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

**PUBLIC COPY**

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FILE:

Office: CHICAGO, IL

Date:

**APR 25 2008**

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 District Director, Chicago, Illinois, 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 crimes involving moral turpitude. The applicant is the spouse of a lawful permanent resident and the 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 district 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 District Director*, dated April 11, 2005.

The record reflects that, on May 31, 2001, the applicant pled guilty to retail theft in violation of paragraph 720, chapter 5/16A-3(a) of the Illinois Compiled Statutes (ILCS). The applicant was placed on supervision for a period of one year. On December 29, 2003, the applicant filed an Application to Register Permanent Residence 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 spouse, [REDACTED]. On April 27, 2004, the applicant pled guilty to attempted obstruction of justice in violation of paragraph 720, chapter 5/31-4(a) of the ILCS. The applicant was given 364 days of conditional discharge and 45 days in jail.

On January 17, 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 spouse and children.

On appeal, counsel contends that the district director failed to consider extreme hardship to the applicant's children as is required by section 212(h) of the Act. *See Counsel's Brief*, dated April 11, 2005. In support of his contentions, counsel submits only the referenced brief. The entire record was reviewed 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--  
....

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [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 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 . . .

The AAO finds that the district director erred in finding the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act based on a conviction for burglary. The record does not reflect that the applicant has ever been charged with or convicted of burglary. However, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act based on the applicant's convictions for retail theft and attempted obstruction of justice, crimes involving moral turpitude. Counsel does not contest the district director's determination of inadmissibility.

Hardship to the alien herself is not a permissible consideration under the statute. A section 212(h) waiver is 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 Mexico.

If 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).

On appeal, counsel contends that the district director erred in failing to consider hardship to the applicant's children in determining whether the applicant had established that a qualifying relative would suffer extreme hardship. The AAO finds that the district director incorrectly relied on the qualifying relations identified in section 212(i) of the Act, 8 U.S.C. § 1182(i), which does not permit hardship to an applicant's children to be considered in determining whether the applicant has met his or her burden.

The record reflects that [REDACTED] is a native and citizen of Mexico who became a lawful permanent resident in 1990. The AAO notes that the district director incorrectly stated that the applicant's spouse is a U.S. citizen. The applicant and [REDACTED] have a 21-year old daughter, a 17-year old son and a 13-year old son who are all U.S. citizens by birth. The record reflects that the applicant and [REDACTED] are in their 40's.

Counsel asserts that the applicant has a daughter who is blind, unable to talk, prone to seizures and attached to a feeding tube. Counsel asserts that this child requires the care of both her parents and the district director neglected to consider whether a single parent would be able to care for such a child while also working and supporting a family. *See Counsel's Brief*, dated April 11, 2005. The applicant asserts that he would be unable to care for his children without the presence of his wife. He asserts that he is a hardworking man while his wife has always cared for the children, especially his disabled daughter. He asserts that his daughter can barely walk, is blind, must be spoon-fed and suffers from epileptic attacks. He asserts that his wife cares for his disabled daughter while he works and he would be unable to afford outside care for her if he were to remain in the United States without his wife. *See [REDACTED]' Letter*, dated January 17, 2005. A medical letter indicates that the applicant's daughter has been followed by the genetics clinic at the University of Chicago since her birth due to her diagnosis with a rare genetic metabolic disorder known as cobalamin C deficiency. The applicant's daughter's condition is treated with a combination of specialized diet and medications. As a result of her condition, the applicant's daughter has suffered multiple complications, including loss of most of her usable vision, severe mental retardation and a lack of speech. While she is ambulatory, the applicant's daughter is legally blind and receives the majority of her nutrition via a gastrostomy tube. The applicant's daughter has seizures, but these are generally well controlled with medication. The applicant's daughter is at risk for additional problems as a result of her condition, including an increased risk of stroke and her medical condition is very complex. The applicant's daughter's treating physician states that there are few medical centers in Mexico that would be able to care for such a complex metabolic disorder and it would be difficult to obtain the necessary medications and formulas required to treat her condition, especially since one of the medications used to treat the applicant's daughter is an "orphan"

medication<sup>1</sup>. The treating physician concludes that he feels that the applicant should be permitted to remain in the United States in order to care for her daughter's medical condition. *See Medical Letter*, dated January 21, 2005.

The economic hardship [REDACTED] and the applicant's children face is not uncommon among families separated as a result of removal. However, this hardship, when combined with the emotional hardship associated with the disabled daughter's health and medical needs, is substantially greater than that which aliens and families would normally face upon removal. [REDACTED] and his children no longer have ties to Mexico and they have significant ties in the United States, including [REDACTED] mother. A finding of extreme psychological hardship is the inevitable conclusion of the combined force of the submitted medical evidence. A discounting of the extreme hardship [REDACTED] and his 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 [REDACTED] and his children face 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 convictions for which the applicant seeks a waiver. The favorable and mitigating factors in the present case are the extreme hardship to the applicant's spouse and children if the applicant were refused admission, her otherwise clean background, and the applicant's spouse's and children's significant ties to the United States.

The AAO finds that, although the criminal convictions of the applicant are 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.

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<sup>1</sup> The Orphan Drug Act defines an orphan disease as a condition that affects fewer than 200,000 persons in the United States. More than 5,000 of these rare conditions exist in about 20 million Americans, according to the National Organization for Rare Disorders (NORD). Because no one would "adopt" the products to treat these diseases in the days before the law, they became known as "orphans." An orphan disease may affect only a few thousand people so the potential for a company to profit from developing an orphan treatment is small.