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U.S. Citizenship
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FILE:

Office: PHOENIX, ARIZONA

Date:

JUN 09 2008

Relates)

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), Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) and Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

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 waiver application was denied by the Field Office Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of New Zealand who 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 (aggravated assault); section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to procure admission into the United States by fraud or willful misrepresentation and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of one year or more. The applicant is the spouse of a U.S. citizen and has two U.S. citizen children. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), section 212(i) of the Act, 8 U.S.C. § 1182(i) and section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his spouse and children.

The field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility. *Decision of the Field Office Director*, dated July 13, 2007.

On appeal, counsel asserts that the field office director failed to give due consideration to the affidavits presented by the applicant's U.S. citizen spouse and children. *Form I-290B*, received August 15, 2007.

The record includes, but is not limited to, counsel's brief, the applicant's statement, the applicant's spouse's statement and the applicant's children's statements. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant was convicted of aggravated assault on November 24, 1987 pursuant to § 13-1204(A)(2) of the Arizona Revised Statutes (ARS). Aggravated assault under § 13-1204(A)(2) of the ARS is a crime involving moral turpitude.¹ On November 8, 2005, the applicant applied for admission at the Nogales, Arizona Port of Entry and failed to indicate on his visa waiver application that he had been previously arrested. In addition, the applicant was unlawfully present in the United States for more than one year, from August 21, 2000, the date his two prior adjustment of status applications were denied, until the date he departed the United States, which is not documented in the record, but necessarily preceded his November 8, 2005 attempt to reenter the United States on a visa waiver.² As a result of the applicant's

¹ Counsel asserts that § 13-1204 of the ARS contains several subsections and that not all of these subsections are crimes involving moral turpitude. *Brief in Support of Appeal*, at 1, dated September 12, 2007. The AAO notes, however, that the applicant's record of conviction reflects that he was specifically convicted under § 13-1204(A)(2) of the ARS. *Judgment, Superior Court of Arizona, Maricopa County*, dated November 24, 1987. § 13-1204(A)(2) of the ARS is for an assault under § 13-1203 of the ARS with the use of a deadly weapon or dangerous instrument, a crime involving moral turpitude (regardless of which prong of the underlying assault statute applies).

² At his December 20, 2006 adjustment of status interview, the applicant testified that he had been outside the United States for a total of eight weeks between August 21, 2000 and July 30, 2006, the date on which he filed his third

crime involving moral turpitude, material misrepresentation and unlawful presence, the applicant is inadmissible to the United States.

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

(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:

(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 . . .

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

- (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

adjustment application. Whatever the date of the applicant's departure from the United States during the period August 2000 to November 2005, his departure triggered the unlawful presence provisions of the Act.

admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

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.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

Therefore, the applicant requires waivers under sections 212(a)(9)(B)(v), 212(i) and 212(h) of the Act.³

³ The AAO notes that the activity resulting in the aggravated assault conviction occurred on May 29, 1987. An application for admission or adjustment is a "continuing" application, adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The date of application is technically the date of decision on the application for adjustment of status, which has not yet occurred. Therefore, section

Section 212(a)(9)(B)(v) and section 212(i) waivers are dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Counsel asserts that the field office director failed to discuss the hardships faced by the applicant's children. *Brief in Support of Appeal*, at 4. The AAO notes that hardship to the applicant's children is not a permissible consideration in section 212(a)(9)(B)(v) and section 212(i) waiver proceedings except to the extent that such hardship may affect the qualifying relative. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship. These factors include the presence of 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.

Therefore, an analysis of the factors mentioned in *Matter of Cervantes-Gonzalez* is appropriate in this case. The AAO acknowledges the factual differences between the applicant's case and the applicant in *Matter of Cervantes-Gonzalez* as mentioned by counsel and will consider this in adjudicating the appeal. The AAO notes that extreme hardship to the applicant's spouse must be established in the event that she relocates to New Zealand or in the event that she remains in the United States, as she is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The first part of the analysis requires the applicant to show extreme hardship to his spouse in the event of relocation to New Zealand. Counsel states that the applicant's spouse has a successful and established chiropractic practice in the United States, she would have to restart her career in New Zealand from "ground zero", she would have to give up the life she has built in the United States and she has no family in New Zealand. *Counsel's Form I-601 Memorandum*, at 17-18, undated. The applicant's spouse states that it would be impossible for her to practice in New Zealand, most of her school credits would not transfer to New Zealand, she would have to go back to school to order to sit for the licensing board, she is not emotionally or physically ready at age 47 to start over, she loves her profession, and she would have no career at all in New Zealand. *Applicant's Spouse's Statement*, at 1, dated March 30, 2007.

The applicant's spouse states that her mother is in a nursing home, her mother has not spoken a word in 18 months; the only relationship she has is when she visits her mother and she would, therefore, have no

212(h)(1)(A) of the Act applies to the applicant as the activity resulting in the aggravated assault conviction occurred more than 15 years prior to the applicant's adjustment of status application. However, as sections 212(a)(9)(B)(v) and 212(i) of the Act have a higher standard (extreme hardship) than section 212(h)(1)(A) of the Act, no purpose would be served in evaluating the section 212(h)(1)(A) waiver absent a finding of waiver eligibility under sections 212(a)(9)(B)(v) and 212(i) of the Act.

relationship with her mother if she resided in New Zealand and she wants to be in the United States at the end of her mother's life. *Id.* at 2. The applicant's spouse states that the applicant's children are the center of her and the applicant's lives, she loves them as her own, the children's mother will not permit them to go to New Zealand and returning the children to their mother will be detrimental to their success. *Id.* at 2-3. The record does not include substantiating evidence of many of the applicant's spouse's claims, including those relating to her inability to practice her profession in New Zealand and her mother's health. Going on record without supporting documentation will not meet the applicant's burden of proof in 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)). Based on the record, the AAO finds that the applicant has not established that his spouse will experience extreme hardship upon residing in New Zealand.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his spouse remains in the United States. Counsel asserts that the applicant and his spouse are paying a mortgage and that the applicant's spouse would encounter emotional and psychological devastation. *Counsel's Form I-601 Memorandum*, at 17-18. The applicant's spouse states that the applicant helps handle many of the non-medical aspects of her chiropractic practice (yearly employment reviews, determination of bonuses and time-off, creating a fee system, establishing relationships with patients, creating a positive work environment), he is truly responsible for the success of her office, they run an aircraft charter business together, the loss of income from the aircraft charter business would be financially devastating, they have a custom home development company which requires the applicant's supervision, she would not be able to pay her bills without his assistance, the numerous debts relating to their business enterprises are more than she can pay on her own, she is worried on a daily basis, and she has headaches and stomach troubles. The AAO notes that the record does not include substantiating evidence of the applicant's spouse's financial hardship claims. The record is not clear as to whether the applicant's spouse would be able to maintain a relationship with her stepchildren in the absence of the applicant, the hardship she might experience due to the potential loss of that relationship and the hardship she might experience due to the hardship her stepchildren would experience without the applicant. As previously noted, going on record without supporting documentation will not meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, at 165. The AAO finds that extreme hardship has not been established in the event that the applicant's spouse remains in the United States without the applicant.

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.

The AAO notes that 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 application for waiver of grounds of inadmissibility under section 212(i) and 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.