

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



H₂

FILE:



Office: MANILA

Date: OCT 05 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: 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 cursive script that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Officer in Charge (OIC), Manila, Philippines, denied the waiver application that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Various documents that the applicant submitted indicate that they were prepared for the applicant by a travel industry worker. The record contains no Form G-28, Notice of Entry of Appearance, and no indication that the person who prepared the applicant's forms is qualified to represent the applicant in this matter. All representations will be considered, but the decision will be furnished only to the applicant.

The applicant is a native and citizen of Fiji, the wife of a United States lawful permanent resident (LPR), the mother of two U.S. citizen children, and the beneficiary of an approved Form I-130 petition. The applicant 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 a crime involving moral turpitude. 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 her spouse and children.

The OIC 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, the applicant asserted (1) that any comparison of the criminal laws of Fiji to those of the United States is unfair to her, (2) that her legal representation was insufficient, (3) that the facts of the case were such that she should not have been found guilty of Acting with Intent to Cause Grievous Bodily Harm, (4), that her husband's testimony was not voluntary, but compulsory, and (5) that she and her husband, who was the victim of her attack, have reconciled.

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 applicant was arrested for a violation of section 224(a) of the Penal Code of Fiji, Acting With Intent to Cause Grievous Bodily Harm, to wit: attacking her husband with a cane knife, in Lubulubu, Tavua, Western Division, Fiji, on April 16, 2004. On June 9, 2004, the applicant was convicted of that offense, pursuant to her plea. On September 14, 2004 she was sentenced to four months imprisonment. In the sentencing document the magistrate specifically found that the applicant, after an argument pertinent to alleged infidelity by her husband, struck her husband with a cane knife while he was lying in bed. ([REDACTED])

Section 224(a) of the Penal Code of Fiji states, in pertinent part,

Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person-

(a) unlawfully wounds or does any grievous harm to any person by any means whatsoever; or

(b) unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife, or other dangerous or offensive weapon

* * * *

is guilty of a felony, and is liable for imprisonment for life, with or without corporal punishment.

Various letters in the record from friends, family, and others state that the applicant acted pursuant to extreme provocation. The AAO notes that the trial court appears to have known the facts of the case and that it convicted the applicant pursuant to her plea of guilty.

The applicant's arguments on appeal are directed at the propriety of her conviction. The applicant argued that she did not attack her husband with a knife, but merely threatened him with it, and that he was not lying in bed but, rather, that he had arisen and attempted to take the knife from her when he was injured, essentially accidentally. She argued that she should not, under these circumstances, have been convicted of Acting With Intent to Cause Grievous Bodily Harm. The applicant further argued that she had not been accorded adequate legal counsel and that her husband did not wish to testify but was obliged to do so.

In *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980), the Board of Immigration Appeals held that the Service cannot go behind the judicial record to determine the guilt or innocence of an alien for a criminal offense. "[C]ollateral attacks upon an [applicant's] conviction do not operate to negate the

finality of his conviction unless and until the conviction is overturned.” *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996) (Citations omitted.) A record of conviction constitutes a conviction for immigration purposes. The applicant can only appeal such a conviction within the court system.

Furthermore, the applicant’s assertions pertinent to the facts that led to her conviction are directly contrary to the substance of the applicant’s guilty plea and to the findings of the court. That she has since reconciled with her husband has no bearing on her inadmissibility. There is no indication that the applicant’s conviction has been overturned and the AAO cannot retry the applicant’s criminal case. Whether or not she agrees that her conviction was just, that the applicant stands convicted of the offense is sufficient for the purposes of section 212(a)(2)(A)(i)(I) of the Act.

The applicant asserted that comparing Fiji laws to U.S. laws is unfair to her, but without further elaboration. She did not indicate how it would be unfair to compare the act of which she was convicted, attacking her husband with a knife while he lay in bed, to an aggravated assault. The act of attacking a person with a knife, without justification or excuse, would be classified in the United States as assault with a deadly weapon or, in a more extreme instance, assault with intent to kill. Both of those offenses are crimes generally held to involve moral turpitude. *C.f. Atoui v. Ashcroft*, 107 F.3d 591 (6th Cir. 2004); *Matter of C-*, 5 I. & N. Dec. 370 (BIA 1953).

The record indicates that the applicant was born on October 17, 1963 and was over 18 years of age when she committed the crime. The maximum penalty for her crime was life in prison. She 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 the applicant was convicted of a crime involving moral turpitude when she was over 18 years old and does not qualify for the petty offense exception. The applicant is inadmissible pursuant to Section 212(a)(2)(A) of the Act.

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)

(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).

A waiver of inadmissibility under section 212(h) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant herself is not directly relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative in the application. The applicant's husband and two U.S. citizen children are the qualifying relatives in this case. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The record contains letters from the applicant's friends, relatives, and from a member of a Lubulubu, Tavua advisory council, an attorney, and a religious official, and a letter from the applicant herself. Those letters state that the applicant and her husband have been together for 26 years and have had a happy life together. They further state that the applicant's husband, who is now in the United States and apart from his wife, is depressed as a result, sometimes has no appetite, and sometimes does not speak. In his own letter, the applicant's husband stated that he sometimes cries because he misses his wife.

Those letters further state that the applicant's husband is unable to return to Fiji because the lease on his family's land there has almost expired and he and the applicant would have nowhere to go. The letters also state that he would be unable to lease land there now and implied that other employment is unavailable. The record contains no corroborating evidence pertinent to the expiration date of the applicant's family's lease, or to the availability of other land to lease, or to the availability of other employment.

With the appeal, the applicant provided printouts of web content pertinent to conditions in Fiji. The content includes news articles pertinent the worsened economy following a military coup, the struggling tourism industry, and to beatings by police and soldiers including the death of a young man from injuries he suffered. The record contains no argument relating those news articles to any hardship that would be occasioned to any of the applicant's qualifying relatives if the waiver application is not approved.

The evidence contains no evidence, nor even an assertion, that failure to approve the waiver application will cause financial hardship to the applicant's husband or U.S. citizen children. Financial hardship will not, therefore, be considered further.

The remaining considerations are the emotional damage and the physical or psychological harm that will be occasioned to a qualifying relative by failure to approve the waiver application.

Several letters assert that the applicant's husband has some symptoms of depression, including loss of appetite, withdrawal, and weeping. The record contains no evidence from any physician or mental health professional, however, to corroborate those statements or to provide a professional assessment of the severity of his condition. Under these circumstances, the AAO is unable to find that the applicant's husband's condition is so serious that he will suffer extreme hardship if the applicant is not allowed to join him in the United States.

Emotional hardship will, of course, result from failure to permit the applicant to live in the United States with her husband and two of her children. 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 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th 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). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship.

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 husband and children 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, son, or daughter is denied admission into the United States to join family members.

The record demonstrates that the applicant has loving and devoted family members who are extremely concerned about the applicant's absence 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.

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. Lawful Permanent Resident husband and U.S. citizen children 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.