

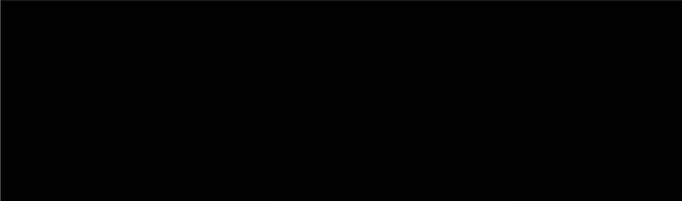
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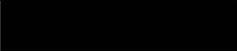


**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: LOS ANGELES, CA

Date: FEB 06 2009

IN RE:

Applicant:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i).

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.

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

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director Services, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, _____ is a native and citizen of Mexico 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 receiving stolen property, a crime involving moral turpitude.

The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated July 13, 2006.

On appeal, counsel states that the submitted evidence demonstrates extreme emotional hardship to the applicant's spouse and daughter if the applicant is not allowed to live in the United States. Counsel states that the applicant's family members would face "long-term practical and interpersonal complications – the family business would fail and the family's integration in their community of friends and family would be severely disrupted." Counsel states that splitting up the applicant's family would result in poverty and instability to his family members and that this hardship is already beginning to manifest itself.

The AAO will first address the finding of inadmissibility.

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

(A)(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 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The record reflects that the applicant pled guilty to the charge of receiving stolen property in California in 1997. Section 496(a) of the California Penal Code provides as follows:

Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison, or in a county jail for not more than one year.

The minute order dated November 21, 1997 and contained in the record reflects that the applicant was sentenced to 180 days in jail, to a three-year supervised probationary term, and to pay a fine. The minute order dated September 8, 2004, states that a hearing was held pending a petition revoking probation, and the applicant's term of imprisonment was modified to 364 days in jail and his supervised probation reinstated and extended to September 8, 2007.

The applicant's conviction involves moral turpitude. See *Patel v. INS*, 542 F.2d 796, 797-98 (9th Cir.1976) (reasoning that a conviction under Cal.Penal Code § 496 for receiving stolen property constitutes a crime involving moral turpitude).

The AAO notes that based on the record before it, the applicant's conviction does not fall within the petty offense exception found in section 212(a)(2)(ii) of the Act.

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

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

(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 convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

California law indicates that for a conviction under section 496(a) of the California Penal Code, a person shall be punished by imprisonment in a state prison or in a county jail for not more than one year, which would satisfy the maximum penalty requirement of the petty offense exception. The question here is what sentence was actually imposed by the court. The record shows that the judge

modified the original sentence of 180 days in jail to 364 days because the applicant violated his probation. The sentence imposed after revocation is imposed for the original conviction. *See, e.g., Alabama v. Shelton*, 535 U.S. 654, 662, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002) (the defendant was incarcerated not for the probation violation, but for the underlying offense, which was a suspended sentence). Consequently, the applicant's theft conviction fails to qualify for petty offense exception because the modified sentence made the term of imprisonment exceed 6 months.

The AAO will now consider whether granting the applicant's section 212(h) waiver is warranted.

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 -

(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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case are the applicant's spouse, who is a naturalized citizen, and his daughter and stepdaughter, who are U.S. citizens. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 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 (BIA) 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 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

On appeal, counsel refers to documentation, including the following, to establish extreme hardship to the applicant’s family members:

- A letter dated September 6, 2006, by the applicant’s wife in which she conveys that the applicant has a close relationship with her, her daughter, and her stepdaughter and their family would not be the same without him. She states that the applicant helps her daughter and her stepdaughter with homework and school projects and plays with them and takes them to the park and to the movies. She states that they own and operate a small video store.
- An undated letter by the applicant’s daughter in which she states that either her father or her mother, [REDACTED], takes care of her, and that she is happy to always be with them.
- Birth certificates that indicate the applicant’s daughter is 13 years old and his step-daughter is 16 years old.
- A September 9, 2006, evaluation by [REDACTED], in which he states that the applicant’s family presented with a great deal of stress as a result of the possibility of the applicant’s deportation. He states that the applicant’s stepdaughter appeared to be in shock and became tearful. The applicant and his wife reported to [REDACTED] that the applicant’s biological daughter lived with them for three years when her mother was unable to take care of her and that the applicant was bewildered that he will not be able to see his daughters and provide child support. [REDACTED] indicates that the applicant’s wife presented with a mild to moderate level of depression, insomnia, fatigue, irritability, and loss of concentration and with a high degree of anxiety. He stated that the applicant and his wife emphasized their commitment and obligation toward the applicant’s daughter in terms of visitation and child support and that the applicant’s daughter would suffer the most with her father’s deportation. He further stated that the applicant’s stepdaughter would benefit from individual psychotherapy to deal with her emotional stress, and that he states that the [REDACTED] family would benefit from family therapy.
- A letter dated March 9, 2006, by the applicant’s wife, in which she conveys that the applicant has been her daughter’s father figure since she was seven years old and that her daughter would suffer without him in her life. She states that her stepdaughter lived with them for three years and she now lives with her mother. She indicates that their daughters enjoy the house they own. The applicant’s wife states that her husband helps with the video store because they are open every day

of the week from 10:00 A.M. to 11:00 P.M., and she needs time off to pick up her daughter from school and cook before returning to the video store. She indicates that she has a close relationship with her husband.

- A letter by the applicant's stepdaughter that is dated March 9, 2006, conveys that her stepfather is her mentor and she would feel sad if he were no longer in her life.
- A Seller's Permit issued to [REDACTED].
- Invoices, photographs, and a grant deed.
- Income tax records for 2001 reflecting income of \$18,953 and showing the applicant's stepdaughter and daughter as dependents.

In rendering this decision, the AAO has carefully considered all of the evidence in the record.

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's qualifying relative must be established if she or he joins the applicant, and alternatively, if she or he remains in the United States without him. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

With regard to family separation, courts in the United States have stated that "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[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); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to 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).

In light of the hardship factors which indicate that the applicant's spouse relies upon the applicant to assist in operating their video store, which is open from 10:00 A.M. to 11:00 P.M.; that the applicant was required to provide care for his 13-year-old daughter during a three-year period while her mother was unable to do so; that the applicant has visitation rights; and that the applicant has been a father figure to his step-daughter since she was seven years old, the AAO finds that in considering the evidence in the aggregate, the applicant has established extreme hardship to his spouse, daughter, and step-daughter if they were to remain in the United States without him.

However, the applicant makes no claim of extreme hardship to his spouse, daughter, or step-daughter if they were to join him in Mexico.

In conclusion, the applicant has established extreme hardship a qualifying family member if he were removed from the country; however, he has not demonstrated extreme hardship to his spouse, daughter, or step-daughter if they were to join him to live in Mexico. Thus, extreme hardship to a qualifying family member for purposes of relief under 212(h) the Act, 8 U.S.C. § 1182(h), has not been established.

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(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed. The application will be denied.

ORDER: The appeal is dismissed. The application is denied.