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U.S. Citizenship
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Services



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FILE:



Office: OMAHA, NEBRASKA

Date: SEP 30 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Omaha, Nebraska, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Slovakia who was determined 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 a crime involving moral turpitude (assault with intent to commit sexual abuse). The applicant is the husband of a U.S. citizen and the beneficiary of an approved Petition for Alien Relative. The applicant 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 wife and children.

The field office director concluded that the applicant had failed to establish extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director* dated February 17, 2009.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) erred in determining that the applicant had not established extreme hardship to his U.S. Citizen wife or children if he is removed from the United States. *See Memorandum in Support of Appeal*. Counsel further asserts that USCIS erred in determining that the applicant's crime was "particularly heinous" because it involved consensual sexual intercourse with a girl who was under the age of sixteen, and the statute under which the applicant was convicted did not require that he know she was underage. *See Memorandum* at 2. Counsel further asserts that the waiver application should not be required for the applicant's conviction for statutory rape because of the "strict liability" nature of the offense, which does not consider the reasonableness of a defendant's belief about the age of the victim. *Memorandum* at 3. In support of this claim, counsel cited decisions of the Ninth Circuit Court of Appeals finding similar offenses not to be crimes of moral turpitude. *Memorandum* at 3. In support of the waiver application and appeal, counsel submitted a letter from the victim of the applicant's crime, affidavits from the applicant and his wife, letters from relatives and friends, evidence of the applicant's participation in a court-ordered drinking and driving course, school records for the applicant's stepson, tax returns for the applicant and his wife, information on conditions in Slovakia, and information on the effects of divorce on children. The entire record was reviewed and 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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if-

(1)(A) [I]t is established to the satisfaction of the Attorney General 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 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 applicant was convicted of Assault With Intent to Commit Sexual Abuse in violation of section 709.11 of the Iowa Criminal Code on October 24, 2000 for conduct that took place in about June 1999 and sentenced to 240 days in a county jail.¹ Counsel asserts that the applicant's conviction does not involve moral turpitude because he was convicted of sexual contact with a minor and knowledge of the age of the victim is not an element of the offense. *Memorandum in Support of Appeal* at 2-4. Counsel cites two decisions of the Ninth Circuit Court of Appeals to support the assertion that a conviction for statutory rape is not a crime involving moral turpitude when no force or violence is involved and knowledge of the victim's age is not required. *See Memorandum in Support of Appeal* at 3, citing *Romero v. Mukasey*, 523 F.3d 992, 1107 (9th Cir. 2008); *Quintero-Salazar v. Keisler*, 506 F. 3d 688 (9th Cir. 2007).

Section 709.11 of the Iowa Criminal Code provides:

709.11 Assault with intent to commit sexual abuse.

Any person who commits an assault, as defined in section 708.1, with the intent to commit sexual abuse is guilty of a class "C" felony if the person thereby causes serious injury to any person and guilty of a class "D" felony if the person thereby

¹ Judgement and Sentence , Hanckck County, Iowa District Court Case Number [REDACTED]

causes any person a bodily injury other than a serious injury. The person is guilty of an aggravated misdemeanor if no injury results.

Sexual abuse is defined in sections 709.1 and 709.4 of the Iowa Criminal Code, which provide, in pertinent part:

709.1 Sexual abuse defined.

Any sex act between persons is sexual abuse by either of the participants when the act is performed with the other person in any of the following circumstances:

1. The act is done by force or against the will of the other. If the consent or acquiescence of the other is procured by threats of violence toward any person or if the act is done while the other is under the influence of a drug inducing sleep or is otherwise in a state of unconsciousness, the act is done against the will of the other.
2. Such other person is suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong of conduct in sexual matters.
3. Such other person is a child.

709.4. Sexual abuse in the third degree

A person commits sexual abuse in the third degree when the person performs a sex act under any of the following circumstances:

1. The act is done by force or against the will of the other person, whether or not the other person is the person's spouse or is cohabiting with the person.
2. The act is between persons who are not at the time cohabiting as husband and wife and if any of the following are true:
 - a. The other person is suffering from a mental defect or incapacity which precludes giving consent.
 - b. The other person is twelve or thirteen years of age.
 - c. The other person is fourteen or fifteen years of age and any of the following are true:

- (1) The person is a member of the same household as the other person.

- (2) The person is related to the other participant by blood or affinity to the fourth degree.
- (3) The person is in a position of authority over the other person and uses that authority to coerce the other person to submit.
- (4) The person is five or more years older than the other person.

....

In *Matter of Silva-Trevino*, 24 I & N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual” (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” *Silva Trevino, supra*, at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708. If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. *Id.* at 699-704, 708-709.

The applicant was initially charged with sexual abuse in violation of sections 709.1 and 709.4 of the Iowa Criminal Code for having performed a sex act by force or against the will of the victim, who was fourteen or fifteen years of age while he was five or more years older. *See Trial Information and Order Setting Arraignment* dated November 9, 1999. The applicant pleaded guilty to assault with intent to commit sexual abuse, and the record of conviction does not specify whether he was found to have intent to commit sexual abuse by force or without the consent of the victim, or only to perform such an act with the consent of the victim who was underage. Counsel asserts that an

offense involving a consensual sex act with a victim under the age of sixteen would not involve moral turpitude because knowledge of the victim's age is not an element of the offense. However, even if intent to commit "statutory rape" as defined in section 709.4(2)(c)(4) of the Iowa Criminal Code were found not to involve moral turpitude, the record of conviction and other evidence in the record is inconclusive as to whether the applicant was found to have intent to commit this offense or sexual abuse through force or against the will of the other person as defined in sections 709.1 and 709.4(1) of the Iowa Criminal Code.

In accordance with the standard set out in *Matter of Silva-Trevino, supra*, the AAO must determine if an actual case exists in which the criminal statute under which the applicant was convicted has been applied to conduct that did not involve moral turpitude. In all such inquiries, the burden is on the alien to establish "clearly and beyond doubt" that he is "not inadmissible." *Silva-Trevino, supra*, at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008)). The applicant has not presented and the AAO is unaware of any prior case, including the applicant's own case, in which a conviction has been obtained under Section 709.11 of the Iowa Criminal Code for conduct not involving moral turpitude. Therefore, in light of the standard set forth in *Silva-Trevino*, the AAO must determine that the applicant's conviction under section 709.11 of the Iowa Criminal Code is categorically a crime involving moral turpitude absent evidence that a prior case exists in which the statute was applied to conduct not involving moral turpitude.

The applicant has been convicted of a crime involving moral turpitude and seeks a waiver of inadmissibility under section 212(h) of the Act. Since a period of less than 15 years has passed since June 1999, the date of the criminal activity for which the applicant was convicted, the applicant is statutorily ineligible for a waiver pursuant to section 212(h)(1)(A) of the Act. He is, however, eligible to apply for a waiver of inadmissibility pursuant to section 212(h)(1)(B) of the Act.

Section 212(h)(1)(B) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999), provides a list of factors the Board of Immigration Appeals (BIA) 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 spouse or parent in 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. *Id.* at 566. The BIA has further stated:

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).

In addition, the Ninth Circuit Court of Appeals has held, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the BIA) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (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).

U.S. court decisions have additionally 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, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA 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, in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the court 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. In *Hassan v. INS*, *supra*, the court further held 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. Moreover, the U.S. Supreme Court additionally 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.

In the present case, the record reflects that the applicant is a thirty-two year-old native and citizen of Slovakia who entered the United States as a B2 visitor on June 24, 1996. He married his wife, a thirty-one year-old native and citizen of the United States, in 1998. They currently reside in Garner, Iowa with their four children.

Counsel asserts that the applicant’s children would suffer emotional and financial hardship if the applicant were removed to Slovakia. Counsel states that the applicant is a “valuable part” of the lives of his wife and children and his absence would affect their lives not only economically, but also emotionally. *Counsel’s Letter in Support of Waiver Application* at 2. Counsel additionally states, his stepson, has also [grown] extremely close to [REDACTED]. They have a very strong relationship.” *Id.* In her affidavit the applicant’s wife states that the applicant spends a lot of time with the kids and takes them to the park or the pool. She further states,

If my husband is sent back to Slovakia then that means our family will be broken. . . . [REDACTED] was only one years (sic) old when I married [REDACTED] and he calls him Dad. Truthfully, [REDACTED] is a better and more reliable father than [REDACTED] biological father will ever be. . . . [REDACTED] would rather be with [REDACTED], as far as he is concerned [REDACTED] is his Dad. *Affidavit of [REDACTED]* dated June 26, 2006.

The applicant's mother-in-law states that the applicant is a loving father and husband and "has done a lot to provide a nice home for them and is a very hard worker." *Letter from [REDACTED]* dated June 10, 2006. She further states that [REDACTED] the applicant's stepson, often came home from visiting his biological father hungry and without having bathed, and he is no longer allowed to visit him overnight. *Letter from [REDACTED]* She further states that the biological father is an alcoholic and takes drugs, and the applicant's wife states that he was arrested in 2006 on drug charges. *See Affidavit of [REDACTED]*

The applicant's wife additionally states that she relies on the applicant for financial support and that before she met him, she was living with her son in low-income housing and was on welfare. She states that the applicant got them off of welfare and has given them a better life, and that they now live in a house that that he has renovated. *See Affidavit of [REDACTED]*. Income tax returns submitted with the waiver application indicate that their income is earned primarily from the applicant's construction business, and a letter from the applicant's wife's employer states that she was earning \$6.35 per hour working at a restaurant. *See letter from Garner Pizza Ranch* dated May 24, 2006. Documentation submitted with an affidavit of support filed in 1998 further indicates that the applicant's wife received various public benefits including food stamps, WIC, Medicaid, and cash assistance from 1996 until after she married the applicant. *See Attachment to Form I-864* dated November 5, 1998. The applicant's father-in-law states that the applicant has purchased a home for his family and completely remodeled it and works hard for the family. *Letter from [REDACTED]* dated October 16, 2006. He further states that if the applicant were removed from the United States it would be a strain on the family and might cause legal problems with the applicant's stepson and his biological father. *Letter from [REDACTED]*

Documentation on the record indicates that the applicant's wife was earning an income significantly below the poverty level before she married the applicant, and although she is employed, she still earns a very low wage and relies on the applicant to support the family. Documentation further indicates that the applicant has three U.S. Citizen children and one stepson with whom he spends a lot of time, and that he is more of a father to his stepson, who is now twelve years old, than the child's biological father, who has neglected him and has only limited visitation rights. It appears that the applicant's children would experience financial and emotional hardship if the applicant departed the United States, and the family would be at risk of losing their home and would likely have to survive on an income below the poverty level without the applicant's income. This financial and emotional hardship, when considered in the aggregate, would rise to the level of extreme hardship, particularly for the applicant's stepson, who has been neglected by his biological father and has grown very close to the applicant, his stepfather since he was one year old.

The applicant's wife states that if she relocated to Slovakia with the applicant, her children, and in particular her oldest son, would suffer extreme hardship. She states that any transition would affect his schooling for the worse and he would have to learn a new language and try to learn everything all over again in a new language. *See Affidavit of [REDACTED]* She states that he is a bright child who does very well in school, and records submitted with the waiver application indicate that his work is consistently above average and he has high scores on state standardized tests, including in the 99 percentile range in certain subjects. The applicant's wife further states that it would be a hardship for her family to relocate to Slovakia because her entire family is in the United States, they have no family and friends in Slovakia, and she would be unlikely to find employment due to economic conditions and her inability to speak the language. *See Affidavit of [REDACTED]* Documentation submitted with the waiver application indicates that Slovakia is experiencing a difficult transition from a centrally planned to a market-oriented economy and that reform has slowed due to corruption.

The BIA has held that total acclimation to life in the United States can result in extreme hardship for children if they relocate to their parent's home country, especially for a teenager who has not mastered the language of that country. *See Matter of Kao and Matter of Lin*, 23 I&N Dec. 45 (BIA 2001). The economic hardship resulting from conditions in Slovakia, combined with emotional hardship caused by separation from their home, friends, and family in the United States and having to adjust to life and schooling in a foreign country, would rise to the level of extreme hardship for the applicant's children, and in particular his stepson, who is now twelve years old.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives). *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine

whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The unfavorable factors in this matter are the applicant’s criminal history, including his conviction for assault with intent to commit sexual abuse and two convictions for driving under the influence of alcohol. The favorable factors in this matter are the hardship to the applicant’s wife and children, in particular his stepson [REDACTED] if he is removed from the United States; his length of residence in the United States; and the passage of over ten years since the offense that rendered him inadmissible and five years since his more recent arrest for driving under the influence. Other documentation on the record indicates that he has completed programs on drinking and driving and attended Alcoholics Anonymous. Letters of recommendation from friends and family members further attest to his good moral character and his regret over mistakes he has made in the past, and state that he spends much time with his family and works hard to support them financially, and has purchased and renovated a house where they now reside. Further, a letter from the victim of his crime states that although she was a minor when the offense occurred, she consented to the act and is not sure if the applicant knew she was under the age of sixteen. She states that she does not believe his past should ruin his future and further states that he works hard for his family and would help anyone who needs help.

The AAO finds that applicant’s criminal conduct cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh this adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

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. Here, the applicant has met that burden. Accordingly, the previous decision of the district director will be withdrawn and the application will be approved.

ORDER: The appeal is sustained, the prior decision of the director is withdrawn, and the application for a waiver of inadmissibility is approved.