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

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FILE:

Office: CHICAGO, ILLIONIS

Date:

NOV 06 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 cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Chicago, Illinois. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Lithuania 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), as an alien convicted of a crime involving moral turpitude. The record indicates that the applicant is married to a United States citizen and he is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 his United States citizen spouse, two United States citizen children, and lawful permanent resident mother.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's qualifying relatives and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *District Director's Decision*, dated December 20, 2005.

On appeal, the applicant, through counsel, asserts that the "District Director failed to consider all relevant facts and circumstances proving extreme hardship in this case." *Form I-290B*, filed January 19, 2006.

The record includes, but is not limited to, counsel's brief, affidavits from the applicant's wife and mother, the applicant's marriage certificate, documents regarding the applicant's son's speech therapy, and court dispositions for the applicant's arrest and conviction. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that on November 17, 2004, the applicant was convicted of identity theft, a class 4 felony, and was sentenced to thirty (30) months probation and sixty (60) days community service.

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

(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...

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

- (h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—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) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] 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 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...

(2) the [Secretary], 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 adjustment of status.

In the present application, the record indicates that on November 29, 1995, the applicant entered the United States on a B2 nonimmigrant visa, with authorization to remain in the United States until May 29, 1996. On February 28, 1998, the applicant married [REDACTED] a lawful permanent resident, in Illinois. On December 11, 1999, the applicant's son, [REDACTED] was born in Illinois. On June 22, 2001, the applicant's daughter, [REDACTED], was born in Illinois. On May 21, 2002, the applicant's wife became a United States citizen. On May 4, 2004, the applicant's wife filed a Form I-130 on behalf of the applicant. The applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485) at the same time. On November 17, 2004, the applicant was convicted of identity theft, a class 4 felony, and was sentenced to thirty (30) months probation and sixty (60) days community service. On March 7, 2005, the applicant's Form I-130 was approved. On July 8, 2005, the applicant filed a Form I-601. On December 20, 2005, the District Director denied the applicant's Form I-485 and Form I-601, finding the applicant failed to demonstrate extreme hardship to his qualifying relatives.

The applicant is seeking a section 212(h) waiver of the bar to admission resulting from a violation of section 212(a)(2)(A)(i)(I) of the Act. A waiver under section 212(h) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent or child of the applicant. Hardship the alien himself experiences upon removal is irrelevant to section 212(h) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant's United States citizen spouse,

children, and lawful permanent resident mother. 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).

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 has established extreme hardship to a qualifying relative. The factors include 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.

The applicant's prior counsel asserts that the applicant committed identity theft because "at the time he did not yet have an employment authorization card or social security number, and was therefore unable to open a line of credit in his own name. His intention was to repay the borrowed funds (which he did)." *Response to RFE*, dated June 21, 2005. The AAO notes that counsel's explanation of why the applicant committed identity theft does not negate the fact that the applicant intentionally stole someone else's identity to benefit himself and was convicted of the crime. Counsel's assertion is unpersuasive. "[C]ollateral attacks upon an [applicant's] conviction do not operate to negate the finality of his conviction unless and until the conviction is overturned." *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996) (citations omitted). Moreover, this office cannot go behind the judicial record to determine the guilt or innocence of an alien. *See id*; *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980) (the Service cannot go behind the judicial record to determine the guilt or innocence of an alien for a criminal offense).

Counsel asserts that the applicant's United States citizen wife, children, and lawful permanent resident mother would suffer extreme hardship if the applicant were removed from the United States. *Applicant's Brief in Support of Appeal*, filed January 19, 2006. Counsel states that the applicant's son, [REDACTED], suffers from a speech impairment. *Id.* On January 11, 2006, [REDACTED] a Speech Therapist, recommended that the applicant's son receive special education for his "speech-articulation." *Notification of Conference Recommendations*, dated January 11, 2006. [REDACTED] states the applicant's son's "articulation errors adversely effect [REDACTED] oral intelligibility, phonics and reading readiness skills"; however, the applicant's son is "meeting all academic goals." *Individualized Education Program report*, Part II, page 2, dated January 11, 2006. The AAO notes that there was no documentation submitted establishing that the applicant's son could not receive speech therapy in Lithuania and there is no indication that the applicant's son has to remain in the United States to receive his speech therapy. Additionally, it has not been established that the applicant's children, who are 6 and 7 years old, would have difficulties rising to the level of extreme hardship in adjusting to the culture of Lithuania. The AAO notes that the applicant's son speaks English and Lithuanian. *See Individualized Education Program report*, Part I, page 2, *supra*. Counsel claims that the applicant's wife would suffer "extreme financial hardship" if the applicant is removed. *Applicant's Brief in Support of Appeal, supra*. The applicant's wife states that the applicant is the "sole breadwinner for the family. He is self-employed and works very hard as a painter/decorator." *Affidavit from [REDACTED]* dated January 13, 2006. The AAO notes that the applicant's wife is a licensed real estate agent, and it has not been

established that she has no transferable skills that would aid her in obtaining a job in Lithuania. Additionally, the applicant's wife is a native of Lithuania, who spent her formative years in Lithuania, and the applicant failed to demonstrate whether or not he has any family ties in Lithuania. Counsel states the applicant's mother will suffer extreme hardship if the applicant is removed from the United States. Counsel states the applicant "faithfully visits [his mother] every week" and she "already struggle[s] with depression." *Id*; see also affidavit from [REDACTED], dated January 13, 2006 ("I already struggle with depression and it will only be exacerbated by [the applicant's] deportation."). The AAO notes that there were no professional evaluations for the AAO to review to determine how the applicant's mother's depression has been affected by the applicant's immigration status. Additionally, the applicant's mother is a native and citizen of Lithuania, and the AAO notes that she made no statement regarding the extreme hardship she would suffer if she joined the applicant in Lithuania. The AAO finds that the applicant failed to establish that his wife, children, and mother would suffer extreme hardship if they accompanied the applicant to Lithuania.

In addition, counsel fails to establish extreme hardship to the applicant's wife, children, and mother if they remain in the United States. Counsel states that "it would be impossible for [the applicant's wife] and the children to follow [the applicant] to Lithuania [sic]." *Applicant's Brief in Support of Appeal, supra*. The applicant's wife states that with "all the problems [her son] has been experiencing with his speech, there is no way we are going to make him go to school in Lithuania. All his education has been in English and he is much more comfortable in that language. Forcing him to start using another language in school is out of the question." *Affidavit from [REDACTED] supra*. The AAO notes that as United States citizens, the applicant's wife and children are not required to reside outside of the United States as a result of denial of the applicant's waiver request. Counsel states that if the applicant is removed from the United States, his wife "would be the sole provider for the family. She would be forced to work. Even if she did find a job; however, she would certainly not be able to keep paying their mortgage and other expenses." *Applicant's Brief in Support of Appeal, supra*; see also affidavit from [REDACTED], *supra*. The AAO notes that the applicant's wife is a licensed real estate agent in Illinois and it has not been established that she could not obtain employment in her field. See *Response to RFE, supra*. Additionally, beyond generalized assertions regarding country conditions in Lithuania, the record fails to demonstrate that the applicant will be unable to contribute to his family's financial wellbeing from a location outside of the United States. Moreover, the United States Supreme Court has held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang*, 450 U.S. 139 (1981).

United States 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 addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. In *Hassan, supra*, the Ninth Circuit Court of Appeals held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. The AAO recognizes that the applicant's wife, children, and mother will endure

hardship as a result of separation from the applicant. However, their situation is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse, children, and mother caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he 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.