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U.S. Citizenship  
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FILE:

Office: CALIFORNIA SERVICE CENTER

Date: AUG 29 2007

IN RE:

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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the waiver application and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Cuba who is 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 spouse of a U.S. citizen and mother of three U.S. citizen children. She 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 her spouse and children.

The director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Director*, dated June 15, 2006.

The record reflects that, on June 2, 1984, the applicant entered the United States without inspection and was placed into proceedings. The applicant was not paroled into the United States but did file an Application for Asylum and Withholding of Removal (Form I-589) before the immigration judge. On October 18, 1988, the immigration judge granted the applicant voluntary departure until April 18, 1989. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On April 19, 1989, a warrant was issued for the removal of the applicant. On November 25, 1996, a criminal judge withheld the applicant's adjudication of guilt and sentenced the applicant to 2 years and 6 months of probation in relation to a charge of violating section 784.045 of the Florida State Statutes, aggravated battery against a pregnant woman. On February 22, 2003, the applicant married her spouse, [REDACTED]. On September 11, 2005, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on her claim that she is a Cuban native or citizen who was admitted to or paroled into the United States after January 1, 1959, and has thereafter been physically present in the United States for at least one year. On September 11, 2005, the applicant filed the Form I-601 with documentation supporting her claim that the denial of the waiver would result in extreme hardship to her husband.

On appeal, counsel contends that the extreme hardship that would be endured by the applicant's family if she is removed from the United States would be more than the common results of mere separation or financial difficulties. *See Counsel's Letter*, dated August 18, 2006. In support of the appeal, counsel submits the referenced letter and medical documentation. The entire record was reviewed and considered in rendering a decision in this case.

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

(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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

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

A “conviction” for immigration purposes is defined in section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), 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 contendere 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.

Section 948.01 of the Florida State Statutes provides:

When court may place defendant on probation or into community control.--

(1) Any court of the state having original jurisdiction of criminal actions may at a time to be determined by the court, either with or without an adjudication of the guilt of the defendant, hear and determine the question of the probation of a defendant in a criminal case, except for an offense punishable by death, who has been found guilty by the verdict of a jury, has entered a plea of guilty or a plea of nolo contendere, or has been found guilty by the court trying case without a jury.

The applicant’s criminal record indicates that the applicant’s adjudication of guilt was withheld. In order for a judge to withhold adjudication and place the applicant on probation, the applicant must have either, been found guilty by a jury, entered a plea of guilty, entered a plea of nolo contendere or been found guilty by the court. As such, the applicant’s withheld adjudication is a conviction for immigration purposes since she was sentenced to 2 years and 6 months of probation.

Hardship to the alien herself 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, son or daughter 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, 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. 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).

Since the applicant's spouse and children are U.S. citizens and are not required to reside outside the United States as a result of the denial of the applicant's waiver, extreme hardship must be established whether they reside in the United States or Cuba.

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 [REDACTED] is a U.S. citizen by birth. The applicant has a 15-year old son from a previous marriage who is a U.S. citizen by birth. The applicant and [REDACTED] have a three-year old son and a two-year old daughter who are both U.S. citizens by birth. The applicant and [REDACTED] are in their 30's.

In *Salcido-Salcido v. INS*, 138 F.3d 1292 (9<sup>th</sup> Cir. 1998), the Ninth Circuit Court of Appeals (the Ninth Circuit) held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9<sup>th</sup> Cir. 1998) (citations omitted). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9<sup>th</sup> Cir. 1987) (remanding to the Board of Immigration Appeals (BIA)) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case. However, in *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996), the Ninth Circuit defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon removal. The Ninth Circuit emphasized that the common results of removal are insufficient to prove extreme hardship. Therefore, while separation from family members may, in itself, constitute hardship, the hardship must still be beyond the common results of removal to constitute "extreme hardship."

Counsel, on appeal, asserts that the applicant's family will suffer extreme hardship if the applicant is removed from the United States. Counsel asserts that the applicant's oldest child has medical and emotional issues that require family unity and his mother's presence.

██████████ in his affidavit, states that the applicant is the energy that makes the family get going every day and it is because of her daily sacrifices that he is able to work as a Florida State Trooper. He states that without the applicant's moral and spiritual support to him and his children he would not be able to go to work every day. He states that the applicant brings stability to their lives and had helped bridge a gap between him and his father, with whom he had not spoken in many years. He states that he cannot fathom how he will raise their children and his stepson without the applicant's presence.

Medical documentation in the record indicates that the applicant's eldest son was diagnosed with and treated for attention deficit disorder in 2000. The medical documentation indicates that the applicant's eldest son's speech delay was related to his decreased auditory functions, which were resolved by the insertion of tubes in his ears in 2000. The last evaluation, dated October 3, 2001, indicates that the applicant's eldest son's socialization had improved and he no longer met the criteria for pervasive developmental disorder (PDD). While the evaluation indicates that he had developmental language disorder and attention deficit with hyperactivity, he was not taking any medications. The evaluation indicates that the applicant's eldest son was to return for a follow-up three months thereafter. However, there is no further documentation indicating that the applicant's eldest son has received continuing evaluation or treatment between October 2001 and June 2005. A New Patient report, dated June 21, 2005, indicates that the applicant's eldest son had a history of speech delay and therapy, but that he was merely attending a regular check-up. The New Patient report indicates that the applicant's eldest child had last been treated in regard to his speech delay three years prior to June 2005. An Established Patient report, dated June 1, 2006, indicates that the applicant's eldest child sought attention for a sore throat, a runny nose and cough. There is no other documentation in the record to suggest that, since 2001, the applicant's youngest son has been evaluated or treated for attention deficit disorder or another learning disorder or that he requires ongoing or special treatment or that the applicant's presence is required for treatment of the child. There is no evidence in the record to suggest that ██████████ or the applicant's children suffer from a physical or mental illness that would cause them to suffer hardship beyond that commonly suffered by aliens and families upon removal.

If the applicant's children were to remain with ██████████ in the United States, ██████████ would essentially become a single parent who may be required to rely on professional childcare that may be expensive and may not equate to the care of a mother. While the AAO notes this hardship, it is not a hardship that is beyond those commonly suffered by aliens and families upon removal. Moreover, the record reflects that the applicant has worked away from the household, indicating that the children may already have alternative care during the periods in which the applicant and ██████████ are absent from the home due to work commitments. Additionally, while it is unfortunate that ██████████ and the applicant's children would experience distress and some level of depression as a result of their separation from the applicant, the record does not demonstrate that their emotional reactions are different than those normally experienced when families are separated by removal.

While the AAO notes that ██████████ may have to lower his standard of living, the record does not contain any evidence to suggest that ██████████ would be unable to support himself and the children without the financial support of the applicant. The record does not support a finding of financial loss that would result in an extreme hardship to Mr. Reinoso and the applicant's children if ██████████ had to support them without additional income from the applicant, even when combined with the emotional hardship described above.

Counsel, on appeal, contends that the applicant's eldest son would not get the quality medical care required for his illnesses if he were forced to return to Cuba with the applicant. As discussed above, there is no

evidence in the record to confirm that the applicant's eldest child suffers from a physical or mental illness for which he would be unable to receive treatment in Cuba. [REDACTED] in his affidavit, does not assert that he or the children would suffer hardship if they were to accompany the applicant to Cuba. The AAO is, therefore, unable to find that [REDACTED] or the children would experience hardship should they choose to join the applicant in Cuba. Additionally, as previously noted, [REDACTED] and the applicant's children, as U.S. citizens, are not required to reside outside of the United States as a result of denial of the applicant's waiver request and, as discussed above, they would not experience extreme hardship if they remained in the United States without the applicant.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse and children would face extreme hardship if the applicant were refused admission. Rather, the record demonstrates that [REDACTED] and the applicant's children will face the unfortunate, but expected disruptions and difficulties arising whenever a spouse is removed from the United States. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship be above and beyond the normal, expected hardship involved in such cases. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). "[O]nly in cases of great actual or prospective injury . . . will the bar be removed." *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. *See INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant has failed to establish extreme hardship to her U.S. citizen spouse and children as required under section 212(h) of the Act, 8 U.S.C. § 1186(h). Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

The AAO notes that the applicant is also inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), as an alien who has been ordered removed.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal is dismissed.

**ORDER:** The appeal is dismissed.