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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

FILE: [redacted] Office: MIAMI, FLORIDA Date: SEP 10 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: [redacted]

PUBLIC COPY

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 application was denied by the District Director, Miami, Florida. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The AAO affirmed the prior decisions on a motion to reconsider and a motion to reopen. The matter is now before the AAO on a third motion to reopen. The motion will be granted and the order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Venezuela who 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 is married to a citizen of the United States and is the beneficiary of an approved petition for alien relative. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen wife.

In a decision dated October 16, 2000, the district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative. The district director denied the application accordingly. The AAO affirmed the district director's decision on appeal on March 12, 2001.

In his first motion to reconsider, filed in April 2001, counsel asserted that the applicant planned to petition a Florida court for a judgment vacating and setting aside his nolo contendre and guilty pleas, and that pursuant to Florida state law, the applicant was not considered "convicted." The AAO noted in a decision dated January 22, 2002, that counsel presented no evidence that the applicant's convictions were vacated. The AAO found further that the applicant was considered "convicted" for federal immigration purposes. The district director's decision was affirmed accordingly.

Counsel filed a second motion to reopen in February 2002, asserting that the applicant had filed a Motion to Vacate and Set Aside Judgment, with a Florida court. Counsel requested additional time to submit evidence regarding the motion. Counsel additionally asserted that he reserved the right to submit new evidence regarding hardship once the Motion to Vacate was granted. On January 31, 2003, the AAO issued a decision summarizing the facts and history of the case. The AAO noted that no additional evidence had been received by the AAO, and the prior decisions of the district director and the AAO were affirmed.

In the present third motion to reopen, filed in February 2003, counsel refers to evidence submitted in May 2002, indicating that a Florida court changed the applicant's "guilty" and "nolo

contendre" pleas and subsequent convictions to "nolle prosequi" dispositions. Although not directly stated, counsel implies that as a result, the applicant was not "convicted" of crimes involving moral turpitude and that he is therefore not inadmissible. Counsel additionally asserts that country conditions in Venezuela have changed dramatically, and that the applicant's wife would suffer extreme hardship if she moved there due to the failing economy, political instability and crime against U.S. citizens. Counsel asserts that the applicant's wife would also suffer extreme financial hardship if she remained in the U.S. because the applicant would not be able to work in Venezuela.

Counsel failed to establish that the "nolle prosequi" dispositions change the applicant's "conviction" status for immigration purposes.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

> A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt 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 contendre or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

In *Matter of Roldan-Santoyo,* 22 I&N Dec. 512 (BIA 1999), the Board of Immigration Appeals held that under the statutory definition of the term "conviction", no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Once an alien is subject to a "conviction" as that term is defined in section 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure.

Counsel additionally failed to demonstrate that changes in Venezuelan country conditions would cause the applicant's wife to suffer extreme hardship in Venezuela due to the failing economy, political instability and crime against U.S. citizens. Counsel also failed to establish that the applicant's wife would suffer

extreme financial hardship if she remained in the U.S. without her husband based on the economic crisis in Venezuela.

Counsel submitted a copy of a January 24, 2003, political speech given to the Organization of American States by U.S. Secretary of State, Colin Powell. The information in the speech is general in nature and fails to demonstrate how the applicant's wife would suffer extreme hardship if she went to Venezuela with the applicant, or if she remained in the U.S. while her husband returned to Venezuela. Moreover, the January 27, 2003, U.S. Dept. of State, Consular Information Sheet on Venezuela submitted by counsel, refers to criminal and in some cases political violence against U.S. citizens near the Venezuelan/Colombian border and in the capital of Caracas and the tourist city of Maracaibo. The applicant and his wife should therefore be able to reside in other parts of Venezuela without encountering the types of problems that exist in the three areas discussed in the Information Sheet. The AAO notes that the U.S. Department of State, Venezuelan Travel Warning submitted by counsel, is dated December 6, 2002, and that the warning expires on March 5, 2003. Moreover, a review of the current U.S. Department of State Travel Warnings issued after March 2003, reflects that Venezuela is no longer on the Travel Warnings list. *See U.S. Department of State, Bureau of Consular Affairs, American Citizens Services, Current Travel Warnings*, as of August 10, 2003. (http://travel.state.gov/warnings_list.html.)

Counsel also failed to establish that the applicant's wife would suffer extreme financial hardship if the applicant's waiver application were not granted. Counsel indicated that the applicant would be unable to work for the bankrupt Venezuelan national airline, VIASA. Counsel provided no evidence to establish that the airline has not continued to operate after filing bankruptcy. Moreover, counsel provided no detailed evidence to establish that the applicant would be unable to work in a different profession in Venezuela.

A review of the new and existing documentation in the record, when considered in its totality, fails to establish the existence of hardship over and above the normal economic and social disruptions involved in the removal of a family member. Accordingly, the prior orders dismissing the appeal will be reaffirmed.

ORDER: The AAO order dated March 12, 2001, dismissing the appeal is reaffirmed.