



U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

PUBLIC COPY

H2

FILE:

Office:

PHILADELPHIA

Date:

NOV 19 2009

IN RE: Applicant:

APPLICATION:

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

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting District Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of St. Lucia, was found inadmissible to the United States under sections 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act, (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 and under 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant sought waivers of inadmissibility pursuant to sections 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse and step-child, born in 1993.

The acting district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Form I-601, Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the Acting District Director*, dated May 30, 2006.

In support of the appeal, counsel for the applicant submits a brief, dated July 29, 2006. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

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...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.

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an

immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General (Secretary) that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien...

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

(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 . . . 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-

(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:

The Attorney General [now Secretary, Homeland Security, (Secretary)] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana 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 . .

Regarding the applicant's ground of inadmissibility under Section 212(a)(9)(B)(i)(II) of the Act, the record establishes that the applicant entered the United States on July 18, 1985 with a valid Crewman's Landing Permit (Form I-95A), with permission to remain until July 19, 1985. In January 1998, the applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status (the first Form I-485). In July 1999, the applicant was issued the Form I-512, Authorization for Parole of an Alien into the United States (Form I-512) and subsequently used the advance parole authorization to depart and re-enter the United States. The Form I-485 was denied on February 24, 2004 based on his divorce from his U.S. citizen petitioner in July 2001. The applicant re-married a U.S. citizen in August 2001 and consequently re-filed a second Form I-485 (the second Form I-485) on October 31, 2003, which was denied on June 2, 2006.

The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, dated May 6, 2009. As such, the applicant accrued unlawful presence from April 1, 1997, the date of the enactment of the unlawful presence provisions, until January 1998, the date of his proper filing of the first Form I-485. The acting district director thus erred in finding the applicant inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (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, as the record establishes that the applicant was unlawfully present for a period of more than 180 days but less than one year. Pursuant to section 212(a)(9)(B)(i)(I), the applicant is barred from again seeking admission within three years of the date of his departure.

An application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The AAO notes that the acting district director denied the applicant's second I-485 application two days after the denial of the I-601 application. The applicant was not afforded the opportunity to pursue the appellate process prior to the denial of the second I-485. The AAO finds that the denial of the second I-485 was premature in that, as of today, the applicant is still seeking admission by virtue of adjustment from his parole status. The applicant's last departure occurred in August 2003. It has now been more than three years since the departure that made the applicant inadmissible pursuant to section 212(a)(9)(B) of the Act. A clear reading of the law reveals that the applicant is no longer inadmissible under section 212(a)(9)(B) of the Act.

Regarding the acting district director's finding that the applicant was also inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of crimes involving moral turpitude, the record establishes that although the acting district director concluded that the applicant was convicted of retail theft on two separate occasions, based on incidents in March 2000 and January

2001, the record only establishes that the applicant was convicted<sup>1</sup> of retail theft on one occasion, in March 2000.<sup>2</sup>

Based on a thorough review of the file, the AAO determined that the record was unclear as to whether said conviction fell within the petty offense exception as outlined in section 212(a)(2)(A)(ii)(II) of the Act. As such, on July 10, 2009, the AAO sent a Request for Evidence (RFE) to the applicant, noting as follows:

[T]he AAO asks that the applicant submit certified court documents, police reports and/or any other documents relating to the arrest in March 2000, to establish the merchandise involved and its value. Based on that information, the AAO will be able to determine whether the applicant was convicted of a summary offense, a misdemeanor or a felony and, by extension, whether said conviction falls under the petty offense exception.

---

<sup>1</sup> Counsel for the applicant contends that the applicant was never convicted of the offense of Retail Theft. As counsel asserts, “the applicant entered no plea, was not tried, made no admission of guilt, and ultimately had the charges dropped and his record expunged. None of the indicia of neither a conviction, nor any of the criminal grounds of inadmissibility apply here....” See *Brief in Support of Appeal*, dated July 29, 2006.

Pursuant to section 101(a)(48) of the INA,

- (A) The term “conviction” means, with respect to an alien, 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 had 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 establishes that based on his retail theft offense in March 2000, the applicant was placed on probation for a period of 12 months, was forced to pay restitution, and was ordered to perform 16 hours of community service. See *Order*, dated October 16, 2000. Were the applicant not guilty of retail theft and/or admitted sufficient facts to warrant a finding of guilt, a court would not have ordered probation/restitution/community service, which are in essence forms of punishment, penalty or restraint. As such, despite counsel’s assertions to the contrary, the AAO concludes that the applicant was convicted of retail theft in October 2000, as outlined in section 101(a)(48)(A) of the Act, based on a March 2000 offense.

<sup>2</sup> Documentation in the record indicates one case number, 00439, stemming from one incident of retail theft, on March 4, 2000. See *Order*, dated March 16, 2000, *Delaware County Criminal Case Docket*, dated August 15, 2005, *Criminal Case Transcript Inquiry*, undated and *Certificate of Completion of A.R.D. Probation*, undated. No documentation in the record establishes an arrest in January 2001 and/or a subsequent conviction, for retail theft.

See *Request for Evidence (RFE)*, dated July 10, 2009. In response to the RFE, counsel for the applicant submitted the following: a letter from [REDACTED] confirming that the applicant completed the A.R.D. Program on October 16, 2001, a Certification of Completion of A.R.D. Probation, dated October 16, 2009, and an Order from the Court of Common Pleas of Delaware County, Pennsylvania Criminal Division, dated October 16, 2000. These documents are duplicates, previously submitted by the applicant and referenced in the AAO's RFE. No documentation in response to the AAO's request, specifically, court documents, police reports and/or any other documents relating to the arrest in March 2000, to establish the merchandise involved and its value, in order for the AAO to be able to determine whether the applicant was convicted of a summary offense, a misdemeanor or a felony, and by extension, whether said conviction fall under the petty offense exception, was provided.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). As the applicant has failed to establish that his conviction for Retail Theft falls under the petty offense exception, the AAO concurs with the acting district director that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of a crime involving moral turpitude.

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 set forth a list of non-exclusive 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 held in *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted) that:

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.

A section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the inadmissibility bar imposes

an extreme hardship to the citizen or lawfully resident spouse, parent, son or daughter of the applicant. Hardship the applicant experiences upon removal is irrelevant to section 212(h) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's U.S. citizen spouse and step-child.

The applicant must first establish that his U.S. citizen spouse and/or step-child would suffer extreme hardship were they to remain in the United States while the applicant relocates abroad due to his inadmissibility. With respect to this criteria as it relates to the applicant's spouse, previous counsel for the applicant asserts that the applicant's spouse will suffer emotional and financial hardship, as she will have to maintain two households—one in the United States and one in St. Lucia, and she will only be able to maintain the family unit when she travels to St. Lucia to visit the applicant. *Memorandum of Law in Support of I-601 Waiver*, dated August 17, 2005. As for the applicant's step-child, counsel for the applicant referenced that the acting district director failed to consider the effect or harm to the family of the applicant's inadmissibility. *Letter from [REDACTED] dated July 29, 2006.*

The AAO notes that neither the applicant's spouse and/or step-child have provided a statement outlining the hardships they would face were they to remain in the United States while the applicant relocated abroad due to his inadmissibility. Nor does the record contain any documentation evidencing the applicant's involvement in his step-child's daily life, to establish that a separation at this time would cause emotional hardship beyond that normally expected of one facing the removal of a step-parent. Moreover, it has not been established that the applicant's spouse and/or step-child is unable to travel to St. Lucia on a regular basis to visit the applicant. 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)). It has thus not been established that the applicant's spouse and/or step-child will suffer extreme emotional hardship if the applicant's waiver request is not granted.

Although the depth of concern over the applicant's inadmissibility is neither doubted or 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 a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary 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 did not intend that a waiver be granted in every case where a qualifying relationship exists. The current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship be above and beyond 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) (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).

As for the financial hardship referenced by the applicant's spouse, the AAO notes that courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS*, 794 F.2d 491, 497 (9th Cir. 1986) (holding that "lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient.").

The record establishes that the applicant's spouse has been gainfully employed since 1996 with Keystone Mercy Health Plan as a Quality Specialist II. See Letter from [REDACTED] Keystone Mercy Health Plan, dated September 29, 2003. In 2004, the applicant's spouse made over \$32,000, well above the poverty guidelines for 2009. See Form I-864P, *Poverty Guidelines for 2009* and Form W-2, *Wage and Tax Statement for 2004*. No documentation has been provided outlining the applicant's spouse's financial situation, including expenses, assets and liabilities, to establish that she will experience financial hardship due to the applicant's inadmissibility. As for the applicant's step-child, the record does not establish what financial support, if any, the applicant is providing to his step-child, to establish that a separation at this time would cause financial hardship beyond that normally expected of one facing the removal of a step-parent.<sup>3</sup> Finally, it has not been established that the applicant, a carpenter in the United States as noted on the applicant's Form G-325A, Biographic Information, is unable to obtain gainful employment abroad, thereby affording him the opportunity to assist his spouse and/or step-child with respect to their finances. While the applicant's spouse and step-child may need to make adjustments with respect to the family's financial situation while the applicant resides abroad due to his inadmissibility, it has not been shown that such adjustments would cause the applicant's spouse and/or step-child extreme hardship.

The AAO recognizes that the applicant's U.S. citizen spouse and step-child will endure hardship as a result of a separation from the applicant. However, their situation, if they remain in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship based on the record. The AAO concludes that based on the evidence provided, it has not been established that the applicant's U.S. citizen spouse and/or step-child will suffer extreme emotional and/or financial hardship due to the applicant's inadmissibility.

Extreme hardship to a qualifying relative must also be established in the event that he or she relocates abroad based on the denial of the applicant's waiver request. With respect to this criteria,

---

<sup>3</sup> The AAO notes that on the Form 1040, U.S. Individual Income Tax Return for 2004, filed by the applicant and his spouse, the applicant's step-child is not listed as a dependent. See Form 1040, *U.S. Individual Income Tax Return*, dated February 2, 2005.

counsel and previous counsel assert that the applicant's spouse<sup>4</sup> would experience emotional, medical and financial hardship were she to relocate to St. Lucia to reside with the applicant, due to unfamiliarity with the country, lack of family ties and substandard country conditions, including human rights abuses, high crime and limited health care. *Supra* at 2. To support these assertions, previous counsel has submitted information from the U.S. Department of State with respect to country conditions in St. Lucia.

To begin, no documentation regarding the applicant's spouse's family ties has been provided, to establish that a separation would cause her extreme hardship. Nor has it been established that the applicant's spouse would be unable to return to the United States to visit family and friends on a regular basis. In addition, with respect to the substandard country conditions referenced, the documentation provided does not specifically establish that the applicant's U.S. citizen spouse would suffer extreme hardship were she to relocate to St. Lucia to reside with the family. Moreover, the AAO notes that the U.S. Department of State has not issued any travel warnings or alerts for U.S. citizens planning to travel to St. Lucia. As such, it has not been established that the applicant's spouse would suffer extreme hardship were she to relocate to St. Lucia to reside with the applicant due to his inadmissibility.

As such, a review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that his U.S. citizen spouse and/or step-child would suffer extreme hardship if he were not permitted to reside in the United States, and moreover, the applicant has failed to show that his U.S. citizen spouse and/or step-child would suffer extreme hardship were they to relocate abroad to reside with the applicant. The record demonstrates that the applicant's spouse and step-child face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse/step-parent is removed from the United States or refused admission. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

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

---

<sup>4</sup> This criteria was not addressed with respect to the applicant's step-child. As such, the AAO concludes that it has not been established that the applicant's step-child would encounter extreme hardship were he to relocate to St. Lucia to reside with the applicant due to his inadmissibility.