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20 Massachusetts Avenue NW, Rm. 3000
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U.S. Citizenship
and Immigration
Services

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FILE:

Office: CLEVELAND, OH

Date:

MAR 03 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.

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, Cleveland, Ohio. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Canada 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 crimes involving moral turpitude. The applicant has a U.S. citizen spouse and three U.S. citizen children, and he seeks a waiver of inadmissibility in order to reside with his family in the United States.

The district director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *District Director's Decision*, at 3, dated March 19, 2007.

On appeal, counsel asserts that the district director's decision constituted an abuse of discretion. *Form I-290B*, received April 18, 2007.

The record includes, but is not limited to, counsel's brief and medical documents for the applicant's family members. The entire record was reviewed and considered in arriving at a decision on the appeal.

The applicant was convicted of uttering threats on July 29, 1998 (under Section 264.1(1) of the Criminal Code of Canada) and sexual interference on August 21, 1996 (under Section 151 of the Criminal Code of Canada), which are crimes involving moral turpitude.¹

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.

¹ The AAO notes that the applicant was convicted of breaking and entering and theft on November 27, 1997 (under Section 348(1)(B) of the Criminal Code of Canada), theft under \$5000 on June 13, 1996 (under Section 334(b) of the Criminal Code of Canada), theft under \$1000 on September 3, 1991 (under Section 334(b) of the Criminal Code of Canada), possession of property obtained by crime under \$1000 on July 2, 1991 (under Section 355(b) of the Criminal Code of Canada), attempted theft over \$1000 on August 7, 1990 (under Section 334(a) of the Criminal Code of Canada), possession of property obtained by crime over \$1000 on February 2, 1990 (under Section 355(a) of the Criminal Code of Canada) and possession of property obtained by crime over \$1000 on August 23, 1989 (under Section 355(a) of the Criminal Code of Canada). The record does not include sufficient evidence to determine whether these are crimes involving moral turpitude.

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

(h) 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.

The AAO notes that section 212(h) of the Act provides 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. 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 (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. These factors included 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.

The AAO notes that extreme hardship to a qualifying relative must be established whether the qualifying relative relocates to Canada or resides in the United States, as there is no requirement that he or she reside outside the United States based on the denial of the applicant’s waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event of relocation to Canada. Counsel states that the applicant’s daughter has been diagnosed with a heart defect and is continuously being reevaluated. *Brief in Support of Appeal*, at 7, undated. The record reflects that the applicant’s daughter was found to have a heart murmur at the age of 30 days. *Applicant’s Daughter’s Medical Records*, at 1, dated December 5, 2003. The record does not reflect the severity of the applicant’s daughter’s medical problem, how it affects her ability to function or that it requires her to remain in the United States for treatment. The record does not establish that the applicant’s daughter would suffer extreme hardship in the event of relocation to Canada based on any health concerns.

The record reflects that the applicant's two sons have vision impairment and they are receiving services at the Cleveland Sight Center. *Letter from [REDACTED] Cleveland Sight Center*, dated April 12, 2007. The applicant's younger son has congenital ocular albinism and he is significantly visually handicapped. *Letter from [REDACTED]*, dated April 9, 2007. The applicant's older son has been diagnosed with ocular albinism and secondary pendular nystagmus, has decreased pigmentation in both eyes, and experiences photophobia/light sensitivity. *Evaluation by [REDACTED]*, at 2, dated February 21, 2007. The applicant's older son is significantly handicapped from his condition and will need visual aids in most of his school activities and throughout life. *Letter from [REDACTED]*, dated April 9, 2007. The record includes copies of individualized education program reports for the applicant's two sons. Based on their medical problems and the impact of removing them from their established medical and educational assistance programs in the United States, the AAO finds that the applicant's sons would suffer extreme hardship in the event of relocation to Canada.

Counsel states that the applicant's spouse was diagnosed with pulmonic stenosis due to lesions associated with obstruction to her ventricular flow, she underwent pulmonic valve surgery and a subsequent stretching of the valve, and she is required to see a doctor every 6 to 12 months for reevaluation of her condition. *Brief in Support of Appeal*, at 6-7. The record reflects that the applicant's spouse had pulmonic valve surgery in 1982, had stretching of the pulmonic valve in 1986, and has been diagnosed with pulmonic valve stenosis, palpitations and murmur. *Applicant's Spouse's Medical Records*, at 1, dated April 5, 2004. Although the record does not reflect the severity of the applicant's spouse's medical problems, the AAO notes that the applicant's spouse would be dealing with her own medical problems while reestablishing health care and educational programs for two children who would be experiencing extreme hardship. Accordingly, the AAO finds that the applicant's spouse would suffer extreme hardship in the event of relocation to Canada.

The second part of the analysis requires the applicant to establish extreme hardship in the event that the qualifying relative resides in the United States. Counsel states that the applicant financially contributes to the family, there are elevated medical expenses, and the reduced source of income would result in suffering due to the difference in availability of medical treatment. *Brief in Support of Appeal*, at 11. The record does not include supporting evidence of counsel's claims. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The applicant's son's case manager states that the applicant has been involved in the children's development and education, he has been an active participant in all aspects of their lives and he has been the parent with whom she has had the most interaction with regard to planning their services. *Letter from [REDACTED] Cleveland Sight Center*. The record does not include evidence of the effect on the applicant's sons if the applicant were absent from their lives. However, the AAO notes that the applicant's spouse would, again, be dealing with her medical problems and solely responsible for the care of three children, two of whom have serious medical conditions that affect their ability to function independently. Based on a review of the record, the

AAO finds that, as a single parent, the applicant's spouse would experience extreme hardship if she remained in the United States following the removal of the applicant.

The applicant has, therefore, established that a qualifying relative would suffer extreme hardship, as required by section 212(h)(i)(B) of the Act. The AAO, therefore, turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States, which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors include the applicant's nine criminal convictions listed previously, his June 8, 1993 conviction for Dangerous Operation of a Motor Vehicle (under Section 249(1) of the Criminal Code of Canada), his September 22, 1994 convictions for Dangerous Operation of a Motor Vehicle and Driving While Disqualified (under Sections 249(2) and 259(4) of the Criminal Code of Canada) and his September 7, 1999 conviction for Failure to Appear (under Section 145(5) of the Criminal Code of Canada).

The favorable factors include the presence of the applicant's U.S. citizen spouse and children, the extreme hardship to the applicant's spouse if his waiver application is denied and the approved Form I-130 benefiting him.

The AAO finds that taken together, the favorable factors in the present case do not outweigh the adverse factors, and, therefore, that a favorable exercise of discretion is not warranted. In reaching its conclusion, the AAO specifically notes the applicant's 1996 conviction for sexual interference under Section 151 of the Criminal Code of Canada. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.