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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

PUBLIC COPY

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



FILE: [Redacted] Office: Los Angeles

Date: JUL 21 2003

IN RE: Applicant: [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:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

JUL2103-01H2212

DISCUSSION: The waiver application was denied by the Acting District Director, Los Angeles, California, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nicaragua who was unlawfully present in the United States in November 1983. On March 24, 1988, an immigration judge granted the applicant's application for asylum. He married a native of El Salvador, [REDACTED] on December 12, 1987, and she became a naturalized U. S. citizen on December 9, 1992. The applicant seeks to adjust his status under the Nicaraguan Adjustment & Central American Relief Act (NACARA), Pub. L. 105-100, as amended. He was found 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. The applicant seeks a waiver of this permanent bar to admission as provided under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The acting district director concluded that the applicant had failed to establish that extreme hardship would be imposed upon his United States citizen wife and denied the application accordingly.

On appeal, counsel states that the applicant has resided in the United States since he was 21 years old. Counsel discusses the hardship that would be imposed on his mother, who is a widow and lawful permanent resident, on his adult lawful resident daughter, on his U.S. citizen son, and on his wife who was diagnosed as DSM IV (Adjustment Disorder with Anxiety and Depression).

On February 23, 1998, the applicant was convicted of Battery and Assault with a Deadly Weapon (a Baseball Bat). He was sentenced to 270 days confinement and placed on probation for three years. The record indicates that on August 30, 1997, the applicant struck the female victim with a baseball bat seven times on various parts of her body and then choked her until she lost consciousness. The applicant and his girl friend had been using methamphetamine in his apartment, and they started quarreling.

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

(A)(i) Except as provided in clause (ii), any 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 part, that:-The Attorney General [now Secretary of Homeland Security] may, in his

discretion, waive the application of subparagraph (A)(i)(I)...or subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana 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 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...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...

Here, fewer than 15 years have elapsed since the applicant committed the last violation. Therefore, the applicant is ineligible for the waiver provided by section 212(h)(1)(A) of the Act.

Nothing could be clearer than Congress' desire in recent years to limit, rather than extend, the relief available to aliens who have committed crimes involving moral turpitude. In addition to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. 104-208, 110 Stat. 3009, this intent was also seen in the provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214, which relates to criminal aliens. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See *Fiallo v. Bell*, 430 U.S. 787 (1977); *Reno v. Flores*, 507 U.S. 292 (1993); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). See also *Matter of Yeung*, 21 I&N Dec. 610, 612 (BIA 1997).

Section 212(h) (1) (B) of the Act provides that a waiver of the bar to admission resulting from inadmissibility under 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. 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. *Matter of Ngai*, 19 I&N Dec. 245 (Comm. 1984). "Extreme hardship" to an alien himself cannot be considered in determining eligibility for a section 212(h) waiver of inadmissibility. *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968).

On appeal, counsel refers to *Matter of Kao*, 23 I&N Dec. 45 (BIA 2001), in which the Board of Immigration Appeals (the Board) held that the same standard for determining "extreme hardship" in application for suspension of deportation is also applied in adjudicating petitions for immigrant status under section 204(a) (1) of the Act, 8 U.S.C. § 1154(a) (1), and waivers of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i).

Matter of Kao relates to the issue of "extreme hardship" as that term was applied in matters involving suspension of deportation under section former 244 of the Act, 8 U.S.C. § 1254, prior to its amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and recodification under section 240A of the Act, 8 U.S.C. 1230A, and redesignation as "cancellation of removal." *Matter of Piltch*, 21 I&N Dec. 627 (BIA 1996); *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

The AAO is not suggesting that the term "extreme hardship" has two different meanings and is in agreement with the holding in *Matter of Kao*. However, it is clear from the statutes concerning both section 212(i) and former section 244 of the Act that the scope of application of that term, in what was formerly called suspension of deportation, was much broader. In the present proceedings and in section 212(h) proceedings, a finding of "extreme hardship" is only applicable to a spouse, parent, son or daughter of a United States citizen or lawfully resident alien. Hardship to the applicant is not a consideration. In former section 244 proceedings, a finding of "extreme hardship" was applicable to the alien as well as to his/her spouse, parent or child who is a U.S. citizen or an alien lawfully admitted for permanent residence.

A review of the documentation in the record, when considered in its totality and considering various hardships to four qualifying relatives instead of two as indicated on the initial application, now establishes the existence of hardship over and above the normal economic and social disruptions involved in the deportation of a family member that reaches the level of extreme as envisioned by Congress if the applicant is not allowed to remain in the United States. It is concluded that the applicant has now established the qualifying degree of hardship in this matter.

The grant or denial of the above waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Attorney General and pursuant to such terms, conditions, and procedures as he may by regulations prescribe.

In *Matter of Goldeshtein*, 20 I&N Dec. 382 (BIA 1991), *rev'd on other grounds*, 8 F.3d 645 (9th Cir. 1993), the Board of Immigration Appeals (the Board) held that an application for discretionary relief, including a waiver of inadmissibility under section 212(h) of the Act, may be denied in the exercise of discretion without express rulings on the question of statutory eligibility. In that matter, the immigration judge found that there may be extreme hardship in that particular case but denied the waiver request as a matter of discretion because the applicant's offense was "very serious." See *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976).

The unfavorable aspects of this matter, including the recency and seriousness of the applicant's criminal violation, have been reviewed and considered. These unfavorable aspects heavily outweigh any positive factors present in this matter such as his marriage, the prospect of separation, and the loss of the family restaurant. The extremely strong negative factors have not been overcome on appeal. Therefore, a favorable exercise of the Attorney General's discretion is not warranted in this matter at the present time.

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. 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.