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**U.S. Citizenship
and Immigration
Services**

#2

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FILE:



Office: ST. PAUL, MN

Date: **AUG 22 2008**

IN RE:



PETITION: Application for Waiver of Grounds of Inadmissibility under Section 212(g) and Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(g) and § 1182(h)

ON BEHALF OF PETITIONER:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, St. Paul, Minnesota, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Guatemala who was found to be inadmissible to the United States under section 212(a)(1)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(1)(A)(i), as an alien who is determined to have a communicable disease (HIV) of public health significance, and under section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i), for having committed a crime involving moral turpitude. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant seeks a waiver of the bar of admission provided under sections 212(g) and (h) of the Act, 8 U.S.C. §§ 1182(g) and 1182(h), in order to remain in the United States with his U.S. citizen spouse and child.

The record reflects that the applicant was paroled into the United States on March 28, 1991 to pursue an application for asylum. As a result of the applicant's failure to appear for a scheduled asylum interview, the asylum application was referred to an immigration judge for adjudication in removal proceedings on May 21, 2007. On March 4, 2008, the applicant's asylum application was denied and he was ordered removed.

The record reflects that the applicant pled guilty on September 25, 1995 in Minnesota District Court in Ramsey County to Criminal Sexual Conduct in the Second Degree in violation of Minnesota Statute 609.343(1)(a). The applicant was sentenced to 25 years imprisonment, but the imposition of the sentence was stayed and the applicant was placed on probation.

The applicant and his spouse were married in the United States on September 18, 2004. The applicant's spouse filed the Form I-130 petition on August 6, 2007. It was approved on January 23, 2008. The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) and an Application for Waiver of Grounds of Inadmissibility (Form I-601) on December 16, 2007.

Although acknowledging the "convincing documentation" and credible testimony concerning extreme hardship to the applicant's spouse, the field office director denied the waiver application after determining the applicant, due to the "violent and dangerous" nature of his crime, was required under 8 C.F.R. § 212.7(d) to demonstrate "exceptional and extremely unusual hardship," but had failed to do so. *Decision of Field Office Director*, dated February 26, 2008. The field office director also stated that even if the applicant had been able to establish exceptional and extremely unusual hardship, the application would have been denied as a matter of discretion because of the various adverse factors present in the case. *Id.* Although the decision does not contain an analysis of the applicant's eligibility for a waiver of inadmissibility under section 212(g) of the Act, the field officer director determined that the applicant had failed to meet this criteria and remains inadmissible under section 212(a)(1)(A)(i). *Id.*

On appeal, counsel asserts that the field office director erred in applying the "exceptional and extremely unusual hardship" standard. *Appeal Brief* at 3. Counsel contends that a waiver of inadmissibility is dependent first on a showing of extreme hardship to a qualified family member followed by an assessment as to whether a favorable exercise of discretion is warranted. *Id.* Counsel asserts that the regulation at 8 C.F.R. § 212.7(d) applies only to this exercise of discretion and provides for a favorable exercise of discretion in extraordinary circumstances, which may include those involving national security or foreign policy considerations *or* in cases in which denial

would result in exceptional and extremely unusual hardship. *Id.* (Emphasis added). Counsel summarizes the hardships the applicant's spouse and daughter would suffer if the waiver application is denied and asserts that this hardship is extreme. *Id.* at 5-7, 8-9, 11-15. Counsel asserts that the field office director ignored the evidence that the applicant has been rehabilitated. *Id.* at 7-8. Counsel states that even though the applicant's confidential medical condition was cited as an adverse factor in the denial, the proper HIV waiver standard was not applied. Finally, counsel contends that a favorable exercise of discretion is warranted as the numerous positive factors presented in the case outweigh the one adverse factor, the applicant's criminal conviction, and foreign policy and national security concerns also favor approval of the waiver. *Id.* at 16-20.

Section 212(a)(1)(A)(i) of the Act provides that any alien who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, is inadmissible. HIV has been determined by the Public Health Service to be a communicable disease of public health significance. 42 C.F.R. § 34.2(b)(4). Aliens infected with HIV, however, upon meeting certain conditions, may have such inadmissibility waived.

Section 212(g)(1) of the Act provides, in part, that the Attorney General may waive such inadmissibility in the case of an individual alien who:

(A) is a spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa, or

(B) has a son or daughter who is a United States citizen or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa; in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human services, may by regulation prescribe.

An applicant who meets this statutory requirement must also demonstrate that the following three conditions will be met if a waiver is granted:

- (1) The danger to the public health of the United States created by the alien's admission is minimal; and
- (2) The possibility of the spread of the infection created by the applicant's admission is minimal; and
- (3) There will be no cost incurred by any government agency without prior consent of that agency.

In this case, the applicant's medical examination shows he had tested positive for HIV infection, and that the results of the serological examination for HIV were confirmed by Western blot. In an affidavit dated November 7, 2007, the applicant states that he has received treatment and counseling for his medical condition, and that he

believes that through medication and preventative measures, he will be able to control his HIV and not infect his wife. In further support of his request for a section 212(g) waiver, the applicant has submitted the following:

1. A letter from [REDACTED] Program Coordinator, in which [REDACTED] states that the applicant may be eligible for services and care provided under the [REDACTED] HIV/AIDS Treatment Modernization Act, services including primary care, case management, mental health care, emergency financial assistance, nutritional services, housing assistance, and antiviral medications.
2. A letter from [REDACTED], Medical Social Worker at the HealthPartners Specialty Center in St. Paul, in which [REDACTED] states that applicant receives ongoing counseling and educational information regarding HIV/AIDS at the Center and understands “the severity of his illness and appreciates what he needs to do to keep himself, his spouse and his child healthy.”
3. A letter from [REDACTED], Infectious Diseases Fellow at the HealthPartners Specialty Center in St. Paul, in which [REDACTED] states that the applicant has been receiving medical care at the Center and is “aware of the modes of transmission and behaviours that increase the risk of transmission.”
4. A letter from [REDACTED], a human resources benefits representative at the Minnesota Department of Transportation, in which [REDACTED] states that the applicant is covered by his spouse’s full medical insurance.

Based on the evidence in the record, it is concluded that the applicant has met the three conditions listed previously in regard to the section 212(g) waiver. As a result, the applicant is eligible for a waiver of grounds of inadmissibility under section 212(a)(1)(A)(i) of the Act and the field officer director’s finding to the contrary is withdrawn.

The AAO turns next to the applicant’s eligibility for a section 212(h) waiver. Section 212(a)(2)(A) of the Act states in pertinent part:

(i) In general.— . . . [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.

The record reflects that the applicant pled guilty on September 25, 1995 in Minnesota District Court in Ramsey County to Criminal Sexual Conduct in the Second Degree in violation of Minnesota Statutes 609.343(1)(a). The applicant was sentenced to 25 years imprisonment, but the imposition of the sentence was stayed and the applicant was required to serve 60 days in jail and placed on probation. Section 609.343 of the Minnesota Statutes, presently and at the time of the applicant’s conviction, provides in pertinent part:

Subdivision 1. Crime defined. A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if any of the following circumstances exists:

- (a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense. In a prosecution under this clause, the state is not required to prove that the sexual contact was coerced. . . .

Sexual misconduct involving a minor is generally considered a crime involving moral turpitude. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996) (alien convicted of sexual assault of 13 year old girl); *accord Nguyen v. ICE*, 400 F.3d 255 (5th Cir. 2005)(sexual assault of a child). The applicant has not disputed that he is inadmissible under section 212(a)(2)(A)(i) of the Act for having committed a crime involving moral turpitude.

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), (B), . . . of subsection (a)(2) . . . if –

. . . .

- (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 AAO notes that section 212(h) of the Act provide 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. In this case, the relatives that qualify are the applicant's spouse and child. Hardship to the applicant himself is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. 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, 565-66 (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 to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in 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 BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

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 in *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, “the most important single hardship factor may be the separation of the alien from family living in the United States”, and that, “[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.” (Citations omitted.) Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO notes further, however, 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). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

In support of his request for a section 212(h) waiver, the applicant has submitted, among other documents, affidavits from his spouse and other relatives, affidavits from the applicant’s spouse’s supervisors, an estimated monthly budget, letters from two doctors and a nurse detailing the medical conditions suffered by the applicant’s spouse, medical articles and reports, letters from the applicant’s spouse’s psychologist, letters from priests at the applicant’s church, and articles and reports concerning country conditions in Guatemala.

In her affidavit, the applicant’s spouse states the financial impact of the applicant’s departure would be “staggering.” She indicates that the applicant contributes approximately half of the couple’s monthly income (\$2000), and this contribution is necessary to meet the couple’s expenses. The applicant’s spouse asserts that the applicant’s absence would negatively impact her health as well. She indicates that she has two lifelong disabilities, hip displasia and neurogenic bladder, and that she had approximately 11 surgeries from 1971-1999, and has had 8 surgeries from 2000 to the present time. She states “[w]hile I am usually able to work full-time, I tire easily, have chronic pain, walk with a limp, cannot stand for more than 15 minutes and can only walk short to moderate distances.” She further states that as a consequence of recent surgeries for pilonidal and sinus cysts, she was hospitalized and incapacitated for extended periods, requiring that her husband care for her and their daughter. The applicant’s spouse indicates that she also suffers from depression and anxiety and has been diagnosed and treated for borderline personality disorder. She asserts that the applicant’s support and assistance ameliorate the impact of these conditions, and that both she and her daughter would suffer emotional hardship without the applicant. The applicant’s spouse indicates that in spite of the insurance coverage she receives from her employer, she still incurs significant medical expenses that she would have difficulty paying without the applicant’s income.

The applicant's spouse asserts that her medical conditions require consistent and specialized medical care, care that would either not be available or only be available at great cost in Guatemala. She indicates that she does not speak Spanish and has no family ties to Guatemala, and would be unlikely to find employment in Guatemala because her current employment is government work that would not be available to her in Guatemala. She asserts that the applicant's family in Guatemala lacks the means to assist her and her husband financially. She states that separation from her family members in the United States, along with the barriers to assimilation in Guatemala, would be devastating emotionally, and would likely exacerbate her mental conditions. She also indicates that she would suffer from being separated from her Orthodox religious community in the United States.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that the applicant's wife and daughter face extreme hardship if the applicant is not granted a waiver of inadmissibility.

The evidence submitted by the applicant supports the claims made by his spouse in her affidavit. The evidence demonstrates that the applicant's spouse suffers from various serious, and potentially incapacitating, physical and mental conditions. The applicant's financial support and other assistance are essential to her ability to function properly, and there is sufficient evidence to show that she would suffer extreme hardship in his absence. The evidence also demonstrates that the applicant's spouse, as a consequence of her medical conditions and the barriers to her assimilation in Guatemala discussed above, would suffer extreme hardship if she relocated there. Consequently, the AAO finds that the applicant has established that the bar to admission would result in extreme hardship to his U.S. citizen spouse and daughter and is eligible under section 212(h) of the Act for a waiver of his inadmissibility under section 212(a)(2)(A)(i) for having committed a crime involving moral turpitude.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the Board held that establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (Secretary of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The field officer director determined that because the applicant committed a "violent or dangerous" crime, the discretionary standards found at 8 C.F.R. § 212.7(d) should be applied. The AAO does not agree. 8 C.F.R. § 212.7(d) provides:

The Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary

circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

It is noted that the terms “violent” and “dangerous” are not further defined in the regulation, and the AAO is aware of no other precedent or guidance defining those crimes considered “violent or dangerous” and those that are not. The field office director provides no rationale for the finding that the applicant’s conviction was for a violent or dangerous crime. The AAO therefore looks to the plain meaning of the terms “violent” and “dangerous.” Black’s Law Dictionary, Seventh Edition (1999), defines violent as “of, relating to, or characterized by strong physical force” and dangerous as “likely to cause serious bodily harm.” It is noted that violation of the statute under which the applicant was convicted can occur even where no physical force or coercion is used, and a showing of lack of consent on the part of the victim is not required for a conviction. The evidence in the record does not show that the applicant’s crime was “characterized by strong physical force” or “likely to cause serious bodily harm.” Consequently, the AAO finds that the applicant’s conviction for violating section 609.343(1)(a) of the Minnesota Statutes is not a “violent or dangerous” crime within the meaning of 8 C.F.R. § 212.7(d), and therefore the heightened discretionary standards found in that regulation are not applicable in this case.

The equities in this case warrant a favorable exercise of discretion. The negative factors in this case consist of the applicant’s 1995 conviction and his periods of unauthorized presence. The positive factors in this case include the extreme hardship that the applicant’s wife and daughter would suffer if the applicant were removed from the United States, the applicant’s employment and other contributions to his family and community, and no indication of further arrests or convictions since 1995. Although the applicant’s crime and unauthorized presence cannot be condoned, the positive factors in this case outweigh the negative factors.

As stated above, the applicant is now the subject of a removal order, and therefore remains inadmissible under section 212(a)(9)(A) of the Act pending the filing and approval of an Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212).

In proceedings for application for waiver of grounds of inadmissibility under section 212(g) and 212(h), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.