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FILE:

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Office: LOS ANGELES

Date: JUL 17 2006

IN RE:

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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 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Los Angeles, California, denied the waiver application, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico 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 the son of lawful permanent residents and parent of four U.S. citizen children. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with mother, father and children.

The district director concluded that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Interim District Director*, dated January 5, 2005.

The record reflects that, on October 28, 1992, the applicant was convicted of misdemeanor burglary in violation of section 459 of the California Penal Code. The applicant was sentenced to 180 days in jail and 36 months of probation. On June 29, 1994, the applicant was found guilty of driving on a suspended license and was ordered to pay a fine. On February 24, 1997, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485), based on an approved Petition for Alien Relative (Form I-130) filed by the applicant's lawful permanent resident father. On August 15, 1997, the applicant was convicted of willful infliction of corporal injury on a spouse, cohabitant, or parent of the perpetrator's child, in violation of section 273.5(a) of the California Penal Code and was sentenced to 30 days in jail and 3 years of probation.

On July 27, 1999, the applicant filed the Form I-601 with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his family members.

On appeal, counsel asserts that the applicant was not convicted of a crime involving moral turpitude and his family members would suffer extreme hardship if he were to be denied adjustment to lawful permanent resident status. *See Applicant's Brief* dated January 28, 2005. In support of the appeal, counsel submitted the above-referenced brief, additional medical and school documents for the applicant's children and copies of documents previously provided. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(2) Criminal and related grounds. —

(A) Conviction of certain crimes. —

(i) In general. — 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 pertinent part, that:

- (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B) . . . 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 . . .

Counsel contends that the applicant has not been convicted of a crime involving moral turpitude because the offense of burglary is not deemed to be an offense involving moral turpitude when the conviction record does not indicate the particular crime that accompanied the breaking and entering, since the determinative factor is whether the crime intended to be committed at the time of entry or prior to breaking in involves moral turpitude. However, the applicant has also been convicted of willful infliction of corporal injury on a spouse, cohabitant, or parent of the perpetrator's child, a crime involving moral turpitude. *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996). Therefore, the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

Hardship to the alien himself is not a permissible consideration under the statute. A section 212(h) waiver is therefore dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse, parent or child of the applicant.

The concept of extreme hardship to a qualifying relative “is not . . . fixed and inflexible,” and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 at 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their

totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The record reflects that the applicant has a 13-year old son, a 12-year old son, a 7 year old son and a six-year old daughter, who are all U.S. citizens by birth. The applicant resides with, but is not married to, the children's mother, [REDACTED] who is a lawful permanent resident. The applicant's father, [REDACTED] resides with the applicant's mother, [REDACTED] in another city in California. The record reflects further that the applicant is in his 30's, [REDACTED] and [REDACTED] are in their 50's, and there is no indication that they have any health concerns.

The applicant contends that his parents and children would suffer extreme financial and emotional hardship whether they remained in the United States without him or traveled to Mexico in order to reside with him.

There is no evidence in the record to suggest, and the applicant does not assert, that the applicant provides any financial support to his mother and father. There is no evidence in the record to suggest that the applicant's parents suffer from a physical or mental illness that would cause them to suffer emotional hardship beyond that commonly suffered by aliens and families upon deportation. Moreover, the record reflects that the applicant's parents have immediate family in the United States, such as their two other grown children, who may be able to provide financial and emotional support in the absence of the applicant.

The applicant has been working as a laborer since 1995 and appears to have no education or other employable skills. The applicant resides with his children's mother who appears to have no marketable job skills and appears to be the primary caretaker for the children. The applicant submits medical documentation that shows the applicant's two eldest children have learning disabilities. The applicant's eldest son has been diagnosed with severe mental retardation and Attention Deficit Disorder (ADHD) for which he has received and currently receives daily intervention and treatment through the Fontana Unified School District. *See Medical Letter, Fontana school District Individualized Education Program Reports and Los Angeles Unified School District Psychoeducational Assessment Report*. The applicant's second eldest son has been diagnosed with a non-sever specific learning disability, severe behavioral problems and a conduct disorder for which he received treatment and currently receives daily intervention and treatment through the Fontana Unified School District. *See Medical Letter, Fontana School District Individualized Education Program Reports and Los Angeles Unified School District Psychoeducational Assessment Report*. The applicant submits documentation that shows the applicant's two eldest children have been receiving evaluations and treatment for developmental delays since 2000. *See Medical Letter, Fontana School District Individualized Education Program Reports and Los Angeles Unified School District Psychoeducational Assessment Report*. The applicant's eldest son continues to receive treatment which requires the assistance of the parents at home in reaching vocational goals with 87% of the child's time spent outside the general education system with one-on-one individualized attention through the Fontana Unified School District. The applicant's second eldest son continues to receive treatment which requires the assistance of the parents at home in reaching written

language goals with 83% of the child's time spent outside the general education system with one-on-one individualized attention through the Fontana Unified School District. The applicant's affidavit indicates that he is concerned that his children will suffer psychological impacts if he were separated from them. As such, even if the applicant's children's mother were able to afford professional care for the applicant's sons if she were able to obtain employment, this professional care could be detrimental to the applicant's eldest two children's learning disabilities. Financial documentation indicates that the applicant earned \$24, 095 in 1997 and that the applicant supplies 100% of the family income, which appears to barely meet the Department of Health and Human Services Poverty Guidelines for a family of five. The applicant is concerned that if his children relocated to Mexico to avoid separation from him, he would find it difficult to obtain sufficient employment to support the family owing to the economy. Moreover, the applicant is concerned that what employment he obtained would be insufficient to provide the necessary care for his son's conditions. The applicant is also deeply concerned that his two eldest children would not receive the intervention and therapy that they receive in the United States in the public school system. He is concerned that such services would not be available in Mexico, or be an expense he would be unable to afford. There is no documentation of country conditions on the record.

Courts in the Ninth Circuit Court of Appeals have recognized that, in certain cases, economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme. "Included among these are the personal hardships which flow naturally from an economic loss decreased health care, educational opportunities, and general material welfare." *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th cir. 1981) (citations omitted); see also *Santana-Figueroa v. INS*, 644 F.2d 1354, 1358 (9th cir. 1981) ("Economic loss often accompanies deportation. Even a significant reduction in standard of living is not, by itself, a basis for relief But deportation may also result in the loss of all that makes life possible. When an alien would be deprived of the means to survive, or condemned to exist in life-threatening squalor, the "economic" character of the hardship makes it no less severe.")

The applicant is responsible for the care of four children. The applicant and the applicant's children's mother's prospects for adequate employment in Mexico are somewhat dim. If the applicant's children remained in the United States, the applicant's children's mother would face trying to maintain alone a household with four young children, two of which have significant disabilities, without the household assistance and support the applicant currently provides, as well as the applicant's children trying to combat their learning disabilities which would be exacerbated by the applicant's absence. It would be extremely difficult to mitigate the effects of separation by visiting the applicant, due to the cost in relation to family income and family size. In Mexico, the significant health conditions of the applicant's sons would most likely suffer, and it is probable that the applicant and the applicant's children's mother would be unable to adequately provide for their care. Although the applicant has years of experience as a laborer, in Mexico, where wages are generally lower and the unemployment rate is high, these skills would be undermined and he and his family could be reduced to poverty, compounded by their family size and the applicant's sons' disabilities. The hardship the applicant's children would face is substantially greater than that which aliens and families upon deportation would normally face. The applicant's children have no immediate family in Mexico and they have significant family ties in the United States, including their lawful permanent resident mother. As set forth in *Matter of Kao & Lin*, 23 I&N Dec. 45 (BIA 2001), the hardships the applicant's adolescent son would experience upon accompanying the applicant to Mexico constitute extreme hardship, even without the additional hardship imposed by his disabilities. A finding of extreme psychological, physical

and financial hardship is the inevitable conclusion of the combined force of the submitted medical and psychological letters. A discounting of the extreme hardship the applicant's children would face in either the United States or Mexico if the applicant were refused admission is, therefore, not appropriate. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that the applicant's children faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case are the criminal convictions, which occurred over nine years ago, for which the applicant seeks a waiver and a prior order of deportation. The favorable and mitigating factors in the present case are the extreme hardship to the applicant's children if he were refused admission, the significant disabilities of the applicant's U.S. citizen sons, the applicant's steady employment and the applicant's payment of taxes.

The AAO finds that, although the immigration violation committed by the applicant was serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.