

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H2

FILE:

Office: LOS ANGELES, CA

Date: JUN 24 2009

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 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.

John F. Grissom,
Acting Chief Administrative Appeals Office

DISCUSSION: The District Director Los Angeles, California, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be sustained.

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 committing 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 September 16, 2004. The applicant submitted a timely appeal.

On appeal, counsel submits additional declarations and previously submitted evidence. Collectively, the declarations by the applicant's wife state the following. She and her three children would experience hardship if separated from the applicant, whom they have a close relationship with. She would be unable to support her children without her husband's income, and would not be financially able to visit him in Mexico. Her children's education would be disrupted if they lived in Mexico because they do not read or write in Spanish, and furthermore, she does not read or speak Spanish well enough to adapt to life in Mexico. They would live in poverty in Mexico as her husband would not be able to financially support them, she would have allergies on account of its pollution, and she is concerned about Mexico's level of crime. Living in Mexico would separate her from her family members in the United States.

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 in the Superior Court of the State of California for the County of Orange on September 14, 1995 the applicant entered a plea of guilty and was found guilty of violation of section 487h(a) of the Cal. Penal Code, grand theft vehicles/trailers/equipment, a felony, on June 29, 1995. The judge suspended the applicant's three-year jail sentence and ordered him to serve three years of probation, spend 120 days in jail, and pay restitution.

Cal. Penal Code 487h(a) provides:

Every person who steals, takes, or carries away cargo of another, when the cargo taken is of a value exceeding four hundred dollars (\$400), except as provided in Sections 487, 487a, and 487d, is guilty of grand theft.

(b) For the purposes of this section, "cargo" means any goods, wares, products, or manufactured merchandise that has been loaded into a trailer, railcar, or cargo container, awaiting or in transit.

In *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003), the Ninth Circuit indicated that "We have previously determined that grand theft is a crime involving moral turpitude." (citing *Rashtabadi v. INS*, 23 F.3d 1562, 1568 (9th Cir.1994)). Thus, the applicant's grand theft conviction would constitute a crime involving moral turpitude; his conviction renders him inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime involving moral turpitude.

The AAO will now consider whether the applicant's section 212(h) waiver should be granted.

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 U.S. citizen spouse and three U.S. citizen children.

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).

In support of the waiver application, the record contains declarations, financial records, birth certificates, a marriage certificate, school records, photographs, real estate records, employment letters, and other documents.

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

In her declarations, the applicant's wife conveys that she and her children have a close relationship with the applicant. She indicates that she stays at home taking care of their children, and that her husband financially supports the family. The birth certificates indicate the applicant and his wife have three U.S. citizen children who are 6, 10, and 14 years old. Income tax records indicate that the

applicant is the sole income earner in his household. An employment letter dated October 7, 2004 states that he was employed as a taper earning wages of \$30.65 per hour.

Courts 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 evidence in the record, which shows the applicant as the sole means of financial support to his family, the AAO finds that the cumulative general emotional effect that family separation would have on the applicant’s wife and children, combined with the increased financial and familial burdens that his wife would face if her husband were removed from the United States, render the hardship in this case beyond that which is normally experienced in most cases of removal. Accordingly, the AAO finds that the applicant has established that his wife and children would suffer extreme hardship if his waiver of inadmissibility application were denied.

The applicant’s spouse indicates that her children do not do not read or write in Spanish and their education would be disrupted if they lived in Mexico.

United States court and administrative decisions, the AAO notes, have held that the consequences of deportation imposed on citizen children of school age must be considered in determining extreme hardship. For example, in *Matter of Kao & Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent’s 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan; she had lived her entire life in the United States and was completely integrated into an American lifestyle; and uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the Circuit Court indicated that “imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language,” must be considered in determining whether “extreme hardship” has been shown. And, in *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Circuit Court found the BIA abused its discretion in concluding that extreme hardship had not been shown in light of fact that aliens’ five-year-old citizen daughter, who was attending school, would be uprooted from the country where she lived her entire life and taken to land whose language and culture were foreign to her.

Based upon the aforementioned decisions, the AAO finds that the applicant’s three children, who have lived their entire lives in the United States, would suffer extreme hardship if they were to join the applicant to live in a country whose language and culture is foreign to them.

The grant or denial of the above waiver does depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's spouse and children, the applicant's gainful employment and payment of income taxes, and the passage of approximately 13 years since the applicant's most recent criminal conviction. The unfavorable factors in this matter are the applicant's criminal convictions for grand theft vehicles/trailers/equipment, misdemeanor receiving stolen property, and burglary and his initial entry without inspection and periods of unauthorized presence.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's breach of the laws of the United States, the severity of the applicant's criminal convictions is at least partially diminished by the fact that 13 years have elapsed since his most recent conviction. The AAO finds that the hardship imposed on the applicant's spouse and children as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 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. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.