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U.S. Citizenship
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HL

[REDACTED]

FILE:

Office: DENVER (SALT LAKE CITY) Date: NOV 26 2007

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]

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 waiver application was denied by the District Director, Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. *The appeal will be sustained.*

The applicant [REDACTED] is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated September 28, 2005.

On appeal, counsel states that the applicant established extreme hardship to a qualifying relative, and the waiver application should therefore have been granted.

The AAO will first address the finding that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II).

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, or
 - (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

....

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

The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) of subsection (a)(2) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if . . . in the case of an immigrant who is 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 that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully permanent resident spouse, parent, son, or daughter of such alien.

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 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.

On July 9, 1996, the applicant was convicted under the Utah Criminal Code § 58-37-8(2) for possession of marijuana, a misdemeanor Class B.¹ This conviction renders the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act, U.S.C. § 1182(a)(2)(A)(i)(II).

The AAO notes that the applicant’s class A misdemeanor assault (domestic violence-in the presence of a child)² conviction on December 16, 1998, and the conviction under Utah Penal Code § 76-6-205 (burglary tools, possession, misdemeanor, Class B) on July 9, 1996 are not crimes involving moral turpitude.

The AAO will now address whether the grant of a waiver of inadmissibility is warranted.

A section 212(h) waiver is generally not available to section 212(a)(2)(A)(i)(II) cases involving controlled substance crimes. However, the section 212(h) waiver applies to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. In this case, the record reflects that the applicant has a single offense of possession of less than one ounce of marijuana. Because less than one ounce of marijuana is equivalent to 30 grams of marijuana, the section 212(h) waiver is available to the applicant.

¹ Utah Penal Code § 58-37-8 (2) (e) states that any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor.

² Utah Code Ann. § 76-5-102 reads as follows:

76-5-102. Assault.

(1) Assault is:

- (a) an attempt, with unlawful force or violence, to do bodily injury to another;
- (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
- (c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if:

- (a) the person causes substantial bodily injury to another; or
 - (b) the victim is pregnant and the person has knowledge of the pregnancy.
- (4) It is not a defense against assault, that the accused caused serious bodily injury to another.

A section 212(h) waiver of inadmissibility is dependent upon a showing that the bar to admission imposes an extreme hardship on a “qualifying relative,” *i.e.*, the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant himself is not relevant to the section 212(h) waiver and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives in this case are the applicant’s U.S. citizen wife and three daughters. The AAO notes that no evidence in the record establishes that the applicant’s parents are qualifying relatives, that is, that they are U.S. citizens or lawful permanent residents in the United States.³ If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(h) of the Act; *see also Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

“Extreme hardship” is not a definable term of “fixed and inflexible meaning”; establishing extreme hardship is “dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. 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. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant’s “qualifying relative.” *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

The evidence in the record includes letters, photographs, a marriage license, birth certificates, criminal records, and other documentation.

The letter submitted by the applicant indicates that his daughters do not speak Spanish.

The letter from [REDACTED] indicates that she and her daughters have a close relationship with the applicant. [REDACTED] states that her twin daughters have a learning disability, and that their father helps them with their homework while she is at work. She states that the twins do not understand Spanish and have difficulty speaking English. [REDACTED] indicates that she would not be able to afford a caregiver if her husband’s waiver application were denied. She states that her husband is the [REDACTED] President at the branch where they worship and had been the [REDACTED] Second Counselor.

³ The letter from the applicant’s father indicates that the applicant financially assists him and is with him every weekend.

The letters from the applicant's daughters convey that they need their father.

The letters in the record from [REDACTED] and others indicate the good character of the applicant.

"Extreme hardship" to the applicant's wife or children must be established in the event that his wife or children join him; and in the alternative, that she or the children remain in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record establishes that the applicant's wife or daughters would endure extreme hardship if they remain in the United States without him.

In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) the Ninth Circuit stated that "[t]he most important single [hardship] factor may be the separation of the alien from family living in the United States." *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir.1983) (internal quotations and citation omitted). Although the circuit court stated that an alien "cannot gain a favored status by the birth of a citizen child," *Ramirez-Durazo v. INS*, 794 F.2d 491, 498 (9th Cir.1986), it also stated that "[t]he hardship to a citizen or permanent resident child may be sufficient to warrant suspension of the parent's deportation." (citation omitted). *Salcido-Salcido* at 1293. The court stated that it has consistently required an examination of the impact that deportation would have on children and families; and that the BIA's failure "to give considerable, if not predominant, weight, to the hardship that will result from family separation, it has abused its discretion." (internal quotations and citation omitted). *Salcido-Salcido* at 1293.

[REDACTED] who is 27 years old, asserts that she would not be able to afford a caregiver for her children if her husband's waiver application were denied. The letter, dated October 14, 2002, from Schreiber Foods, Inc. indicates that [REDACTED] works full-time, earning \$10.02 per hour. The pay statement from Schreiber Foods, Inc. for the period ending October 12, 2002 reflects gross pay of \$776.96. The record contains invoices for the following monthly expenses: \$290.74 - car payment, dated September 21, 2003, for two vehicles; car insurance - \$132.01; and home mortgage loan payment - \$812.03. [REDACTED] income is sufficient to satisfy these expenses and other basic necessities, but she has shown that it is not enough for the additional expense of a caregiver for the three children. The record contains no documentation suggesting that a family member such as [REDACTED] mother would be able to assist in childcare. The AAO finds that the applicant's income, which was \$11.00 per hour in 2002, is needed to meet the household expenses of the Silva family.

In *Mejia-Carrillo v. United States INS*, 656 F.2d 520, 522 (9th Cir. 1981), the Ninth Circuit stated that economic loss alone does not establish extreme hardship, but it is still a fact to consider in determining eligibility for suspension of deportation. (citations omitted). The court further stated that personal and emotional hardships which result from deportation must be considered. (citation omitted). In *Tukhowinich v. INS*, 64 F.3d 460 (9th Cir. 1995) the Ninth Circuit found that the loss of financially comparable employment would create not only an economic hardship for [REDACTED] but would severely frustrate what she regards as the overriding mission in her life, which is to provide for her parents and siblings.

Based on the evidence in the record, the stress that the applicant's wife would experience in attempting to

keep her family unit intact would, the AAO finds, rise to the level of extreme emotional and financial hardship.

The present record is sufficient to establish that the applicant's children would endure extreme hardship if they join him in Mexico.

With regard to the education of a child, in *Prapavat v. I.N.S.*, 638 F.2d 87, 89 (9th Cir.1980), the Ninth Circuit stated that the hardship to the petitioners' United States citizen daughter, who was about five years old at the time of the Board's decision and is now almost six, must be considered. It stated that:

The child, born in this country, has spent her entire life here. She is enrolled in school, a factor of significance. *See, e. g., Wang*, 622 F.2d at 1348 n.7; *Jong Shik Choe v. I. N. S.*, 597 F.2d 168, 170 (9th Cir. 1979); *Urbano de Malaluan v. I. N. S.*, 577 F.2d 589, 595 n.5 (9th Cir. 1978). If her parents are deported, this American citizen child will be uprooted from her native country where she has spent her entire life, and taken to a land whose language and culture are foreign to her.

In *Ramos v. I.N.S.*, 695 F.2d 181, 187 n. 16 (5th Cir.1983) the Fifth Circuit noted the "great difference between the adjustment required" of infants going to a parent's homeland and school age children facing the same fate. In *Ravancho v. I.N.S.*, 658 F.2d 169, 175-77 (3d Cir. 1981) the court stated that consideration must be given to the effect of a move to the Philippines would have on an eight-year-old American citizen. In *In Re Kao & Lin*, 23 I&N Dec. 45 (BIA 2001), the BIA held that to uproot the respondent's 15-year-old daughter at this stage in her education and her social development and to require her to survive in a Chinese-only environment would be a significant disruption that would constitute extreme hardship to her. The Ninth Circuit in *Casem v. INS*, 8 F.3d 700 (9th Cir. 1993), and cases cited therein, observed the difference between the adjustments required of very young children accompanying their parents to a foreign country and those faced by children already in school. *Matter of Andazola*, 23 I&N Dec. 319, 333 (BIA 2002).

The record reflects that the [redacted] first-born daughter is 11 years old and their twins are 8 years old, that their daughters do not read or write Spanish, and that they have never lived in Mexico. The AAO finds that the record indicates that the [redacted] children would experience extreme hardship at this stage in their education and social development if they lived in Mexico. *See Prapavat, Ramos, Ravancho, In Re Kao, and Casem, supra.*

The grant or denial of the above waiver does depend only on the issue of the meaning of extreme hardship. Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The unfavorable factors in this matter are the applicant's convictions in 1996 and 1998, his initial entry without inspection and his periods of unauthorized presence in the United States.

The favorable factors are the applicant's extensive family ties to the United States, his steady work history, his involvement in his church, and his positive letters from his employer, friends, and family members. The AAO finds that the favorable factors outweigh the unfavorable factors.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.