



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

H2

NOV 17 2009

FILE:

CDJ 1992 625 424

Office: CIUDAD JUAREZ, MEXICO Date:

IN RE: Applicant:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under sections 212(h), 8 U.S.C. § 1182(h), and 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), of the Immigration and Nationality Act.

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Ciudad Juarez, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be 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 committing a crime involving moral turpitude, and section 212(a)(9)(B)(i)(II), of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year.

The applicant is the spouse of a lawful permanent resident and the father of U.S. citizen children. The applicant sought a waiver of inadmissibility pursuant to sections 212(h), 8 U.S.C. § 1182(h), and 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), of the Act. The OIC 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 OIC*, dated June 26, 2006. The applicant submitted a timely appeal.

On appeal, counsel states that the OIC erred in denying the waiver application. Counsel states that the applicant is married to a lawful permanent resident and that his spouse has been his family's sole support since his removal eight years ago. Counsel indicates that the OIC failed to consider the emotional, economic, and educational hardship to the applicant's four U.S. citizen children.

The AAO will first consider the finding of inadmissibility under section 212(a)(9)(B)(i)(II), of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

Inadmissibility for unlawful presence is found under section 212(a)(9)(B) of the Act. That section provides, in part:

(B) Aliens Unlawfully Present

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States without inspection in September 1977, and was deported from the United States in August 1986. The applicant entered the United States without inspection in January 1991 and remained until October 1998. The applicant accrued over one year of unlawful presence, from April 1, 1997 to October 1998, and triggered the ten-year-bar when he left the United States, rendering him inadmissible until October 2008. Since it has been more than 10 years since the applicant left the United States in October 1998, he is no longer inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The AAO will now consider the finding of inadmissibility under section 212(a)(2)(A)(i) of the Act.

A document in the record reflects that in the state of Washington, on September 14, 1985, the applicant was arrested for and charged with two counts: (1) vehicular homicide in violation of RCW 46.61.520(1), and (2) felony eluding a pursuing police vehicle in violation of RCW 46.61.024. For vehicular homicide, he was sentenced to 17 years and 6 months confinement (of which he served 17 months and was then deported); for eluding a police vehicle he was sentenced to three months jail.

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

(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.

(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, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, 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).

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)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] 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 [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 and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture

The Board of Immigration Appeals (BIA) 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....

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 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.)

At the time of the applicant's conviction, the Washington statute RCW 46.61.520(1) provided that:

When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:

- (a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or
- (b) In a reckless manner; or
- (c) With disregard for the safety of others.

RCW 46.61.520(1) provides that a driver is guilty of vehicular homicide if he causes a death while operating a vehicle: "(a) While under the influence of intoxicating liquor . . . ; or (b) In a reckless manner; or (c) With disregard for the safety of others."

RCW 46.61.520 is a negligent homicide statute. A person is convicted under the statute whenever there is "substantial evidence that the victim's death occurred as a proximate result of the operation of any vehicle by any person (1) while under the influence of or affected by intoxicating liquor, narcotic drugs or dangerous drugs, or (2) in a negligent manner no matter what degree of negligence is involved." *State of Washington v. Haley*, 39 Wash.App. 164, 692 P.2d 858 (1984). The Supreme Court of Washington in *State v. Roggenkamp*, 153 Wash. 2d 614, 106 P.3d 196 (2005), states that driving in "a reckless manner" in subsection (b) is not defined in the vehicle homicide statute, but in case law it means "driving in a rash or heedless manner, indifferent to the consequences." *Id.* at 621-622. The phrase "in a reckless manner" is not defined as the "willful or wanton disregard for the safety of persons or property." *Id.* at 630.

Death resulting from negligent or reckless operation of an automobile has been found not be a crime involving moral turpitude. In *People v. Montilla*, 134 Misc.2d 868, 513 N.Y.S.2d 338 (N.Y.Sup.1987), the court held that second-degree vehicular manslaughter in violation of Penal Law Section 125.12 is not a crime involving moral turpitude since it is a crime based on completely unintentional conduct, criminal negligence, in contrast to crimes that involve some form of evil intent. *Id.* at 870. Penal Law § 125.12 defines second-degree vehicular manslaughter as the commission of criminally negligent homicide by means of a vehicle while the driver was intoxicated. *Id.* at 869. Penal Law § 15.05 (4) states that "[a] person acts with criminal negligence*** when he

fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists.” *Id.* at 869-870.

In *Matter of N-*, 1 I&N Dec. 181 (BIA 1941), the respondent drove his automobile while intoxicated upon a sidewalk and struck a woman who subsequently died of her injuries. He was convicted of manslaughter in violation of section 4586 of the Arizona Code. Section 4586 of the Arizona Code provided that:

Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: Voluntary, upon a sudden quarrel or heat of passion; involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection.

In concluding that the respondent’s crime did not involve moral turpitude, the BIA found that he committed involuntary manslaughter and cited to a Rhode Island District Court decision, *In re Schiano Di Cola*, 7 F.Supp. 194, 195 (D.R.I.1934), which the Court stated is squarely in point, as the Rhode Island District Court held that manslaughter arising from the involuntary injury to a person, which results in death, through negligent or reckless operation of an automobile, does not involve moral turpitude.

In consideration of the decisions in *People v. Montilla*, *Matter of N-*, and *In re Schiano Di Cola*, the AAO finds that vehicular homicide under RCW 46.61.520(1) would not constitute a crime involving moral turpitude.

The felony fleeing statute is found under RCW 46.61.024. Since the applicant’s conviction occurred prior to the revision of RCW 46.61.024 in 2003, the convicting statute would have read that:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

The felony fleeing statute criminalizes a person who willfully fails or refuses to stop his vehicle and drives it in a manner of wanton or willful disregard for the lives or property of others while attempting to flee a pursuing police vehicle after being signaled to stop the vehicle.

Aggravated fleeing a police officer in violation of Ill. Statute 625 ILCS 5/11-204.1(a)(1) involved moral turpitude in *Mel v. Ashcroft*, 393 F.3d 737 (7th Cir. 2004). In concluding that aggravated fleeing is a crime involving moral turpitude, the court reasoned that a person who deliberately flees at a high speed from an officer who, the flier knows, wants him to stop, thus deliberately flouting lawful authority and endangering the officer, other drivers, passengers, and pedestrians, is deliberately engaged in seriously wrongful behavior.

Here, the AAO finds the applicant's conviction would constitute a crime involving moral turpitude as he willfully failed or refused to immediately bring his vehicle to a stop and drove his vehicle in a manner of wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop.

The AAO notes that the applicant's fleeing conviction does not fit the petty offense exception in section 212(a)(2)(A)(ii)(II), which requires that the maximum penalty possible must not exceed imprisonment for one year, and the alien must not have been sentenced to a term of imprisonment in excess of 6 months, regardless of the extent to which the sentence was ultimately executed. With the applicant's conviction the sentence imposed was for three months in jail. However, for a class C felony, which is what the applicant's conviction is, a person may be punished by confinement in a state correctional institution for five years or be fined in an amount fixed by the court of ten thousand dollars, or by both confinement and fine. *See*, RCW 9A.20.021. Thus, the applicant does not qualify for the petty offense exception.

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if the 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; the applicant's admission to the United States must not be contrary to the national welfare, safety, or security of the United States; and the applicant must establish that he has been rehabilitated.

Since the criminal conviction for which the applicant was found inadmissible occurred more than 23 years ago, it is eligible for review for a waiver under section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and section 212(h)(1)(A)(iii) requires the applicant to establish that he has been rehabilitated.

On appeal, counsel states that the applicant is married to a lawful permanent resident and that his spouse has been his family's sole support since his removal eight years ago. He states that the applicant's wife struggles to support the family, that 23-year-old [REDACTED] works to support the family, and that 20-year-old [REDACTED] attends Palo Verde College. Counsel indicates that the OIC failed to consider the emotional, economic, and educational hardship to the applicant's four U.S. citizen children who are 23, 20, 16, and 4 years old.

However, the applicant submitted no evidence to show that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by sections 212(h)(1)(A)(ii) and (iii) of the Act. Consequently, the AAO finds that the applicant has not established the criterion under the waiver provision of section 212(h)(1)(A) of the Act and will review his eligibility under section 212(h)(1)(B) of the Act.

Section 212(h)(1)(B) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if the applicant establishes that the bar to admission 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 is the applicant's lawful permanent spouse and his four U.S. citizen children. If extreme hardship to the qualifying relative is established, the Attorney General 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).

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

In rendering this decision, the AAO has carefully considered all of the evidence in the record such as birth certificates, a marriage certificate, and other documentation.

The AAO notes that the undated letter by the applicant's wife does not have an English language translation. The regulation at 8 C.F.R. § 103.2(b)(3) states:

- (3) Translations. Any document containing foreign language submitted to the Service [now the Bureau of Citizenship and Immigration Services, "Bureau"] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is

competent to translate from the foreign language into English.

In that the undated letter by the applicant's spouse is not accompanied by an English language translation, the letter will carry no weight in this proceeding.

Counsel states that the applicant's spouse has the sole support of their family sole since the applicant's removal eight years ago, and that the family is struggling financially. According to counsel, the applicant's 23-year-old daughter is working to support the family. However, no documentation has been provided of the income or financial obligations of the applicant's family. In the absence of such documentation, the AAO cannot determine whether the applicant's family is unable to meet its monthly financial obligations without the applicant's assistance. 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).

Counsel states that the emotional hardship of the applicant's four U.S. citizen children has not been considered in the hardship determination. He states that the applicant's four children, who are now 26, 23, 19, and 7 years old, have been separated from the applicant for almost eight years. Family separation must be considered in determining hardship. *See, e.g., Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) ("the most important single hardship factor may be the separation of the alien from family living in the United States"). However, courts have found that family separation does not conclusively establish extreme hardship. In *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the 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." (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), states that "[e]xtreme hardship" is hardship that is "unusual or beyond that which would normally be expected" upon deportation and "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship." (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991).

The AAO is mindful of and sympathetic to the emotional hardship that is endured as a result of family separation. However, the record before the AAO fails to establish that the situation of the applicant's wife and children, if they remain in the United States without the applicant, rises to the level of extreme hardship. The record is insufficient to show that the emotional hardship to be endured by the applicant's family members, as a result of separation from the applicant, is unusual or beyond that which is normally to be expected from an applicant's bar to admission. *See Hassan and Perez, supra*.

Although counsel states that the applicant's children have experienced educational hardship, he has provided no evidence of such hardship. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra*.

Having carefully considered the hardship factors raised collectively, the AAO finds that in this case those factors are not sufficient to establish extreme hardship to the applicant's family members if they remain in the United States without him.

The applicant makes no claim of extreme hardship to either his wife or children if they were to join him to live in Mexico.

Consequently, the factors presented do in this case do not constitute extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act, 8 U.S.C. § 1182(h).

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he 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 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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.