



U.S. Citizenship
and Immigration
Services

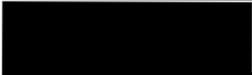
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FILE:



Office: SAN ANTONIO

Date: JUN 09 2006

IN RE:



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 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, Chief
Administrative Appeals Office

DISCUSSION: The Interim District Director, San Antonio, Texas, denied the waiver application, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Colombia who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a violation of a law relating to a controlled substance. The applicant is the spouse of a U.S. citizen. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his spouse.

The interim district director concluded that the applicant is statutorily ineligible for a waiver of inadmissibility and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Interim District Director*, dated May 13, 2003.

The record reflects that, on April 17, 1998, the applicant pled guilty to manufacturing, distributing and dispensing cocaine, manufacturing, distributing and dispensing cocaine within 1000 feet of a school and conspiracy to distribute cocaine. The applicant was sentenced to probation. On December 24, 1998, the court dismissed the case against the applicant after he successfully completed his probation.

The interim district director concluded that in order to qualify for a waiver pursuant to section 212(h) of the Act, the applicant must have been convicted of only a single offense of simple possession of 30 grams or less of marijuana. She concluded further that the Act provides for no other waivers to the applicant's ground of inadmissibility. *See Decision of the Interim District Director*, dated May 13, 2003.

On appeal, the applicant and his spouse assert that the applicant was not convicted of the charges, the case has since been over-turned and alternatively, his wife would suffer extreme hardship if he were to be denied adjustment of status to a lawful permanent resident. *See Form I-290B* dated May 27, 2003 and *Applicant's Spouses' Letters*. In support of the appeal, the applicant and his spouse submitted the above-referenced Form I-290B, letters from his spouse and additional court records. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a) of the Act states in pertinent part:

(2) Criminal and related grounds. —

(A) Conviction of certain crimes. —

(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 essential elements of —

(II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102

of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

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

The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) *and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana* (emphasis added.)

Court documentation submitted by the applicant's spouse indicates that, on January 22, 2004, the applicant was granted a motion for new trial because the judge and counsel failed to explain the elements of the offenses and the facts recited during the colloquy were insufficient to constitute all the elements to show that the applicant's plea was intelligent and knowing. On November 16, 2004, all counts against the defendant were dismissed. In applying the definition of a conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), the Board of Immigration Appeals (BIA) found that there is a significant distinction between convictions vacated on the basis of procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act. If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). The AAO agrees with the interim district director's finding that a conviction is not required in order to find the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act. However, the record of proceeding in this case does not provide sufficient evidence to find that the applicant has admitted to committing acts which constitute the elements of a violation of law related to a controlled substance violation. The AAO therefore finds that, absent additional evidence, the applicant is not inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act.

The AAO conducts the final administrative review and enters the ultimate decision for Citizenship and Immigration Services (CIS) on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible

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- (iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The record reflects that, on February 22, 2001, the applicant married [REDACTED] a U.S. citizen by birth. On April 26, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on a Petition for Alien Relative (Form I-130) filed by the applicant's U.S. citizen spouse. The applicant appeared at Citizenship and Immigration Services' (CIS) San Antonio District Office and admitted that he procured admission to the United States by presenting a fraudulent Colombian passport and U.S. nonimmigrant visa in July 1997. As such, the AAO finds that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. 1182(a)(6)(C)(i), for procuring admission to the United States by fraud or willful misrepresentation of a material fact.

Hardship to the alien himself is not a permissible consideration under the statute. A section 212(i) waiver is therefore 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.

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 at 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 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. 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).

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 and his spouse have no children. The record reflects further that the applicant and [REDACTED] are in their 20's and [REDACTED] has no health concerns.

[REDACTED] asserts that she would suffer extreme hardship if she were to remain in the United States without the applicant. [REDACTED] in her letters, states "I can't see myself living my life without him . . . [REDACTED] provides me with so much support . . . I cannot imagine successfully completing medical school without him by my side . . . I find myself unsure of my career path, unsure of the school I attend and the city I have to live in . . . please allow us to raise our children as Americans, please allow me to continue my medical education at a US medical school." Financial records indicate that while [REDACTED] is completing medical school she receives financial aid, including \$16,000 for her household expenses. There are no financial records to indicate that the applicant would be unable to support herself without the assistance of the applicant or that she would be unable to obtain post-graduation employment sufficient to sustain her. There is no evidence in the record to suggest, that [REDACTED] suffers from a physical or mental illness that would cause her to suffer emotional hardship beyond that commonly suffered by aliens and families upon deportation. Moreover, the record reflects that [REDACTED] has immediate family in the United States who may be able to provide financial and emotional support in the absence of the applicant.

[REDACTED] asserts that she would face extreme hardship if she relocated to Colombia in order to remain with the applicant. [REDACTED] in her letters, states "I will have to leave my family . . . I will have to leave my dreams . . . I have already incurred over \$100,000 in debt and would be responsible for paying that debt, even if I was unable to complete my medical training . . . I would lose my dream and everything that I have worked so hard to achieve . . . I would suffer not only financially, but psychologically as well." There is no evidence in the record to suggest that [REDACTED] suffers from a physical or mental illness that would cause her to suffer emotional hardship beyond that commonly suffered by aliens and families upon deportation. There is no evidence in the record that the applicant and [REDACTED] would be unable to find employment sufficient to support themselves. Additionally, the record reflects that the applicant has family members in Colombia who may be able to support them financially and emotionally. While the hardships [REDACTED] faces are unfortunate, the hardships faced by [REDACTED] with regard to adjusting to a lower standard of living, a new culture and separation from friends and family, are what would normally be expected with any spouse accompanying a deported alien to a foreign country. Finally, the AAO notes that, as a U.S. citizen, the applicant's spouse is not required to reside outside of the United States as a result of denial of the applicant's waiver request.

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 spouse would face extreme hardship if the applicant were refused admission. Rather, the record demonstrates that [REDACTED] 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 nearly every qualifying relationship, whether between husband and wife or parent

and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of “*extreme hardship*,” Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(i) of the Act, be above and beyond the normal, expected hardship involved in such cases. 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 section 212(i) of the Act, 8 U.S.C. § 1186(i). 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(i) 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.