

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



Hr

FILE: [REDACTED] Office: MIAMI, FL

Date: OCT 06 2009

IN RE: [REDACTED]

PETITION: 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 PETITIONER:



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).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Nicaragua who was found to be inadmissible to the United States pursuant to 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 committed a crime involving moral turpitude. The applicant is the father of two United States citizens. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen children.

The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) pursuant to the Nicaraguan Adjustment and Central American Relief Act (NACARA) on March 31, 2000. The applicant also filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) on February 7, 2005.

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 waiver application accordingly. *Decision of Acting District Director*, dated October 23, 2006.

On appeal, counsel contends that United States Citizenship and Immigration Services (USCIS) erred and abused its discretion in finding that the applicant failed to establish extreme hardship to his qualifying relative, as necessary for a waiver under 212(h) of the Act. *Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO)*. Although counsel indicates that he is filing a brief, no brief is found in the record.

In support of the waiver, the record includes, but is not limited to, criminal records for the applicant; a telephone bill; an electricity bill; notices from the Internal Revenue Service; a substance abuse certificate; an Advocate Program, Inc. receipt; earnings statements and Form W-2s for the applicant; a tax statement for the applicant; and credit card bills. The entire record was considered in rendering a decision on the appeal.

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.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

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

- (i) . . . 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,
- (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 . . .

Section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

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.)

The record shows that the applicant was convicted in Florida of Burglary/Armed and Grand Theft, Second Degree on July 14, 1987; Petit Theft on September 1, 1989; Petit Larceny, Theft on February 1, 1994; Petit Larceny, Theft on May 2, 1995; and Grand Theft, Third Degree on June 7, 1995. *Court records, in the Circuit and County Courts of the Eleventh Judicial Circuit of Florida, in and*

for Miami-Dade County. The applicant also pled Nolo Contendere in Florida to crashes involving damage to vehicle or property on April 16, 1990; Driving while license suspended, revoked, canceled, or disqualified on November 20, 1990; Driving under the Influence on February 4, 1992; Driving under the Influence on September 14, 1998; and Driving while license suspended, revoked, canceled, or disqualified on March 22, 2000. *Court records, Traffic Division, in the County Court in and for Dade County, Florida*, dated January 10, 2005. The applicant was also arrested on August 4, 1989 for Aggravated Assault and was convicted of a reduced charge, although the record is unclear as to his specific conviction. *Court records, in the Circuit and County Courts of the Eleventh Judicial Circuit of Florida, in and for Miami-Dade County*.

Florida Statutes § 810.02 provides, in pertinent parts:

- (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender:
 - (b) Is or becomes armed within the dwelling, structure, or conveyance, with explosives or a dangerous weapon;

In *Matter of Garcia-Garrocho*, the Board of Immigration Appeals (BIA) found that the applicant's conviction for burglary in the first degree in New York constituted a crime involving moral turpitude for which he was excludable. 19 I&N Dec. 423, (BIA 1986).

New York Penal Law § 140.30 provides, in pertinent parts:

A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime:

1. Is armed with explosives or a deadly weapon

In that the language of Florida Statutes § 810.02, like that of New York Penal Law § 140.30, defines first degree burglary as burglary when the perpetrator is armed with explosives or a dangerous/deadly weapon, the reasoning in *Matter of Garcia-Garrocho* is persuasive in this case. As such, the AAO finds that an individual convicted under Florida Statutes § 810.02(2)(b) has been convicted of a crime involving moral turpitude and is thus inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest this finding.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen family ties to this country; the qualifying relative's

family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

The AAO notes that extreme hardship to an applicant's qualifying relative must be established whether he or she resides in Nicaragua or the United States, as he or she is not required to reside outside the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

If the applicant's children join the applicant in Nicaragua, the applicant needs to establish that his children will suffer extreme hardship. The record shows that the applicant's children were born in the United States. *Birth certificates for the applicant's children*. The AAO notes that Nicaragua has been designated for Temporary Protected Status through July 5, 2010. As such, the AAO finds that the applicant has demonstrated extreme hardship to his children if they were to relocate to Nicaragua.

If the applicant's children reside in the United States, the applicant needs to establish that his children will suffer extreme hardship. The record indicates that the children's mother is a resident of Florida, born in Cuba. The record does not indicate that she is not caring for or is unable to care for her children. The record does not address whether the applicant contributes financially to the welfare of his children in the United States and if so, how his residing in Nicaragua would affect them. The record does not document through published country conditions reports that the applicant would be unable to contribute to his children's welfare on a financial level from Nicaragua. The record does not include a statement from a licensed healthcare professional documenting how the applicant's children would be affected emotionally or mentally as a result of being separated from the applicant. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO acknowledges the difficulties faced by the applicant's children in being separated from the applicant. However, U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. The AAO recognizes that the applicant's children will endure hardship as a result of separation from the applicant. However, the record does not distinguish their situation, if they remain in the United

States, from that of other individuals separated as a result of removal. Accordingly, it does not establish that the hardship experienced by the applicant's children would rise to the level of extreme hardship. When looking at the aforementioned factors, the AAO does not find that the applicant has demonstrated extreme hardship to his children if they were to reside in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's qualifying relatives caused by the applicant's inadmissibility to the United States. 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 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.