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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: LOS ANGELES (SANTA ANA) Date: AUG 0 8 2006

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

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 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 district 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 District Director*, dated April 20, 2004.

On appeal, counsel for the applicant contends that the applicant's wife and child will suffer extreme hardship if the applicant is prohibited from remaining the United States. *Statement from Counsel on Form I-290B*, dated May 19, 2004. Counsel further contends that the applicant received ineffective assistance from his prior counsel who prepared his Form I-601 application. *Id.*

The record contains a brief from counsel; statement's from the applicant's wife and the applicant's mothers-in-law; a letter from a business for whom the applicant serves as a contractor; a letter verifying the applicant's wife's employment; a copy of the birth certificates for the applicant, the applicant's wife, and the applicant's son; a copy of the marriage certificate of the applicant and his wife; a copy of a certificate that reflects that the applicant's wife completed training as a medical assistant; tax records for the applicant and his wife, and; documentation relating to the applicant's criminal history. 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:

> (h) 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 was convicted of five crimes between 1996 and 2000, including: two convictions for burglary under California Penal Code § 459, on March 27, 1996 and January 28, 1999; a conviction for receiving/concealing stolen property under California Penal Code § 496(A) on May 4, 1999; a conviction for failure to leave information/accident under California Penal Code § 20002(A) on February 22, 2000, and; a conviction for theft of property under California Penal Code § 484(A) on May 2, 2000.

There is ample precedent to support that petty theft under section 484(A) of the California Penal Code constitutes a crime involving moral turpitude. *See, e.g., United States v. Esparza-Ponce*, 193 F.3d 1133, 1135-37 (9th Cir. 1999); *Morales-Alvarado*, 655 F.2d 172, 174 (9th Cir. 1981); *United States v. Villa-Fabela*, 882 F.2d 434, 440 (9th Cir. 1989), *overruled on other grounds*, Proa-Tovar, 975 F.2d 592, 595 (en banc)(9th Cir. 1992); *United States v. Lopez-Vasquez*, 1 F.3d 751, 755 n.8 (9th Cir. 1993); *In re De La Nues*, 18 I&N Dec. 140, 145 (BIA 1981); *In re Scarpulla*, 15 I&N Dec. 139, 140-41 (BIA 1974). In *United States v. Esparza-Ponce*, the Ninth Circuit stated that, "In addition to . . . statements in our own cases, every other circuit that has addressed the question in the context of the immigration laws has concluded that petty theft is a crime involving moral turpitude for purposes of those laws." *United States v. Esparza-Ponce*, 193 F.3d at 1135-37(citiations omitted). Accordingly, as the applicant has been convicted of theft under section 484(A) of the California Penal Code, as well burglary and related offences under other provisions of the California Penal code, he has been convicted of a crime involving moral turpitude. The applicant does not contest his inadmissibility on appeal.

The AAO notes that 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 and son. *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).

In addition, the Ninth Circuit Court of Appeals case, *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), held that, "the most important single hardship factor may be the separation of the alien from family living in the United States," and that, "[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." (Citations omitted.) The AAO notes that the present case arises within the jurisdiction of the Ninth Circuit Court of Appeals. The AAO further notes that the applicant's wife and son would possibly remain in the United States if the applicant departs. Separation of family will therefore be carefully considered in the assessment of hardship factors in the present case.

On appeal, the applicant's wife explains that she and the applicant's son will experience significant hardship if the applicant departs the United States. *Statement from Applicant's Wife*, dated June 17, 2004. She states that she was born in the United States, her parents are here, and she and her son would suffer emotional hardship if they are separated from their family in the United States. *Id.* at 1. She indicates that she and her son share a close relationship with the applicant, and that they would suffer emotional hardship if they lose the applicant's companionship. *Id.* at 2. She expresses that the applicant is very active in their son's life, and she wishes for her son to continue to enjoy the presence of the applicant. *Id.* at 1-3.

The applicant's wife asserts that she will suffer significant economic hardship without the applicant's assistance. *Id.* at 2. She provides that she completed training as a nursing assistant, and she is employed full-time at a rate of $9.50 per hour. *Id.* at 1. She indicates that the applicant works full-time as a satellite installer for home and commercial sound systems, and he earns $1,200 per month. *Id.* at 2. She states that the applicant has worked three jobs simultaneously when she has not been able to work. *Id.* She indicates that the lease of their family residence costs $600 per month. *Id.* She provides that she is pregnant with a second child, which would compound her hardship if the applicant returns to Mexico. *Id.* at 1.

The applicant's wife contends that she and her son will suffer significant hardship if they relocate to Mexico with the applicant. *Id.* at 1-2. She provides that she does not speak Spanish, and thus she would be unable to find employment. *Id.* at 2. She indicates that the applicant would be unable to earn sufficient income to support the family. *Id.* She states that her son would suffer hardship if he must forego educational opportunities in the United States. *Id.* at 3. She indicates that she and her son have health insurance through her employment, and they would lose this benefit if they depart the United States. *Id.*

Counsel contends that the applicant's wife and child will suffer extreme hardship if the applicant is prohibited from remaining the United States. *Statement from Counsel on Form I-290B*, dated May 19, 2004. Counsel reiterates that the applicant's wife's family members are in the United States, and she has no ties to Mexico. *Brief from Counsel* at 2, dated June 17, 2004. Counsel states that conditions in Mexico are poor, and the applicant's wife would have no employment options there. *Id.* at 3. Counsel contends that the applicant's wife will experience extreme hardship whether she remains in the United States or relocates to Mexico with the applicant. *Id.* Counsel provides that the applicant's criminal past must be balanced against factors that weigh in the applicant's favor. *Id.* at 2.

Counsel further contends that the applicant received ineffective assistance from his prior counsel who prepared his Form I-601 application, as the application was "bare bones" and constituted a failure to provide representation. *Id.* at 4.

Upon review, the applicant has not established that a qualifying relative will experience extreme hardship if he is prohibited from remaining in the United States. The applicant's wife contends that she and the applicant's son will experience significant economic hardship if the applicant departs the United States. Yet, the record reflects that the applicant's wife is a trained medical assistant, and she worked on a full-time basis at a rate of $9.50 per hour as of June 8, 2004. Based on a 52-week year, the applicant's wife earns $19,760 per year, an income above the 2006 poverty line for a family of two, evaluated as $13,200. *See Form I-864P, Poverty Guidelines*. The only documentation in the record to reflect the applicant's recent income consists of an IRS Form W-2 Wage and Tax Statement for 2002 that provides that he earned $1,944.25 for the year. While the record contains a letter to show that the applicant serves as an installer on a contract basis, the applicant has not submitted evidence of his income. While the applicant's wife states that her family's rent is $600 per month, the applicant has not provided an account of his household's other regular expenses. While the applicant's wife asserts that she is pregnant with her and the applicant's second child, the applicant has not submitted documentation to support this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, the AAO lacks sufficient evidence to assess the economic impact the applicant's departure would have on his wife and son, and he has not established that they would experience financial hardship.

The applicant's wife explains that she and the applicant's son are close with the applicant, and that they spend significant time together. She further provides that she is close with her relatives in the United States. She expresses that she and her son will experience extreme emotional hardship if they are separated from the applicant or their family members in the United States. While the AAO acknowledges that family separation is difficult, the applicant has not established that his wife or son will suffer emotional consequences that go beyond those which are commonly experienced by the families of individuals deemed inadmissible. U.S. court decisions have 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, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), 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. *Hassan v. INS, supra,* 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 applicant's wife asserts that she and the applicant's son will experience extreme hardship if they relocate to Mexico to maintain family unity. She states that poor economic conditions in Mexico and her lack of Spanish language ability would hinder her in obtaining employment, and the applicant would be unable to earn sufficient income to support the family. The AAO acknowledges that employment and educational opportunities are more limited in Mexico, and that the applicant's wife's limited language ability would

impact her eligibility for employment. Thus, it is understood that the applicant's wife would experience the challenge of finding new employment, and emotional hardship in observing her son relinquish the benefits of education in the United States. Yet, as the applicant's wife and son are citizens of the United States, they are not required to reside outside the United States as a result of the applicant's inadmissibility. As discussed above, the applicant has not shown that his wife and son will experience extreme hardship should they remain in the United States.

All instances of hardship to the applicant's husband have been considered separately and in aggregate. Based on the foregoing, the applicant has not submitted sufficient evidence to show that the instances of hardship that will be experienced by his wife and son, should he be prohibited from remaining in the United States, rise to the level of extreme hardship.

Counsel asserts that the applicant's criminal past must be balanced against factors that weigh in the applicant's favor. However, a balancing of positive and negative factors is only performed when assessing whether the applicant warrants a favorable exercise of discretion. If an applicant fails to first establish that a qualifying relative will experience extreme hardship, citizenship and Immigration Services (CIS) lacks discretion to approve a waiver application. *See* section 212(i)(1) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would been served in discussing whether he merits a waiver as a matter of discretion.

Counsel further contends that the applicant received ineffective assistance from his prior counsel who prepared his Form I-601 application, as the application was "bare bones" and constituted a failure to provide representation. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). As the applicant has not submitted evidence to meet any of the above criteria, the AAO is unable to make a finding that he was prejudiced by ineffective assistance from his prior counsel.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) 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.