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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

H2

FILE:

Office: LOS ANGELES, CA

Date:

MAR 03 2009

IN RE:

APPLICATION:

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

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. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California. 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 Mexico who has been found to be inadmissible to the United States pursuant to § 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 arrested and convicted of crimes involving moral turpitude (CIMT). The record indicates that the applicant has a U.S. citizen mother, a lawful permanent resident father and a U.S. citizen son. He is the beneficiary of an approved petition for alien relative and seeks a waiver of inadmissibility in order to reside with his parents and son in the United States.

The district director denied the application after finding that the applicant had failed to establish extreme hardship to a qualifying relative. *Decision of the District Director*, dated August 29, 2006.

On appeal, the applicant asserts that he has no recollection or record of the crime for which the district director found him inadmissible. The applicant claims that the only time he ever had problems with the law was in 1997 for driving under the influence of alcohol or drugs. In support of this assertion, the applicant submits the disposition court record. The entire record was considered in rendering a decision on the appeal.

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) states in pertinent part that:

- (h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if-
 - (1)(A) [I]t is established to the satisfaction of the Attorney General that-
 - (i) [T]he 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 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, as the district director found in her decision, the record reflects that the applicant was convicted of a violation of section 245(a)(1) of the California Penal Code (CPC), assault with a deadly weapon, not firearm, great bodily injury likely, and was sentenced to 365 days in County Jail on April 14, 1993 in Superior Court Los Angeles County, California. The district director correctly concluded that this offense constituted a crime involving moral turpitude rendering the applicant inadmissible and a crime of violence pursuant to 18 U.S.C. § 16.

The record also contains a final court disposition from the Municipal Court of Antelope Judicial District, County of Los Angeles, State of California, dated August 29, 2002 showing that the applicant was found guilty of a misdemeanor in violation of PC section 23152(b), driving a vehicle with 0.08% or more by weight of alcohol in his blood, and was sentenced to 180 days in jail and five years probation. The applicant's conviction under PC section 23152(b) is not found to be a conviction for a crime involving moral turpitude.

The record indicates that the event which resulted in the applicant's conviction for a crime involving moral turpitude occurred on June 20, 1992. The AAO notes that an applicant 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 decision is the date of the final decision on the application for adjustment of status, which, in this case, must await the AAO's findings in the present matter.¹ Therefore, section 212(h)(1)(A) of the Act applies to the applicant as the crime for which he has been found inadmissible to the United States occurred more than 15 years prior to his application for adjustment of status.²

¹ The AAO notes that the appeal of the Form I-601 is part of the process of adjustment of status and, therefore, technically, the application for adjustment of status is not final until the appellate process is complete.

² The applicant was not eligible for consideration under 212(h)(1)(A) at the time the district director reached her 2006 decision as 15 years had not passed since the events that resulted in the applicant's conviction under CPC section 245(a)(1).

Based on the record before it, the AAO finds no evidence that the applicant's admission to the United States would be contrary to the welfare, safety or security of the United States. Further, it concludes that, despite his 2002 conviction for driving while intoxicated, the applicant has been rehabilitated. Accordingly, the applicant has established his eligibility for a waiver under section 212(h)(1)(A) of the Act. However, as a waiver of inadmissibility is granted at the discretion of the Secretary, the applicant must also establish that he warrants a favorable exercise of discretion pursuant to section 212(h)(2) of the Act.

In the present matter, the applicant has not only been found to have been convicted of a crime involving moral turpitude, but of a crime of violence. Therefore, he is subject to the regulation at 8 C.F.R. § 212.7(d), which states the circumstances under which a favorable exercise of discretion is warranted in the case of an applicant convicted of a crime of violence:

(d) Criminal grounds of inadmissibility involving violent or dangerous crimes

The Attorney General [now Secretary of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. § 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application of adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extreme unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The AAO finds that, in the instant case, no national security or foreign policy considerations are involved. Therefore, the applicant must demonstrate that the denial of the waiver would result in an exceptional or unusual hardship to a qualifying relative, in this case the applicant's parents or son.

The concept of exceptional or unusual hardship is addressed by the Board of Immigration Appeals (BIA) in *Matter of Montreal*, 23 I&N Dec. 56 (BIA 2001), in which the BIA found that many of the factors that are considered in assessing "extreme hardship" should be considered in evaluating "exceptional and extremely unusual hardship." The BIA held, however, that the hardship suffered by the qualifying relative(s) must be "substantially beyond that which would ordinarily be expected to result from the alien's deportation," but need not be "unconscionable." *Id.* At 59-63.

In determining whether the record establishes that any of the applicant's qualifying relatives would suffer exceptional or unusual hardship as a result of his inadmissibility, the AAO will, therefore, first consider whether the record before it demonstrates extreme hardship to these same individuals.

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 provides a list of factors relevant in 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 566.

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.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

The AAO notes that extreme hardship to the applicant’s parents or son must be established whether they reside in Mexico or the United States, as they are not required to reside outside the United States based on the denial of the applicant’s waiver request.

On appeal, the applicant contends that his parents and son would suffer extreme hardship financially and emotionally in the United States if he were removed. In his October 8, 2006 statement, the applicant states that his parents would be devastated if he were removed to Mexico as they are disabled and he is the child who lives with them and supports them financially. He states that he takes care of his parents and transports them to the hospital for medical attention and rehabilitation, as well as to church. The applicant also states that he has primary custody for his son. He asserts that denying his waiver would result in extreme hardship to his U.S. citizen son, U.S. citizen mother and lawful permanent resident father.

The applicant submits a statement from his parents, dated October 8, 2006. In their statement, the applicant’s parents claim that they and the applicant’s son depend on the applicant’s financial support to survive and any separation will leave them devastated. The parents assert that they have been on disability since August 1989 and December 11, 2002 respectively due to old age and that they have only limited income. They also state that they are very emotionally attached to their family members, and that they have been nervous, depressed, and have had trouble sleeping due to the amount of stress created by the prospect of their son’s removal. In support of these assertions, the record contains statements from the applicant’s brothers and sisters, which report that the applicant is the child who lives with and takes care of their parents and that they cannot support their parents.

The record also contains a letter, dated October 8, 2006, from the applicant's son, expressing his concerns about separation from the applicant. In his letter, the applicant's son states that he needs his father to stay in the United States because his mother lives nearby, that he loves both parents and cannot leave either of them, and that, without his father, he cannot get the things he needs and wants, that he will not have money to spend on things that he wants and that his dog needs the applicant to buy him food.

Economic hardship faced by the applicant's parents and son is relevant in determining whether extreme hardship exists. However, the record does not contain any documentary evidence showing the incomes of the applicant and his parents, the expenses of the household or that the applicant is financially supporting his parents and his son. Neither does the record contain documentation showing that the applicant would be unable to find a job in Mexico and earn sufficient income to assist his parents in supporting their family from outside the United States. The AAO also observes that the record fails to demonstrate that the applicant's parents and son would be unable to obtain financial assistance or generalized support from other family members. The applicant's parents have all their children in the United States and the record does not provide documentary evidence that the applicant's siblings are unable to assist their parents financially or support them emotionally in the applicant's absence.

Although the applicant claims that his son's mother is not able to care for him because of her history of drug abuse, the record does not contain any documentary evidence to support this assertion. The AAO notes that the applicant's son was placed in foster care on October 17, 2002, but the record does not provide an explanation for this action. The submitted Custody Order Juvenile Final Judgment entered by the Superior Court of California, County of Los Angeles on July 1, 2003 places the applicant's son in the joint legal custody of his parents, giving the applicant primary physical custody. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

The record contains a letter, dated September 13, 2006, from [REDACTED] AV Occupational Medicine. In this letter, [REDACTED] certifies that both the applicant's parents have been under his care since 2002 and that the applicant's father has been on disability since August 1989 and his mother since December 11, 2002. However, [REDACTED] fails to indicate the extent of the applicant's parents' disabilities, how these disabilities affect their ability to function on a daily basis, or that they are dependent on the applicant's assistance.

The AAO is mindful of and sensitive to the applicant's and his family members' concerns about maintaining their family and the hardship the applicant's parents and son will endure if separated from him. However, it does not find the record to contain evidence that distinguishes the applicant's parents and son's situations, if they remain in the United States, from that of other individuals separated as a result of removal. U.S. court decisions have repeatedly held that the common results

of deportation or exclusion are insufficient to prove extreme hardship. *See, e.g. Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991)(upholding the BIA's finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission); *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996)(holding that the common results of deportation are insufficient to prove extreme hardship and defining "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation). Having carefully considered the hardship factors, both individually and in the aggregate, the AAO concludes that the record in this case does not establish extreme hardship to the applicant's parents or son in the event that they remain in the United States following the applicant's removal.

The AAO notes that the record fails to address the issue of relocation and its impact on the applicant's parents and son. While in his October 8, 2006 statement the applicant states that he does not see how he can care for his son in Mexico as he has little or almost no knowledge of that country, he does not indicate how relocation would affect his son, nor does he submit any evidence to establish that his son would suffer extreme hardship if he relocated to Mexico. Therefore, the AAO is unable to determine that the applicant's parents or son would suffer extreme hardship if they traveled to Mexico with the applicant.

As the record does not establish that a qualifying relative would suffer extreme hardship as a result of a denial of the applicant's waiver application, the AAO finds that it also fails to demonstrate that a qualifying relative would suffer the heightened standard of exceptional or unusual hardship. Accordingly, the applicant does not warrant a favorable exercise of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A) 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.

ORDER: The appeal is dismissed.