense, claiming that his 1992 conviction was expunged. The record reflects that, on September 8, 2000, the applicant's conviction was reduced to a misdemeanor charge, which was dismissed. The reason for the dismissal was the applicant's fulfillment of the conditions of his probation without further involvement in criminal activity. The applicant also indicates that an expungement of his 1990 conviction is pending. A 2002 letter in the record from an attorney indicates only, "TO INFORM YOU THAT MR. [REDACTED] WILL BE DOING A EXPUNGEMENT [sic] FOR MS [REDACTED] [sic]." *Letter of Sammy [REDACTED]* (July 3, 2002). There is no evidence that the 1990 conviction for felony grand theft has actually been expunged or that he is eligible for expungement under state law.

In *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999), the Board of Immigration Appeals (BIA) held that, under the statutory definition of the term "conviction," no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Once an alien is subject to a "conviction" as that term is defined in section 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure. The Ninth Circuit Court of Appeals, under whose jurisdiction this case arises, reversed *Roldan* in part by finding that, for the purposes of drug convictions, the 1996 amendment of the INA defining "conviction" did not repeal the Federal First Offender Act and, therefore, relief granted under the FFOA or similar state expungement laws precluded deportation based on the expunged drug conviction. *Lujan v. INS*, 222 F.3d 728 (9th Cir. 2000). However, the court has subsequently ruled that for crimes *not* covered under the Federal First Offender Act, convictions that have been expunged or set aside under state rehabilitation statutes remain "convictions" for purposes of inadmissibility or deportability under the Act. *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001); *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002).

The district director therefore properly found the applicant inadmissible based on both criminal convictions for crimes involving moral turpitude, even though the 1992 conviction was later expunged in state court under California Penal Code § 1203.4. The inadmissibility finding is sustained. The question remains whether he is qualified for a waiver. Section 212(h) of the Act provides, in pertinent part:

The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . 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 [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;

. . . and

(2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. . .

8 U.S.C. § 1182(h). Less than 15 years have elapsed since the activities for which the applicant was found inadmissible occurred, thus he is ineligible for a waiver under INA § 212(h)(1)(A). A section 212(h)(1)(B) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the alien himself is not a permissible consideration under the statute.

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 alien has established extreme hardship to a qualifying relative. 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. The BIA has held:

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). In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). See also *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (BIA)) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). As noted above, the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case. 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).

The record reflects that the applicant's wife (Ms. [REDACTED]) is a 37-year-old U.S. citizen born in Los Angeles, California. Her mother and father are also U.S.-born American citizens. Her mother is deceased. Her father and brother live in Los Angeles. She and the applicant met in 1994 and married in 1997, in California. She completed 2 years of post-high school education and works for Los Angeles County as a welfare officer. Ms. [REDACTED] has never traveled outside the United States and speaks only English. She has no family ties outside the United States. Her brother-in-law (the applicant's brother) also lives in Los Angeles. It appears from the record that the applicant's mother and father reside in Nigeria

Ms. [REDACTED] is concerned about country conditions in Nigeria, where she would relocate to avoid separation from her husband. Specifically, she is concerned that she would be unable to afford medical care in Nigeria if she leaves her job in the United States and loses her medical insurance obtained through her employer. She is also concerned that the quality of care in Nigeria is inferior and in particular its impact on her ability to become pregnant if, as she suspects, she will need medical fertility treatments to do so. There is no medical documentation regarding her health or fertility on the record. She also fears political instability, poor infrastructure, and violent crime in Nigeria.

[REDACTED] does not assert any particular financial hardship if the applicant is removed, except the loss of her job if she relocates to Nigeria and the cost of medical care. The record reflects that her household income for 1999 was \$29,116. Two dependents are listed on her tax records, but their relationship to her and/or the applicant is not contained in the record. More recent financial documentation was not provided.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's wife faces extreme hardship if the applicant is refused admission. The AAO notes that the record is essentially silent as to the hardship the applicant's spouse would face if she remains in the United States without her husband, except the emotional hardship she would face due to separation. It appears that the applicant and his wife have sufficient financial resources to support themselves individually. Particularly if she remains in the United States, the record demonstrates that the applicant's wife

will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States. In limiting the availability of the waiver to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. See *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under INA § 212(h), 8 U.S.C. § 1186(h).

In proceedings for application for waiver of grounds of inadmissibility under section 212 of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.