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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: BALTIMORE DISTRICT OFFICE Date: AUG 09 2006

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (INA), 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, Baltimore. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant [redacted] a 24-year old citizen of Jamaica, 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 record indicates that the applicant's mother, [redacted] is a lawful permanent resident (LPR). The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The District Director based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's conviction for the offense of theft under $500, committed on or about May 6, 2002. *District Director's Decision,* dated February 25, 2005.

The District Director also found 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. *Id.*

On appeal, counsel contests the District Director's determination of inadmissibility, claiming that the District Director "erroneously stated that the conviction of the applicant was not removed for immigration purposes," and erred in relying on *Matter of Pickering,* 23 I & N Dec. 621 (BIA 2003). *Notice of Appeal to the Administrative Appeals Office, (Form I-290B),* dated March 24, 2005; *Appellant's Brief,* dated April 21, 2005. Counsel also claims that the evidence supports a finding of extreme hardship. *Id.*

The record includes statements by former employers and acquaintances of [redacted] referring to his good character; a letter from his pastor noting that [redacted] volunteers at his church and is remorseful about the prior unlawful incident; and [redacted] statement noting his graduation from high school in Jamaica and move to the United States at age 17, and the complications of finding employment, support for himself, and a place to reside. *See attachments to Additional Response to the Notice of Intent to Deny Applicant,* dated December 30, 2004. The record also contains a psychological evaluation [redacted] based on background information and an interview with them. *Affidavit of* [redacted] dated October 7, 2004. Also included in the record are [redacted] court and probation documents. The entire record was reviewed and considered in arriving at a decision on the appeal.

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 (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) . . . of subsection (a)(2) . . . if –
>
> (1) (A) . . . it is established to the satisfaction of the Attorney General 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 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 . . .

Regarding the District Director's finding that the applicant is inadmissible under section 212(a)(2)(A) of the Act, the record reflects that [redacted] plead guilty to "Theft: Less $500 Value" in the District Court of Maryland for Montgomery County on June 17, 2002; was found guilty and given a suspended sentence of 18 months and probation for 18 months; and was ordered to pay restitution of $4550.18 and complete 40 hours of community service. *Defendant Trial Summary,* dated June 17, 2002. The judge later changed this sentence to "probation without judgment" pursuant to [redacted] Motion for Reconsideration. *See Motion for Reconsideration,* dated September 4, 2002; *District Court of Maryland for Montgomery County, judge's order to grant reconsideration and "enter PBJ,"* dated April 24, 2003.

Counsel contends that because [redacted] as granted "probation without judgment," [redacted] was never convicted and is therefore not inadmissible. This case arises in the Fourth Circuit, and the Court of Appeals for the Fourth Circuit has considered this exact issue, concluding that a state court's granting of "probation without judgment" constitutes a "conviction" within the meaning of the immigration laws of the United States." *Yanez-Popp v. INS*, 998 F.2d 231 (4th Cir.1993). [redacted] was therefore convicted of a crime involving moral turpitude, and the District Director accordingly correctly determined that the applicant was inadmissible under section 212(a)(2)(A) of the Act.

[redacted] current application for adjustment of status is less than 15 years after the commission of his offense. He is therefore statutorily ineligible for a waiver pursuant to section 212(h)(1)(A) of the Act. He is, however, eligible to apply for a waiver of inadmissibility pursuant to section 212(h)(1)(B) of the Act.

A section 212(h)(1)(B) waiver of inadmissibility is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse, parent or son or daughter of the applicant. Hardship to the applicant himself is not a permissible consideration under the statute; thus, hardship suffered by the applicant will be considered only insofar as it results in hardship to a qualifying relative in the application, in this case, the applicant's LPR mother. 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,* 21 I&N Dec. 296 (BIA 1996).

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 applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. 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.

> "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).

The record reflects that [redacted] was born in Nigeria in 1958. According to information she provided to [redacted] (*see Affidavit of* [redacted] *supra), s*he completed teachers' college in Nigeria and worked as a teacher and in the banking field; when she was 27 she married her first husband, a Jamaican national, and accompanied him to Jamaica; she divorced him nine years later after discovering that he was engaged in extramarital affairs. *Id.* She then began her own business as a distributor of African print cloth, and met her second husband on a business trip to the United States; two years later she joined him in Maryland, and they were married, but after four months of a physically and psychologically abusive marriage, she left him. *Id.*

[redacted] is her eldest son, born in Nigeria in 1982; he moved to Jamaica in 1990; her second son is approximately 14 years old and lives with his father in Jamaica. [redacted] joined her in the United States in 1999 shortly after her second marriage and later moved to Dallas, where [redacted] had moved to start a new life and with hopes of becoming a nurse; [redacted] worked two jobs and attended community college. *Id.* He was on probation while in Dallas. *Defendant Probation Summary,* dated June 17, 2002. [redacted] says she has been completely demoralized by the turn of events in her life and is too humiliated

to return to Jamaica; she lost her job as a nurse's aide in May 2004 and feels that [redacted] is her main support in life and considers him to be essential to her emotional and financial survival in Dallas. *Affidavit of* [redacted] According to her psychological evaluation, [redacted] "has become increasingly helpless, demoralized, and dependent, especially upon [redacted] provide her with the necessary emotional support for her to function." *Id.* The only financial information in the record is [redacted] Affidavit of Support for [redacted] filed in September 2003, which shows that she was employed by the [redacted] 40 hours per week at $11 per hour; for 2002, her income was $11,167 and [redacted] income was $16,126.

Other than statements from [redacted] made in the course of their psychological evaluation in September 2004, in which they both indicate [redacted] dependence on [redacted] both emotional and financial, there is nothing in the record to show any hardship [redacted] would suffer if the applicant were denied admission to the United States beyond what is normally associated with family separation. The evidence indicates that [redacted] younger son still resides in Jamaica, and there is no evidence that she has any close family ties in the United States; her prior divorce in Jamaica and abusive relationship in her second marriage have clearly caused her trauma, but other than her statement that she would feel humiliated if she were to return to Jamaica, there is no other evidence that she would suffer hardship if she returned there. She was able to work and earn a living there with her own business before, and she has had training as a teacher, skills that would allow her to earn a living either in the United States or in Jamaica. Though it is clear that she is suffering from recent events in her life, including the loss of her job, and that she would suffer emotionally from separation from the applicant if she chose to remain in the United States, it appears that she faces the same decision that confronts others in her situation – the decision whether to remain in the United States or relocate to avoid separation.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that [redacted] faces extreme hardship if the applicant is refused admission. U.S. 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, *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 individuals who are deported.

In this case, though the applicant's mother will endure emotional hardship if she remains in the United States separated from the applicant, her situation, based on the record, is typical of individuals separated as a result of removal proceedings and does not rise to the level of extreme hardship. The AAO therefore finds that the applicant failed to establish extreme hardship to his qualifying relative as required under section 212(h)(1)(B) of the Act, 8 U.S.C. § 1186(h). 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(h) of the Act, the burden of proving eligibility rests 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.