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U.S. Citizenship  
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Services

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*He*

FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

**MAR 10 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).

*Michael Shumway*

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the waiver application that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Cuba who resides in Hialeah, Florida. The applicant filed for adjustment of status pursuant to the Cuban Adjustment Act and was found to be inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act) for having been convicted of crimes involving moral turpitude.

The applicant is married to a United States citizen, is the son of a United States citizen, and the father of a United States citizen. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his spouse, his father, and his child.

The director concluded that the applicant had not demonstrated that denial of the waiver application would result in extreme hardship to a qualifying relative as described in section 212(h) of the Act. The application was denied accordingly.

On appeal, counsel asserted that the director's denial of the waiver application was incorrect. Counsel submitted no other argument on appeal and submitted no new evidence.

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

(i) In general. – Except as provided in clause (ii), any 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].

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

(I) the crime was committed when the alien was under 18 years of age . . . . or

(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).

The record reveals the following criminal history:

(1) The applicant was arrested, on May 7, 1973, in Clifton, New Jersey, pursuant to a summons or warrant charging a violation of N.J.S.A. 2a:170-1, failure to give a good account of oneself. The applicant was convicted of that offense and sentenced to 30 days confinement, which sentence was suspended, and fined \$50. (Complaint [REDACTED], Summons/warrant number [REDACTED])

(2) The applicant was arrested, in Clifton, New Jersey, on June 12, 1973, for violating N.J.S.A. 2a:141.1, robbery, and 2a:151-5, committing a crime while armed. On November 12, 1973 the applicant was acquitted of those offences. (Complaint # [REDACTED] Indictment/accusation number [REDACTED])

(3) The applicant was arrested, on November 6, 1973, in Passaic, New Jersey, for a violation of N.J.S.A. 2a:170-1, loitering. The disposition of that charge is unknown to the AAO. (Agency case number [REDACTED])

(4) The applicant was arrested, under the name [REDACTED] on October 7, 1974, for a violation of section 240.25 subdivision 05 of the New York Penal Law, harassment. The disposition of that charge is unknown to the AAO.

(5) The applicant was arrested, under the name [REDACTED], on October 8, 1974, in Sullivan County, New York, for a violation of section 160.10 subdivision 2a of the New York Penal Law, Robbery in the Second Degree (Forcible Theft with Injury). That charge was subsequently amended to subdivision 3 of that section, Robbery in the First Degree (Armed Robbery). On November 18, 1974 the applicant was found guilty of the lesser offense under subdivision 2a. On November 25, 1974 the applicant was committed to the custody of the state prison in Elmira, New York, to serve an indeterminate sentence of up to three years for the robbery. (Agency case number [REDACTED])

(6) On August 30, 1978 and/or March 1, 1979, the applicant was arrested on, in Passaic, New Jersey, for a violation of N.J.S.A. 2a:170-30.1, larceny. On May 7, 1979, the applicant was convicted of a violation of N.J.S.A. 2a:94-1, entering with intent to steal; a violation of N.J.S.A. 2a:85-5 and 2a:119-2, attempted larceny; and a violation of N.J.S.A. 2a:94-3, possession of burglar tools. The larceny charge was dismissed. On June 5, 1979 the applicant was sentenced, on each count, to an indeterminate term of confinement with a five year maximum, those sentences to be served concurrently. (Summons/warrant number [REDACTED], Indictment [REDACTED] Accusation [REDACTED] Agency case number [REDACTED])

(7) The applicant was arrested, on December 16, 1981, for violations of N.J.S.A. 2c:18-2, burglary, and N.J.S.A. 2c:5-5, possession of burglar tools. On December 18, 1981 the burglary charge was reduced to a violation of N.J.S.A. 2c:18-3, trespassing. The applicant was convicted of possession of burglar tools, and sentenced to 60 days confinement, which was suspended, and placed on one year of probation. (Summons/warrant number [REDACTED])

(8) The applicant was arrested on February 11, 1989, in Miami, Florida, for soliciting prostitution. On June 2, 1989 the applicant was convicted of that offense, and placed on six months probation. (Case # [REDACTED])

(9) The applicant was arrested, on September 29, 1989, in Miami, Florida, for resisting an officer without violence. On June 26, 1990, the applicant was convicted of that offense, and fined \$75. (Case number [REDACTED])

(10) On May 26, 1990 the applicant was arrested, in Miami, Florida, for driving under the influence. On October 10, 1990 the applicant was convicted of that offense, and fined \$1,082.50. (Case number [REDACTED])

(11) The applicant was arrested on August 16, 1993, for a violation of interstate transportation of stolen property. On January 28, 1994, the applicant was convicted, in the U.S. District Court for the Southern District of Florida, pursuant to his guilty plea, of a violation of 18 U.S.C. §§ 371, 2314, conspiracy to sell and possess stolen aircraft parts, and was sentenced to 21 months in a Federal penitentiary, three years of supervised release, and ordered to pay restitution of \$138,000. All remaining counts were dismissed. (Case numbers [REDACTED] and [REDACTED])

The conviction in number five, above, was for violating section 160.10 subdivision 2a of the New York Penal Law, robbery in the second degree (forcible theft with injury). The statute and subdivision in that case state, in pertinent part,

A person is guilty of robbery in the second degree when he forcibly steals property and when . . . [i]n the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime . . . [c]auses physical injury to any person who is not a participant in the crime . . .

Robbery is clearly a crime involving moral turpitude. The force or threatened force against the person of the victim and the intent to deprive him of his property unlawfully both supply the element of "evil intent." *Matter of Martin*, 18 I. & N. Dec. 226 (BIA 1982) (Colorado law); *Matter of Carballe*, 19 I. & N. Dec. 357 (BIA 1986) (Florida Statute); *Ashby v. INS*, 961 F.2d 555 (5th Cir. 1992); *Matter of Burbano*, Int. Dec. 3229 (BIA 1994). The applicant's conviction in number five, above, constitutes a conviction for a crime of moral turpitude.

In number 11, above, the applicant was convicted, pursuant to his plea, of a violation of 18 U.S.C. § 371, conspiracy to commit a crime, to wit: 18 U.S.C. § 2314, sale or possession of stolen property. A violation of 18 U.S.C. 2314 requires knowledge that the property sold or possessed is stolen. Knowing possession or sale of stolen property is a crime involving moral turpitude. *Wadman v. INS*, 329 F.2d 812, 814 (9th Cir.1964). The applicant's conviction of conspiracy in number 11, above, is a conviction of a crime involving moral turpitude.

The applicant's convictions in number six, above, were for violating N.J.S.A. 2a:94-1, entering with intent to steal; a violation of N.J.S.A. 2a:85-5 and 2a:119-2, attempted larceny; and a violation of N.J.S.A. 2a:94-3, possession of burglar tools. In number seven, above, the applicant was convicted of violating N.J.S.A. 2c:5-5 by possessing burglar tools.

Those convictions may also be convictions of crimes involving moral turpitude. Because the applicant has already been shown to have been convicted of two crimes involving moral turpitude

in numbers five and eleven, above, the AAO need not analyze the applicant's remaining convictions in order to render a decision on the Form I-601 appeal.

The applicant has been convicted of at least two crimes involving moral turpitude. The Form I-601 application for waiver in this matter indicates that the applicant was born on July 24, 1954. He was therefore over 18 years of age when he committed each of the enumerated crimes involving moral turpitude. Further, he has been sentenced to more than one year for each of those convictions. He thus does not meet the requirements for an exception as set forth in section 212(a)(2)(A)(ii) of the Act.

The AAO finds that because he was convicted of a crime involving moral turpitude when he was over 18 years old and does not qualify for the single petty offense exception, the applicant is inadmissible pursuant to Section 212(a)(2)(A). The balance of this decision will pertain to whether waiver of that inadmissibility is available and whether the applicant has demonstrated that waiver of that inadmissibility, if available, should be granted.

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

The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . 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 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 (BIA1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a nonexclusive list of factors relevant to determining whether an alien has established extreme hardship to a qualifying relative. 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. The BIA has held:

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).

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

In an affidavit dated July 6, 1990, the applicant stated that he is completely rehabilitated since 1979, the last time he was charged with a crime.

As detailed above, the applicant was arrested during 1981, twice during 1989, and again during May 1990. Those facts contradict the applicant's assertion, made in his sworn affidavit, that he was not arrested between 1979 and July 1990.<sup>1</sup>

Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. Further, the applicant must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

In a brief filed with the application counsel cited *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978) for the proposition that CIS should consider various aspects of hardship to the applicant in deciding whether to grant waiver in this matter. Counsel then made various arguments pertinent to the hardship that would be occasioned to the applicant if the instant waiver application is not approved. The *Anderson* case did not involve waiver of inadmissibility pursuant to section 212(a) of the Act. As was noted above, hardship to the applicant, of whatever sort, is not directly relevant to the decision in the instant matter.

Counsel also argued that the applicant's wife and his children depend upon him for financial and emotional support. Counsel stated that the applicant's wife would be unable to support the family without the applicant. Counsel stated that the applicant is very close to his children and they love him very much. Counsel stated that the applicant's whole family is in the United States.

Counsel stated that the applicant's parents require ongoing medical treatment and if waiver is not approved, "extremely dire consequences" to his parents' health would ensue. Counsel did not state in what way the applicant has been alleviating his parents' medical issues, or what the dire consequences to which he referred are.

Counsel further stated that, if the applicant takes his family with him to Cuba, they will suffer extreme hardship because Cuba is a totalitarian-ruled Communist country. Counsel stated that the children would therefore be brainwashed by attending a school that espouses Communism. All of

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<sup>1</sup> Further, a few months subsequent to that statement, the applicant was arrested again, and on January 28, 1994, the applicant pleaded guilty to a felony. Those additional offenses cast yet further doubt on the applicant's rehabilitation.

the applicant's children to whom the file refers are adults. No reason exists to believe that they would follow the applicant to Cuba and, in any event, they are not obliged to follow him.

Counsel stated, "It is clear from the social and economic conditions that currently exist in Cuba, [the applicant's] chances of finding employment are essentially none." Counsel provided no evidence in support of that assertion, but cited precedent for the proposition that, if that circumstance is demonstrated, it may be sufficient to establish extreme hardship.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

In a letter dated July 27, 2006 the applicant's wife stated that she loves the applicant very much, would be unable to live without him, and would accompany him to Cuba if he is removed from the United States. She adds that she should not be forced to do so. The AAO notes that the applicant's wife would not be required to accompany him to Cuba.

In an affidavit dated May 31, 1990 the mother of the applicant's son [REDACTED] stated that the applicant provides her \$200 per month to support their son, and sees him every weekend.

The applicant's son, [REDACTED] stated in a July 14, 2006 letter that he hopes his father will not be deported. That letter indicates that [REDACTED] the youngest of the applicant's children listed on the Form I-485 in the record, is married and has a child. The Form I-485 indicates that [REDACTED] was born on April 3, 1981, and was therefore 25 years old on the date of that letter and is 27 today. The return address on that letter shows that the applicant's son lived in Greenville, South Carolina when he composed that letter, more than 700 miles from the applicant's residence in Hialeah, Florida. The applicant's son did not state that he depends on the applicant financially, and no reason exists to believe that he continues to be financially dependent on the applicant.

The record contains no evidence pertinent to the applicant's other two children. However, they were born during 1976 and 1978. No reason exists to assume that they are now financially dependent on the applicant.

A 1999 Form 1040 U.S. Individual Income Tax Return in the record shows that the applicant filed as single that year and declared Line 22 Total Income of \$27,793. The record also contains printouts from the IRS showing that the applicant and his wife filed joint 2003, 2004, and 2005 Form 1040 tax returns and declared Line 22 Total income of \$24,737, \$27,161, and \$28,276 during those years, respectively.

Those printouts contain no indication of the individual contributions of the applicant and his wife to those amounts. The record contains no W-2 forms or any indication of the amount the applicant earned during recent years and the amount his wife earned. Absent any evidence, this office cannot find that the applicant's wife would be unable to support herself in the applicant's absence.

In her July 27, 2006 letter, the applicant's wife stated that the applicant's father has a heart

condition that required an operation two years before, that the applicant sees his father three to four times per week and recently spent time in the hospital with him. She did not describe any assistance the applicant might be rendering to his father.

In a July 24, 2007 letter the applicant's younger brother stated that the applicant's father would suffer if the applicant was forced to return to Cuba, noting that the applicant's father was a political prisoner in Cuba for 12 years and is now ill.

In his own letter of July 25, 2006, the applicant's father<sup>2</sup> stated that he has a heart condition that requires constant monitoring and care, and that he has relied heavily on the applicant and needs his assistance daily. The applicant's father did not concretely describe any assistance rendered by his son.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's qualifying relatives face extreme hardship if the applicant is refused admission. Rather, the record suggests that they will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States.

The record demonstrates that the applicant has very loving and devoted family members who are extremely concerned about the prospect of the applicant's departure from the United States. Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances.

In nearly every qualifying relationship, whether between husband and wife or parent and child, there is affection and a certain amount of emotional and social interdependence. While, in common parlance, separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress made plain that it did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist.

Separation from one's spouse or child is, by its very nature, a hardship. The point made in this and prior decisions on this matter, however, is that the law requires that, in order to meet the standard in INA § 212(i), the hardship must be greater than the normal, expected hardship involved in such cases.

U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968)

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<sup>2</sup> The record contains other letters, including letters from other members of the applicant's wife's family. Because those other letters do not address any hardship that would be caused to any qualifying relative, they will not be further addressed.

(holding that separation of family members and financial difficulties alone do not establish extreme hardship). “[O]nly in cases of great actual or prospective injury . . . will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship.

The U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The AAO therefore finds that the applicant failed to establish extreme hardship to his qualifying relatives as required under INA § 212(h), 8 U.S.C. § 1186(h) and that waiver is therefore unavailable. Because the applicant has been found statutorily ineligible, the AAO need not address whether the applicant merits waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

**ORDER:** The appeal is dismissed.