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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

*ADMINISTRATIVE APPEALS OFFICE*
*425 Eye Street N.W.*
*BCIS, AAO, 20 Mass, 3/F*
*Washington, D.C. 20536*

[redacted]

FILE: [redacted] Office: DENVER, CO Date: AUG 19 2003

IN RE: [redacted]

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:

[redacted]

INSTRUCTIONS:

This is the decision 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 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Cameroon 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 a crime involving moral turpitude. The applicant is married to a United States (U.S.) citizen and he is 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), so that he may reside with his wife in the United States.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed upon his U.S. citizen wife. The application was denied accordingly.

On appeal, counsel asserts that the Immigration and Naturalization Service ("Service", now known as the Bureau of Citizenship and Immigration Services, "Bureau") erred in finding that the crimes that the applicant committed involved moral turpitude. Counsel further asserts that the Service incorrectly applied immigration law in its analysis of extreme hardship and that the Service also failed to consider or balance the discretionary factors in the applicant's case. Counsel additionally asserts that the applicant's wife would suffer extreme financial and emotional hardship if the applicant were removed from the United States.

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

> (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, that:

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

. . . .

> (1) (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 . . . .

The record reflects that on September 14, 2000, the applicant was convicted of the offenses of "Menacing", in violation of the Colorado Revised Statute, Criminal Code (C.R.S.C.C.) § 18-3-206, and "Assault 3", in violation of C.R.S.C.C. § 18-3-204. Counsel's assertion that these crimes are not crimes involving moral turpitude is unconvincing. Counsel provides no legal authority for his assertions. Moreover, the Board of Immigration Appeals ("Board") held in *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992) that:

> 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 statue, moral turpitude does not inhere.*Perez-Contreras* at 618. (Citations omitted; emphasis added).

In the present case, the statutory language for the crime of "menacing" under C.R.S.C.C § 18-3-106 states:

> A person commits the crime of menacing if, by any threat or physical action, **he or she knowingly** places or attempts to place another person in fear of imminent serious bodily injury bodily injury. Menacing is a class 3 misdemeanor, but it is a class 5 felony if committed:
>
> (a) By the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon; or

> (b) By the person representing verbally or otherwise that he or she is armed with a deadly weapon. [Emphasis added]

The evidence in the record reflects that in the applicant's case, the crime of "menacing" was considered a class 5 felony. Based on the statutory language, the applicant's conviction for "menacing" is clearly a crime involving moral turpitude.

The statutory language for the crime of "assault in the third degree" under C.R.S.C.C. § 18-3-204 states:

> A person commits the crime of assault in the third degree if **he knowingly or recklessly** causes bodily injury to another person **or with criminal negligence** he causes bodily injury to another person by means of a deadly weapon. Assault in the third degree is a class 1 misdemeanor. (Emphasis added).

The Board has held that criminally reckless conduct involves moral turpitude, and that it is conduct that shows an awareness of and conscious disregard of a substantial and unjustifiable risk. *See Perez-Contreras, supra* at 618 (*citing Matter of Wojtkow,* 18 I&N Dec. 111 (BIA 1981) and *Medina-Luna v. INS,* 547 F.2d 1171 (7th Cir. 1977)). It thus appears that the applicant's conviction for "assault in the third degree" also constitutes a crime involving moral turpitude.

The district director's decision states, in pertinent part, that:

> [I]n support of your application . . . you have provided a letter of support from your wife . . . . The letter states that your wife would be depressed if she had to stay by herself for a long period of time and that financially she would not be able [to] support herself without your income. She also states that she would be afraid to live alone without your protection and that it would ruin so many of your life dreams and aspirations.
>
> . . . .
>
> Through your application and the letter from your wife, [redacted] you claim there will be extreme hardship to your United States citizen wife. In assessing whether an applicant has met his burden

> of establishing that a grant of waiver of inadmissibility is warranted in the exercise of discretion, there is a balancing of the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane consideration presented on his behalf to determine whether the grant of waiver appears to be in the best interest of the United States. *Matter of Mendez-Morales*, Int. Dec. 3272 (BIA 1996).
>
> You have failed to establish that the denial of this application will create extreme hardship, hardship beyond the attendant hardship encountered in any deportation, for you or your family. "When the potential hardships the alien may encounter are the same faced by any alien to be deported, the "extreme hardship" standard has not been met. *Cortes-Castillo v. INS*, 997 F.2d 1199, 1204 (7th Cir. 1993). *See also Diaz-Salazar v. INS*, 700 [F].2d 1156, 1160 (7th Cir)
> . . . .

*See District Director Decision*, dated February 8, 2003. Although the district director's physical placement of section 212(h) "exercise of discretion" language could arguably be confusing, the decision does indicate that the basis of the applicant's waiver of inadmissibility denial is that the applicant failed to establish he or his family would suffer extreme hardship beyond that normally suffered by aliens who are removed from the United States.

Counsel correctly points that hardship the alien himself experiences upon deportation is irrelevant to section 212(h) waiver proceedings, and that the only relevant hardship in the present case is that suffered by the applicant's wife. *See Appeal Brief* dated March 1, 2003. The district director's conclusion that the applicant failed to establish extreme hardship to himself and his family was thus erroneous and contrary to current immigration laws. Moreover, it is additionally noted that the 7th Circuit Court of Appeal cases cited to by the district director are suspension of deportation and waiver cases which under pre-amended immigration law, allowed for hardship to the alien him or herself to be assessed. The district director's reference to these case is thus contrary to qualifying relative provisions contained in the amended section 212(h)of the Act.

Nevertheless, the AAO finds that the above errors are harmless in the applicant's case. The district director's discussion of

extreme hardship does not include or appear to have taken into account any hardship factors relating to the applicant himself. Moreover, even if the district director did assess hardship to the applicant in his decision, the inclusion of this hardship would not have been harmful to the applicant's case, and the determination that the applicant did not establish extreme hardship to a qualifying relative would be the same. In a letter to the Service [Bureau], the applicant's wife stated that she would suffer emotional and financial hardship if the applicant were not granted a waiver of inadmissibility. The record contains no other claims or evidence of hardship. Moreover, the letter contains no detailed information or corroborative evidence to establish emotional or financial hardship to the applicant's wife.

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien had established extreme hardship pursuant to section 212(i) of the Act. The factors included 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.

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, 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 *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit Court of Appeals defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Ninth Circuit emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court 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.

The evidence in the present case does not establish that the applicant's wife would suffer hardship beyond that normally expected upon the deportation.

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 must then assess whether an exercise of discretion is warranted. Because the applicant failed to establish the section 212(h) statutory extreme hardship element of his case, the district director was not required to balance the adverse and positive factors of the applicant's case. Thus, the fact that the district director's decision made no determination regarding whether discretion should be exercised did not constitute a legal error or an abuse of discretion.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that his U.S. citizen wife will suffer extreme hardship if his waiver of inadmissibility application is denied. Having found the applicant ineligible for relief, the AAO finds that 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 under section 212(a)(2)(A) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* 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.