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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE [redacted] Office: HONOLULU, HI Date: JUN 18 2001

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(h) of the Immigration and Nationality Act, 8 U.S.C. 1182(h)

IN BEHALF OF APPLICANT:

[redacted]

identification data deleted to prevent clearly unwarranted invasion of personal privacy.

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Honolulu, Hawaii, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reconsider. The motion will be granted and the order dismissing the appeal will be affirmed. The application will be denied.

The applicant is a native and citizen of New Zealand who was found to be inadmissible to the United States under § 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. The applicant married a United States national in April 1994 and is the beneficiary of an approved petition for alien relative. The applicant seeks a waiver of this permanent bar to admission as provided under § 212(h) of the Act, 8 U.S.C. 1182(h), to reside in the United States with his spouse and children.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the application accordingly. The Associate Commissioner affirmed that decision on appeal.

On motion, counsel argues that the applicant's criminal history cited in the record is incorrect and that the record contains adequate evidence of extreme hardship to qualifying relatives to warrant a grant of the applicant's waiver request.

The record contains a police report from New Zealand containing the following information regarding the applicant's criminal history:

> (1) On May 2, 1975, he was convicted of sexual intercourse with a girl 12 to 16. He was fined $200 and placed on probation for one year.
>
> (2) On December 22, 1975, he was convicted of common assault and imprisoned for six months.
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> (3) On June 21, 1976, he was convicted of common assault and placed on probation for one year.
>
> (4) On April 29, 1985, he was convicted of false report, careless driving and unlicensed driving. He was fined $500 on each count and disqualified from driving for three months.

Section 212(a) of the Act states:

> CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.- Except as otherwise provided in this Act, aliens who are ineligible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) CRIMINAL AND RELATED GROUNDS.-

(A) CONVICTION OF CERTAIN CRIMES.-

(i) IN GENERAL.- Except as provided in clause (ii), an alien convicted of, or who admits having committed, or who admits committing such 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:

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

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General 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 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; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or for adjustment of status.

> No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. See [redacted] 21 I&N Dec. 516 (BIA 1996; A.G. 1997). If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. [redacted] 11 I&N Dec. 419 (BIA 1965); [redacted] 12 I&N Dec. 633 (BIA 1968).

The applicant filed his application for adjustment of status on September 26, 1995. At least 15 years have now elapsed since he committed his last excludable act. In addition, he is the son of a lawful permanent resident father, the spouse of a U.S. national, and parent of citizens of the United States. Therefore, the applicant is eligible for consideration of a waiver provided under both § 212(h)(1)(A) and (B) of the Act.

Consideration for a waiver of inadmissibility as provided under § 212(h)(1)(A) hinges upon the applicant showing that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

On motion, counsel asserts that the applicant is now forty-seven years-old and has had no involvement with the law for more than twenty-five years. Although the record contains documentation regarding the applicant's good behavior and helpfulness to family members, evidence in the record also indicates the applicant failed to completely disclose the facts of his criminal record when interviewed under oath by an immigration officer in March 1996 and June 1999. The applicant stated under oath on both occasions that he had been arrested only one time, and that he had been imprisoned

only one time, for fighting in a public place. He also stated on both occasions that he did not remember having been arrested for having sex with a young girl.

Counsel submits a verification of criminal record from the New Zealand police indicating that the applicant was imprisoned only one time. Counsel asserts that the applicant therefore did not lie under oath regarding the number of times he had been imprisoned. However, while the applicant was imprisoned only once, he stated under oath that he had been arrested on only one occasion when, in fact, he had been arrested on at least four occasions.

Counsel also asserts that the district director characterized the applicant's May 1975 conviction of sexual intercourse with a girl 12 to 16 as involving "rape." Counsel explains that the applicant met the girl at a bar and was invited by her to a party where he had sexual intercourse with her. Several days later, the applicant developed a severe venereal infection for which he sought treatment. As part of the treatment process, the applicant identified his sexual partners so that the source and spread of the disease could be identified. When the girl's age became known, the applicant was charged as indicated in the record. Counsel states that the applicant did not force or coerce the girl into the sexual relationship, that it was consensual and clearly not rape. Counsel asserts that the applicant was not given the opportunity to explain the circumstances of the offense at the time of his interviews under oath with an immigration officer.

A review of the record does not support counsel's assertions. There is no evidence in the record to indicate that the district director characterized the crime as "rape." The denial of the applicant's request notes only that the crime was of a "serious" nature. As the applicant claimed not to have been arrested for the offense, he was not able to explain the circumstances of the arrest. Furthermore, the circumstances of the crime do not negate the fact that the applicant was arrested and convicted of the offense.

Section 212(h)(1)(B) of the Act provides that a waiver of the bar to admission resulting from inadmissibility under § 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. The key term in the provision is "extreme." Therefore, only in cases of great actual or prospective injury to the qualifying relative(s) will the bar be removed. Common results of the bar, such as separation or financial difficulties, in themselves, are insufficient to warrant approval of an application unless combined with much more extreme impacts. [redacted], 19 I&N Dec. 245 (Comm. 1984). "Extreme hardship" to an alien himself cannot be considered in determining eligibility for a § 212(h) waiver of inadmissibility. [redacted] 12 I&N Dec. 810 (BIA 1968).

On motion, counsel asserts that there are several factors which, when considered in the aggregate, would constitute extreme hardship to the applicant's family members in the United States. Counsel states that the applicant's brother suffers from an incomplete spinal cord injury that requires daily supervision and physical assistance which is provided entirely by the applicant. If the applicant is removed from the United States, counsel asserts that the applicant's spouse will be burdened both physically and financially with his brother's care.

Counsel also states that the parents of the applicant's spouse are elderly and rely exclusively on the physical assistance of the applicant's spouse. The applicant's spouse is unable to leave the United States, and will not allow the couple's minor children to leave the United States, because of her parental care obligations.

In [redacted] 96 F.3d 390 (9th Cir. 1996), the court stated that "extreme hardship" is hardship that is unusual or beyond that which would normally be expected upon deportation. The common results of deportation are insufficient to prove extreme hardship.

The court held in [redacted] 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.

It should also be noted that there are no laws that require the applicant's spouse or children to leave the United States and live abroad. Further, the common results of deportation are insufficient to prove extreme hardship. [redacted] 927 F.2d 465 (9th Cir. 1991). 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. [redacted] 39 F.3d 1049 (9th Cir. 1994). In [redacted] 437 F.2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that he has sufficiently reformed or rehabilitated or that his qualifying relatives would suffer extreme hardship over and above the normal economic and social disruptions involved in the removal of a family member. 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 application for waiver of grounds of inadmissibility under § 212(h), the burden of proving eligibility remains entirely with the applicant. [redacted] Here,

the applicant has not met that burden. Accordingly, the order dismissing the appeal will affirmed. The application will be denied.

ORDER: The Associate Commissioner's order of September 14, 2000 dismissing the appeal is affirmed. The application is denied.