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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 15 2008

IN RE: [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.


John F. Grissom, Acting Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Nicaragua 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 seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The director concluded that the applicant 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 July 25, 2006.

On appeal, counsel for the applicant asserts that the applicant's U.S. citizen wife, daughter, mother, and stepfather will suffer extreme hardship should the applicant be prohibited from remaining in the United States. *Brief from Counsel*, dated August 22, 2006. Counsel asserts that the applicant warrants a favorable exercise of discretion, and the application should be approved. *Id.*

The record contains a brief from counsel; statements from the applicant and his wife; a copy of the applicant's marriage certificate; a copy of the applicant's wife's birth certificate; copies of medical documents for the applicant's wife; a copy of the birth certificate for the applicant's daughter; copies of naturalization certificates for the applicant's mother, stepfather, and brothers; a copy of the passport for another of the applicant's brothers; a copy of the permanent resident card for the applicant's sister; documentation of the applicant's employment; letters from the applicant's family members, friends, and coworkers, and documentation relating to the applicant's criminal convictions. The entire record was reviewed and considered in rendering this decision.

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

- (A)(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 (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:

The Attorney General [now Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) [or] (B) . . . of subsection (a)(2)

. . . if -

- (1) (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 [now the Secretary of Homeland Security (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 record reflects that the applicant pled guilty to two criminal counts, Burglary of a Conveyance under Florida Statute § 810.02 and Larceny - Grand Theft in the Third Degree under Florida Statute § 810.14. The applicant was sentenced to two years probation. The conduct for which the applicant was convicted occurred on June 6, 1994, when the applicant was 18 years old. Where a theft statute provides for culpability whether a taking was temporary or permanent, a conviction under such provision does not immediately give rise to inadmissibility. *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). Florida Statute § 812.014 criminalizes the taking of property with the intent to “either temporarily or permanently” deprive the owner of the property. Florida Statute § 812.014. The Board of Immigration Appeals has found that, where a conviction is based on such a divisible theft statute, “it is permissible to look beyond the statute to consider such facts as may appear from the record of conviction to determine whether the conviction was rendered under the portion of the statute dealing with crimes that do involve moral turpitude.” *Matter of Grazley* at 333. In the present matter, the record of the applicant’s conviction reflects that he intended to permanently deprive the owner of possession of a vehicle, as the applicant intended to sell it for \$500. *Arrest Form*, dated June 7, 1994. Accordingly, the record supports that the applicant’s conviction for Larceny - Grand Theft is a crime involving moral turpitude. See *Matter of M-*, 2 I&N Dec. 686 (BIA 1946); *Matter of Grazley* at 333.

Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest his inadmissibility on appeal.

Section 212(h)(1)(B) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. Hardship the applicant himself experiences due to his inadmissibility is irrelevant to section 212(h) waiver proceedings; the only relevant hardship in the present case is hardship suffered by the applicant’s U.S. citizen wife, daughter, and mother. *Id.* If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(h) of the Act.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (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. These factors included 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.

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).

On appeal, counsel for the applicant asserts that the applicant's U.S. citizen wife, daughter, mother, and stepfather will suffer extreme hardship should the applicant be prohibited from remaining in the United States. *Brief from Counsel*, dated August 22, 2006. Counsel contends that the director failed to consider all elements of hardship in aggregate. *Id.* at 3.

Counsel states that the applicant's wife has been diagnosed with clinical depression, for which she has received treatment for over five years. *Id.* Counsel contends that any drastic change in the applicant's wife's life could cause her to become suicidal, and that losing the applicant's support would cause serious deterioration in her condition. *Id.* Counsel contends that the applicant's wife needs the applicant's financial and emotional support even more due to the birth of their child. *Id.*

Counsel asserts that the applicant's child will experience hardship if the applicant departs the United States, as she depends on him for economic and emotional support. *Id.* at 4. Counsel contends that conditions in Nicaragua are poor, and the applicant would be less able to contribute to the financial support of his family. *Id.* Counsel states that the applicant's family members would be unlikely to be able to visit the applicant in Nicaragua. *Id.*

The applicant stated that denial of the present application will result in permanent separation of him and his family members. *Statement from the Applicant*, at 3, undated. The applicant states that his wife and mother indicated they will not accompany him to Nicaragua. *Id.* The applicant explained that his wife is under permanent medical treatment due to depression, and that her father committed suicide and her mother has mental illness. *Id.* The applicant suggests that his wife's hardship, should he be compelled to depart the United States, would be exacerbated due to her mental health. *Id.*

The applicant stated that his mother left Nicaragua due to political persecution, and that she does not wish to return. *Id.* at 3. He explained that his mother has other children in the United States, and that she does not wish to leave them behind should she relocate abroad. *Id.* The applicant asserts that he provides his mother with support and economic assistance, and that he would be unable to continue to provide such support if he were in Nicaragua. *Id.* at 3-4.

The applicant stated that he would be unable to provide housing for his wife or mother in Nicaragua, as the country is experiencing a housing shortage. *Id.* at 4. He explained that conditions are poor in Nicaragua, and that his wife and mother would be exposed to poor health standards, lacking health care, political violence, common crime, and high unemployment which would create economic hardship. *Id.* The applicant noted that his wife does not speak Spanish, thus she would be at a disadvantage in Nicaragua. *Id.* at 5.

The applicant's wife lauded the applicant's good qualities. *Statement from the Applicant's Wife*, dated July 5, 1999. The applicant's wife indicated that she wishes for her and the applicant to be able to live in the United States and take advantage of the opportunities here. *Id.* at 2.

Upon review, the applicant has shown that a qualifying relative will experience extreme hardship should the present waiver application be denied. Specifically, the applicant has established that his wife will experience extreme hardship should he be prohibited from remaining in the United States. This finding is primarily based on the applicant's wife's mental health and the strong likelihood that denial of the present application will result in a lengthy or permanent family separation. *See Salcido-Salcido*, 138 F.3d at 1293.

Should the applicant depart the United States and his wife remain, his wife would experience extreme hardship. The applicant has submitted documentation to show that his wife has been undergoing treatment for clinical depression since approximately 2001. *Letter from* [REDACTED], dated August 23, 2006. The applicant's wife's treating Psychiatrist expressed the opinion that the applicant's wife is in a fragile state, and that separation from the applicant could cause serious deterioration in her condition. *Id.* at 1. Thus, should the applicant's wife remain in the United States without the applicant, she would suffer significant mental health consequences.

The applicant's wife gave birth to the applicant's daughter on June 23, 2006. It is evident that caring for the applicant's child without the emotional and economic support of the applicant would create additional hardship for the applicant's wife.

It is noted that the record reflects that the applicant's wife attended community college as late as 2003, and she worked as late as 2001 with compensation of approximately \$14,500. The applicant has not provided an explanation of whether his wife continues to work, or whether she completed education that gave her additional job skills. The applicant has not provided a clear account of his family's regular expenses, or whether they have financial resources in addition to their earnings from employment. Thus, the AAO is unable to determine whether the applicant's wife is able to work and earn sufficient income to meet her and her child's needs in the applicant's absence. Yet, it is observed that the applicant has worked consistently in the United States and his income accounts for the majority of the family's reported income on their 2000, 2001, 2002, and 2003 federal tax filings. The applicant's wife has relatives in the United States, yet the record does not reflect that they reside with the applicant's wife, or that they would be able or willing to assist her with childcare. Thus, it is reasonable that the applicant's wife may incur childcare expenses should she care for the applicant's daughter alone in the United States. Based on the foregoing, the applicant has shown by a preponderance of the evidence that his wife would endure some economic hardship should she remain in the United States.

The applicant has shown by a preponderance of the evidence that the hardships to his wife should she remain in the United States without him, considered in the aggregate, constitute hardship that is greater than that which would ordinarily be expected of family members separated as a result of deportation. *See e.g., Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991).

The AAO further finds that the applicant's wife would experience extreme hardship should she relocate to Nicaragua to maintain family unity. The applicant's wife was born in the United States. The applicant explained that his wife does not speak Spanish. Without Spanish language ability, it is evident that the applicant's wife's employment and social opportunities would be limited. The AAO acknowledges that relocating to an unfamiliar country involves general stress, and that such stress would be exacerbated by the applicant's wife's mental health condition and her need to care for her child.

The applicant's wife's psychiatrist expressed the opinion that there are limited resources in Nicaragua for the applicant's wife's treatment. As the applicant has shown that his wife's treatment has been ongoing, the applicant has shown by a preponderance of the evidence that his wife will continue to require treatment for her mental health in the future. The AAO is persuaded that the applicant's wife's mental health care would be significantly impacted should they relocate to Nicaragua, creating the need to reestablish employment, straining their present resources, and cutting off the applicant's wife from her current psychiatrist and care regimen.

The AAO acknowledges that the applicant's wife would face other factors of hardship should she relocate to Nicaragua, such as separation from her family and church community, as well as economic challenges. *See Letter from [REDACTED]*, dated June 19, 1999.

Based on the foregoing, the applicant has shown by a preponderance of the evidence that the hardships to his wife should she relocate to Nicaragua, considered in the aggregate, constitute hardship that is greater than that which would ordinarily be expected of family members who relocate abroad as a result of the inadmissibility of a close family member. As noted above, the AAO bases this finding primarily on the applicant's wife's mental health status, and her significant family and economic ties to the United States. *See e.g., Hassan*, 927 F.2d at 468.

The AAO finds that the applicant's wife will face extreme hardship if the applicant's waiver application is denied. Thus, the applicant has shown that a qualifying relative would suffer extreme hardship if he is required to depart the United States.

The applicant has presented evidence that his daughter, mother, and stepfather would experience hardship should he be compelled to depart the United States. However, the applicant has not submitted sufficient documentation or explanation to show that his daughter or parents would experience consequences that can be distinguished from those ordinarily experienced by the close family members of those compelled to depart the United States due to inadmissibility. While the AAO acknowledges that family separation usually involves emotional difficulty, the applicant has not established that his parents rely on him for unusual emotional needs. Nor has he shown that they receive or require economic support from him. It is understood that the applicant's daughter would endure consequences as a result of the applicant departing the United States, yet the applicant has not submitted a sufficient description of such hardship to show that it rises to the level of extreme hardship as contemplated by section 212(h)(1)(B) of the Act.

However, as the applicant has established that his wife would experience extreme hardship, he is eligible for consideration for a waiver under section 212(h)(1)(B) of the Act.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General (now Secretary of the Department of Homeland Security) has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12.

The negative factors in this case consist of the applicant's conviction for two crimes. The applicant's statements regarding his convictions suggested that he does not have remorse or that he does not take responsibility for his associated conduct, as he implied that he was only convicted due to his lack of financial resources for a defense. He stated that "[i]f [he] had the money to have a good defense, like O.J. Simpson, or other celebrities that [sic] get away with murder [he] would not even have the need to be filing this waiver." *Statement from the Applicant* at 6. He stated that his family members "know that *if* [he] did anything wrong [he] was punished and rehabilitated for it." *Id.* (emphasis added).

The positive factors in this case include the applicant's significant family ties to the United States, including his wife, daughter, mother, siblings, and stepfather; the fact that the applicant's wife would suffer extreme hardship if the applicant is compelled to depart the United States; the fact that the applicant maintains employment in the United States and pays taxes. The applicant has not been convicted of any crimes in approximately 14 years, and the applicant participates in his community, such as engaging in activities with his church.

The positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.