

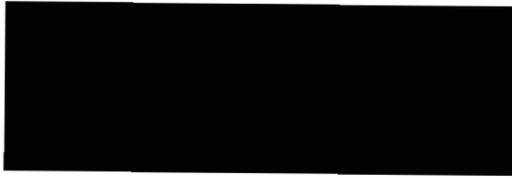
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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Date: **MAR 22 2010**

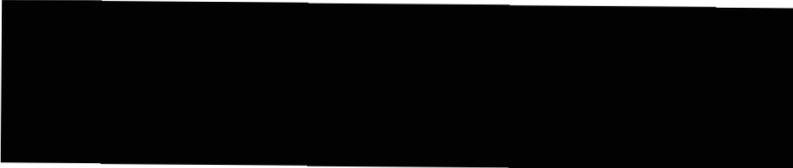
IN RE:



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 District Director, Cleveland, Ohio, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of Senegal 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 been convicted of crimes involving moral turpitude. The record indicates that the applicant is married to a United States citizen and he is the beneficiary of an approved *Petition for Alien Relative (Form I-130)*. 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 his United States citizen wife and children.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on his qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated March 29, 2006.

On appeal, the applicant, through counsel, asserts that “USCIS erred in denying applicant’s I-601.” *Form I-1290B*, filed April 26, 2006. Counsel further claims that “[t]he evidence presented conclusively establishes that applicant’s USC wife and children would suffer an extreme hardship if he is deported from the United States.” *Id.*

The record includes, but is not limited to, counsel’s brief; letters from the applicant’s wife, son, and mother-in-law; and court dispositions for the applicant’s arrests and convictions. The entire record was reviewed and considered in arriving at a decision on the appeal.

In the present application, the record indicates that the applicant was paroled into the United States on September 14, 1987. On October 17, 1994, the applicant was convicted of criminal simulation, and was sentenced to twelve (12) months probation and courts costs and fees. On January 27, 1995, the applicant was convicted of criminal possession of forged instrument, and was sentenced to five (5) years probation and court costs and fees. On an unknown date, the applicant departed the United States. On February 14, 1998, the applicant reentered the United States. On March 16, 1998, an immigration judge terminated immigration proceedings against the applicant. On November 29, 1999, the applicant’s United States citizen wife filed a Form I-130 on behalf of the applicant. On the same day, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On December 12, 2001, the applicant’s Form I-130 was approved. On November 5, 2004, the applicant filed a Form I-601. On March 29, 2006, the District Director denied the applicant’s Form I-485 and Form I-601, finding the applicant failed to demonstrate extreme hardship to his qualifying relative.

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.

The District Director found the applicant inadmissible for having been convicted of crimes involving moral turpitude, criminal simulation on October 17, 1994 and criminal possession of a forged instrument on January 27, 1995. The applicant, through counsel, has not disputed this determination on appeal. The AAO has reviewed the statutes, case law and other documents related to these convictions, as well as the relevant precedent decisions from the Board of Immigration Appeals (Board) and the courts. The AAO concurs with the District Director that the applicant has been convicted of crimes involving moral turpitude and is therefore inadmissible under section 212(a)(2)(A)(i) of the Act.

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

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, “Secretary”] may, in [her] discretion, waive the application of subparagraphs (A)(i)(I)...of subsection (a)(2) if—

(1) (A) in the case of any immigrant it is established to the satisfaction of the [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 established to the satisfaction of the [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...

(2) the [Secretary], in [her] discretion, and pursuant to such terms, conditions and procedures as [she] 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.

The applicant is seeking 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. A waiver under section 212(h) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child

of the applicant. Hardship the alien himself 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 United States citizen wife and children. 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).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The 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.

The applicant's last conviction for criminal possession of forged instrument occurred on January 27, 1995, and he filed a Form I-485 on November 29, 1999. The AAO notes that the applicant's conviction did not occur in excess of 15 years prior to his filing for adjustment of status; however, 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 District Director denied the applicant's Form I-485 on March 29, 2006. However, because the basis of the denial is the applicant's inadmissibility, we deem that decision not to have final effect pending adjudication of the appeal of the decision denying his Form I-601. Consequently, the applicant, as of today, is still seeking admission. Therefore, the crime involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the applicant's application for adjustment of status.

The AAO finds that the applicant meets the requirements for a waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act, in that the applicant has not been convicted of any additional criminal charges since his last conviction on January 27, 1995, the lack of any additional convictions on the applicant's record attests to his rehabilitation, and the record of proceedings does not establish that the admission of the applicant to the United States would be "contrary to the national welfare, safety, or security of the United States."

Additionally, the AAO finds that even if the applicant had not satisfied the requirements for a waiver under section 212(h)(1)(A) of the Act, the applicant meets the requirements for a waiver of his grounds of inadmissibility under section 212(h)(1)(B) of the Act, in that his wife and children would suffer emotional and financial hardship as a result of their separation from the applicant. Counsel claims that the applicant's wife and children would suffer extreme financial hardship if the applicant were removed from the United States. *See brief*, page 9, filed May 22, 2006. Counsel states the applicant's wife "is not currently employed, but she still attends college part-time and volunteers at the daycare center where the couple's three youngest children attend." *Id.* at 3. The applicant's wife states the applicant is the main financial provider for the family as she attends college part-time. The applicant's wife further states she is "attending college to become a school teacher and that goal/mission would have to be put on hold if [the applicant] were to be deported." Counsel states "[t]he [a]pplicant is employed as a taxi driver and currently

the sole financial provider for the family.” *Brief, supra* at 3. Counsel further states that “given the fact that [the applicant’s wife] would be raising six children alone if the [a]pplicant is deported, it would be impossible for her to hold a full-time job and adequately care for her children.” *Id.* at 9. The AAO notes that the record establishes that the applicant is the primary source of support for his wife and six children. In *Matter of Recinas*, 23 I&N Dec. 467, 469-70 (BIA 2002), the respondent was “a single mother of six children, four of whom are United States citizens.... The respondent [was] divorced from the father of her United States citizen children...[and] there [was] no indication that he remain[ed] actively involved in their lives.” The facts are similar in this case. The Board further held in *Recinas* that “the heavy financial and familial burden on the adult respondent, the lack of support from the children’s father, the United States citizen children’s unfamiliarity with the Spanish language,” and other factors, “render the hardship in this case well beyond that which is normally experienced in most cases of removal.” *Id.* at 472.

Counsel states the applicant’s wife has two children from a previous relationship, and the applicant and his wife “are their sole providers and caregivers, because their biological father is currently imprisoned.... [T]he two children’s biological father is currently awaiting sentencing for sexually assaulting the fourteen year old daughter.” *Brief, supra* at 2. Counsel states “the [a]pplicant is the only father these two children know.” *Id.* The AAO notes that the 2008 Country Report on Senegal states that “[r]ape was a widespread problem.... The law prohibits rape...however, the government rarely enforced the law.” Additionally, “[t]here were periodic reports of child rape and pedophilia.” In a letter dated May 16, 2006, the applicant’s son, [REDACTED], states the applicant helps him with his school work and they need the applicant in the United States. Counsel states the applicant’s fourteen year old stepson has a cognitive learning disorder and “the [a]pplicant is instrumental to his success at school.” *Brief, supra* at 11. The AAO notes that the Senegal country report states that “[d]ue to a lack of special education training for teachers and a lack of facilities accessible to children with disabilities, only approximately 40 percent of such children were enrolled in primary school.” The country report further states “[t]he law provides for free education, and education is compulsory for all children ages six to 16; however, many children did not attend school due to lack of resources or available facilities. Students must pay for their own books, uniforms, and other school supplies.” The AAO notes that applicant does not have employment in Senegal, and therefore, it appears that he will not be able to afford to send his children to school. In a letter dated May 11, 2006, the applicant’s mother-in-law, Sarah, states the applicant has accepted her daughter’s children as his own and he has been “there for them.” The AAO notes that the applicant and his wife have six children all together. Additionally, all of the applicant’s wife’s family resides in the United States.

The AAO finds that if the applicant were removed from the United States, his wife and children would suffer extreme hardship staying in the United States without their husband/father, the primary wage earner, or joining their husband/father in Senegal, where he does not have employment. The AAO notes that applicant’s wife and children are incapable of maintaining their wellbeing in the absence of the applicant. Additionally, the U.S. State Department reports in its most recent human rights report that the Senegalese government often does not respect human rights, and violence is common in certain areas of Senegal.

The favorable factors presented by the applicant are the extreme hardship to his United States citizen wife and children, who depend on him for emotional and financial support; the applicant’s stable work history in the United States; and the lack of any other criminal convictions since his last conviction in 1995. In addition to counsel’s brief, letters from the applicant’s wife, mother-in-law, and son indicate that the

applicant has become a law-abiding and responsible husband and father. The record of proceeding does not establish that the admission of the applicant to the United States would be “contrary to the national welfare, safety, or security of the United States.”

The unfavorable factors presented in the application are the applicant’s convictions for criminal simulation on October 17, 1994, and criminal possession of forged instrument on January 27, 1995; and any periods of unauthorized presence and employment. The AAO notes that the applicant has not been convicted of any criminal violations since his last conviction and his crime occurred more than 15 years ago, demonstrating the applicant’s rehabilitation.

While the AAO does not condone his actions, the AAO finds that the favorable factors outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary’s discretion is warranted in this matter and the District Director’s denial of the I-601 application is withdrawn.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.