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



H2

FILE:



Office:

PHOENIX

Date:

JUN 22 2009

IN RE: Applicant:



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

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.

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).

A handwritten signature in black ink, appearing to read "John F. Grisson".

John F. Grisson, Acting Chief
Administrative Appeals Office

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

The applicant, a native and citizen of Mexico, was found inadmissible to the United States under 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 multiple crimes involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen father and children.¹

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on any qualifying relatives and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated July 31, 2006.

In support of the appeal, the applicant submits the Form I-290B, Notice of Appeal (Form I-290B) and a letter. The entire record was reviewed and considered in rendering this decision.

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

- (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 . . . 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-
 - (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

¹ Although the applicant contends that he is the father of four U.S. citizen children, as outlined above, the AAO notes that the only U.S. birth certificate that lists the applicant as the father is that of [REDACTED] born in January 2006; the biological mother is listed as the applicant's live-in girlfriend, [REDACTED], a U.S. citizen. The other three U.S. birth certificates submitted by the applicant do not list a father; the biological mother is listed as [REDACTED] a native of Mexico. Moreover, neither the applicant's father and/or girlfriend specifically reference the fact that the applicant has four U.S. citizen children. As such, the issue of how many children the applicant has is unclear.

(regardless of the extent to which the sentence was ultimately executed).

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

The Attorney General [now Secretary, Homeland Security, (Secretary)] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (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 . . .²

In January 2003, the applicant was convicted of Criminal Damage, a violation of section 13-1602 of the Arizona Revised Statutes. The applicant was placed on probation and a sentence of 18 days imprisonment was imposed. In addition, the applicant was convicted of Threatening or Intimidating, a violation of section 13-1202 of the Arizona Revised Statutes, based on a January 2004 incident. He was placed on probation and a sentence of 30 days imprisonment was imposed.

The AAO must first analyze whether the applicant's conviction for criminal damage constitutes a crime involving moral turpitude under section 212(A)(i)(I) of the Act. In examining whether a crime involves moral turpitude, the Board of Immigration Appeals [the Board] held in *Matter of Perez-Contreras*, 20 I. & N. Dec. 615, 617-18 (BIA 1992) that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we

² Section 212(h) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the USCIS must then assess whether to exercise discretion.

have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In order to determine whether criminal damage constitutes a crime involving moral turpitude, the AAO must examine the statute itself to determine whether the inherent nature of the crime involves moral turpitude. If the statute defines a crime in which moral turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude for immigration purposes, and our analysis ends.

Section 13-1602 of the Arizona Revised Statutes states, in pertinent part:

A. A person commits criminal damage by **recklessly**:

1. Defacing or damaging property of another person; or
2. Tampering with property of another person so as substantially to impair its function or value; or
3. Tampering with the property of a utility.
4. Parking any vehicle in such a manner as to deprive livestock of access to the only reasonably available water.
5. Drawing or inscribing a message, slogan, sign or symbol that is made on any public or private building, structure or surface, except the ground, and that is made without permission of the owner.

The AAO finds that the Board's decision in *Matter of P*, 2 I. & N. Dec. 117 (BIA 1944) is relevant to this analysis. In *Matter of P*, the Board stated that one of the criteria adopted to ascertain whether a particular crime involves moral turpitude is that it be accompanied by a vicious motive or corrupt mind. "It is in the intent that moral turpitude inheres." *Id.* at 121. In this case, the intent required to be convicted of criminal damage is recklessness. The statute does not outline a requirement that the act of criminal damage show a vicious motive or a corrupt mind, as referenced in *Matter of P*. As such, the AAO concludes that the district director erred in concluding that the applicant's conviction for criminal damage resulted in an inadmissibility finding under section 212(a)(2)(A)(i)(I) of the Act.

Regarding the applicant's 2004 conviction for threatening or intimidating, the district director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Based on a thorough review of the file, the AAO determined that the record was unclear as to whether said conviction is for a crime involving moral turpitude and if so, whether said conviction falls within the petty offense

exception as outlined in section 212(a)(2)(A)(ii)(II) of the Act. As such, on April 3, 2009, the AAO sent a Request for Evidence to the applicant, noting as follows:

The question before the AAO is whether the applicant's conviction for Threatening or Intimidating...based on a January 2004 incident, is in fact a conviction for a crime of moral turpitude...and if so, whether said conviction falls under the petty offense exception.... Therefore, the AAO asks that the applicant submit certified court documents and/or any documents relating to the arrest.

See Request for Evidence (RFE), dated April 3, 2009. In response to the RFE, the applicant submitted a letter and documentation pertaining to his guilty plea for Criminal Damage. *See Stipulated Guilty Plea*, dated March 27, 2003. No documentation in response to the AAO's request, specifically, court records regarding the conviction for Threatening or Intimidating, was provided. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). As the applicant has failed to establish that his conviction for Threatening or Intimidating is not for a crime involving moral turpitude or that said conviction falls under the petty offense exception, the AAO concurs with the district director that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of a crime involving moral turpitude, namely, Threatening or Intimidating.³

A section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the inadmissibility bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship the applicant and/or his girlfriend experience upon removal is irrelevant to section 212(h) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's U.S. citizen father and children.

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 O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted) the BIA held that:

³ "Previous decisions by this Board have found that threatening behavior can be an element of a crime involving moral turpitude. *See Matter of B-*, 6 I&N Dec. 98 (BIA 1954) (involving usury by intimidation and threats of bodily harm); *Matter of C-*, 5 I&N Dec. 370 (BIA 1953) (involving threats to take property by force); *Matter of G-T-*, 4 I&N Dec. 446 (BIA 1951) (involving the sending of threatening letters with the intent to extort money); *Matter of F-*, 3 I&N Dec. 361 (C.O. 1948; BIA 1949) (involving the mailing of menacing letters that demanded property and threatened violence to the recipient). We find that the intentional transmission of threats is evidence of a vicious motive or a corrupt mind...." *In re Ajami*, 22 I. & N. Dec. 949, 1999 WL 487022 (BIA 1999).

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.

This matter arises in the Phoenix District Office, which is within the jurisdiction of the Ninth Circuit Court of Appeals. That court has stated, “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). *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). Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case.

The only reference to the hardship the applicant’s U.S. citizen father will encounter if the applicant relocates abroad due to his inadmissibility are the hardships associated with having to take full responsibility for the applicant’s U.S. children. The record fails to establish that the children’s biological mothers would be unable to raise their own children, thereby alleviating the applicant’s father’s concerns.

The AAO recognizes that the applicant’s father will endure hardship as a result of separation from the applicant. However, his situation, if he remains in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship based on the record. Thus, the AAO concludes that it has not been established that the applicant’s U.S. citizen father will suffer extreme hardship were he to remain in the United States while the applicant resides abroad due to his inadmissibility.

The applicant further asserts that his U.S. citizen children will suffer emotional and financial hardship were the applicant’s inadmissibility waiver denied. In a declaration he states that the children would suffer extreme emotional hardship due to the close relationship they have with him, and that they would suffer extreme financial hardship because he is the principal financial provider for the children. *Declaration of* [REDACTED] The record however, contains no documentation regarding his financial support or any other evidence of his relationship with his children that would establish that a separation at this time would cause hardship beyond that normally expected of one facing the removal of a parent. Based on the evidence provided, it has not been established that the applicant’s U.S. citizen children will suffer extreme hardship if the applicant’s waiver is not granted.

The AAO notes that extreme hardship to a qualifying relative must also be established in the event that he or she relocates abroad based on the denial of the applicant's waiver request. This criteria has not been addressed with respect to the applicant's U.S. citizen father. As such, it has not been established that the applicant's father would suffer extreme hardship were he to relocate to Mexico, his birth country, to reside with the applicant.

As for the applicant's U.S. citizen children, the applicant asserts that the children will not be allowed to accompany him to Mexico, but no statements from the applicant's children's biological mothers, one who is a native of Mexico and one who is currently the applicant's live-in girlfriend, have been provided to corroborate this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Suffice*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). As such, it has not been established that the applicant's children would suffer extreme hardship were they to relocate to Mexico to reside with the applicant.

As such, a review of the documentation in the record, when considered in its totality, reflects that the applicant has not established that his U.S. citizen children or father will face extreme hardship were the applicant unable to reside in the United States. The record demonstrates that the applicant's qualifying relatives face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a son/spouse is refused admission. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant 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. 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. The waiver application is denied.