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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**

H3

FILE:

Office: CIUDAD JUAREZ, MEXICO

Date: MAY 15 2009

IN RE: Applicant:

APPLICATION:

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

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Ciudad Juarez, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of Mexico, was found inadmissible to the United States under 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, 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 section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and section 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 children, born in 2000 and 2001.

The officer in charge concluded that that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Ground of Excludability (Form I-601) accordingly. *Decision of the Officer in Charge*, dated June 5, 2006.

In support of the appeal, counsel for the applicant provides a letter, dated July 23, 2006 and a letter concerning the applicant's spouse's mental health condition, dated July 17, 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-

(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) of the Act provides, in pertinent part:

(A)(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 provides, in pertinent part:

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

- (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
- (2) The Attorney General (Secretary), in his discretion . . . has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

Regarding the applicant's inadmissibility finding by the officer in charge for unlawful presence, the record establishes that the applicant entered the United States without authorization in 1996 and did not depart until September 2003. The applicant accrued unlawful presence from April 1, 1997, the date of the enactment of the unlawful presence provisions, until his departure in September 2003. The officer in charge correctly found the applicant to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, for having been unlawfully present in the United States for more than one year.

Regarding the applicant's inadmissibility finding by the officer in charge for having been convicted of a crime involving moral turpitude, the AAO notes that pursuant to the record, on May 23, 1998, the applicant was arrested and subsequently charged with Assault in the Second Degree and Sexual Offense in the Fourth Degree. *See Criminal System Inquiry Charge/Disposition Display, District Court of Maryland*, dated April 14, 2004. Counsel contends that although the applicant was charged with the offenses referenced above, he offered a plea, to Sexual Offense in the Fourth Degree, and since no

prison term was imposed, his conviction meets the requirements set forth under section 212(a)(2)(A)(ii) of the Act.¹ Letter from [REDACTED], dated July 23, 2006.

Based on a thorough review of the record, the AAO finds that the applicant has not been convicted of Assault in the Second Degree and/or Sexual Offense in the Fourth Degree. The record establishes that the applicant's cases were entered as "stet" under Maryland law. No plea of guilty was entered and no sentence imposed.

The Maryland Code of Criminal Procedures, Rule 4-248, states, in pertinent part, that:

- (a) Disposition by stet. On motion of the State's Attorney, the court may indefinitely postpone trial of a charge by marking the charge 'stet' on the docket.... A stettered charge may be rescheduled for trial at the request of either party within one year and thereafter only by order of court for good cause shown.
- (b) Effect of stet. When a charge is stettered, the clerk shall take the action necessary to recall or revoke any outstanding warrant or detainer that could lead to the arrest or detention of the defendant because of the charge.... The entry of a stet in criminal cases means that the State will not proceed against an accused on that indictment at that time.

Section 101(a)(48) of the Act states, in pertinent part, that:

- (A) The term "conviction" means, with respect to an alien, a formal judgment of guilty of the alien entered by a court, or if adjudication 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 has admitted sufficient facts to warrant a finding of guilt, and

¹ Section 212(a)(2)(a)(ii) of the Act states in pertinent part, that:

(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).

- (ii) the judge has ordered some form of punishment, penalty or restraint on the alien's liberty to be imposed.

At the present time, the applicant's charge has not been rescheduled for a trial. As stated above, no plea of guilty was entered and no sentence was imposed. Therefore, as the record does not reflect that the applicant was convicted of a crime of moral turpitude, the officer in charge erred in finding the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of a crime involving moral turpitude. Nevertheless, the applicant's unlawful presence automatically renders him inadmissible under section 212(a)(9)(B)(i)(II) of the Act, as noted above. The applicant is eligible to apply for a section 212(a)(9)(B)(v) waiver.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship. 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.

Section 212(a)(9)(B)(v) of the Act provides that a waiver under section 212(a)(9)(B)(i)(II) of the Act is applicable solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Unlike waivers under section 212(h) of the Act, section 212(a)(9)(B)(v) does not mention extreme hardship to a United States citizen or lawful permanent resident child. Nor is extreme hardship to the applicant himself a permissible consideration under the statute. In the present case, the applicant's U.S. citizen spouse is the only qualifying relative, and hardship to the applicant and/or their children cannot be considered, except as it may affect the applicant's spouse.

Counsel contends that the applicant's spouse is suffering emotional hardship due to the applicant's inadmissibility. As stated by counsel:

The Applicant's U.S. citizen spouse [REDACTED] has been suffering from a recognized mental illness since she was separated from the Applicant....

[REDACTED] has been suffering from Major Depressive Disorder since 2003....

In Addition, [REDACTED] (6 years old) and [REDACTED] (4 years old) from the Applicant. [the applicant's spouse] has two children,

Her son [REDACTED] was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) in 2003....

Symptoms of ADHD in children include inability to focus, sudden temper outbursts and screeching, inability to complete tasks. [REDACTED] suffers from all these symptoms which makes it even harder for [REDACTED]: She not only has to deal with her own mental illness brought on by her husband's removal, but she also has to raise a child with ADHD without her husband's help....

Id. at 1-2.

A letter from the applicant's spouse's treating psychologist has been provided, corroborating the applicant's spouse's mental health condition, specifically, Major Depressive Disorder, which was diagnosed in 2003, and confirming that she has been receiving mental health services, including individual psychotherapy and medication. *See Letter from [REDACTED], Licensed Psychologist, Baltimore Medical System, dated July 17, 2006.*

In addition to the emotional hardship referenced above, the applicant's spouse asserts that she is suffering extreme financial hardship due to her spouse's inadmissibility. She contends that without her husband's physical presence in the United States, she has been forced to ask family members for financial help. She explains that although her husband is a skilled carpenter in great demand in the United States, he is unable to financially provide for his family while he remains in Mexico. She also notes that she was forced to declare bankruptcy due to the crisis with respect to her husband's immigration situation. *See letter from [REDACTED], dated July 10, 2005.*

Were the applicant unable to reside in the United States, the applicant's U.S. citizen spouse, diagnosed with a depressive disorder in 2003 and currently involved in individual psychotherapy, would have to assume the role of primary caregiver and breadwinner to two young children, one with significant mental health issues, without the complete emotional, physical and financial support of the applicant. Moreover, as the applicant's spouse asserts, and country condition reports corroborate, the applicant has been unable to find gainful employment in Mexico with sufficient income to support his spouse and children in the United States. *See U.S. Department of State Profile-Mexico, dated November 2008.* The AAO thus concludes that the applicant's U.S. citizen spouse would suffer extreme hardship were the applicant to remain abroad while she resides in the United States. The applicant's spouse needs her husband's emotional and financial support on a day to day basis. A prolonged separation at this time would cause hardship beyond that normally expected of one facing the removal of a spouse.

The AAO notes that 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. In this case, the applicant's spouse asserts that "I have no plans to move to Mexico as I want to raise our children here as Americans...." However, no concrete reasons are provided for why she is unable to relocate to Mexico. *Id.* at 1. 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)). The applicant has thus failed to establish that his spouse would suffer extreme hardship were she to relocate to Mexico to reside with the applicant.

A review of the documentation in the record, when considered in its totality reflects that although the applicant has established that his U.S. citizen spouse would suffer extreme hardship were she to remain in the United States while the applicant resided abroad, the applicant has failed to establish that his U.S. citizen spouse would suffer extreme hardship if she were to accompany the applicant abroad based on his inadmissibility. 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.