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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: LOS ANGELES (SANTA ANA) Date: OCT 25 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, Los Angeles. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [redacted] of Mexico, 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 two crimes involving moral turpitude. [redacted] is a U.S. citizen; he resides with her and three U.S. citizen stepchildren, and he is the beneficiary of an approved Petition for Alien Relative. He seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his wife and stepchildren.

The district director concluded that was inadmissible for having been convicted of two crimes, stating, "You stipulated and were convicted for violating Section 484-488 PC, misdemeanor, theft, relating to your 08/06/89 arrest, case number [redacted] Moreover, you pled guilty and was [sic] convicted for violating Section 484(a)-488, misdemeanor, theft, relating to your 06/25/1998 arrest, case number [redacted] The district director also concluded that [redacted] was ineligible for a waiver of inadmissibility because he had not shown that a qualifying relative would suffer extreme hardship if he were denied a waiver.

On appeal, counsel for the applicant asserts that the district director erred because [redacted] had been convicted of only one crime involving moral turpitude; that an application for a waiver of inadmissibility (Form I-601) was not necessary because his one misdemeanor conviction qualified for the "Petty Offense Exception"; and that even if an I-601 were required, he had shown that his U.S. citizen wife and stepchildren would suffer extreme hardship if he were denied a waiver. *Notice of Appeal to the Administrative Appeals Office (Form I-290B),* filed November 16, 2004; *Motion to Reopen/Reconsider Waiver Denial/in the Alternative, Appeal of Waiver Denial,* dated November 10, 2004.

The record includes counsel's Brief in Support of the Appeal and exhibits, including: (1) a declaration from [redacted] explaining her emotional attachment to her husband since approximately 1990, how he supports her and her children and how he manages their janitorial business, which she could not handle on her own due to a hand injury and the loss of one of her fingers; and how devastated both she and her children would be if her husband were forced to return to Mexico; (2) medical records and photographs confirming [redacted] hand injury; (3) a declaration from [redacted] stating that he arrived in the United States when he was approximately 18 years old, that he would not be able to find employment in Mexico, as he has experience only in janitorial work and unemployment is high in Mexico, and explaining the circumstances surrounding his theft conviction in 1998 (he states that he stole a couple of packs of batteries from Home Depot because his employer asked him to get supplies but did not reimburse him on a timely basis); (4) the couple's joint income tax returns from 1999 through 2003 showing that they supported four children in 2003; that their janitorial business made a profit of approximately $22,000 in 2003; and that [redacted] had earned income from several jobs in the past, including at Toys "R" Us and with the Anaheim City School District; (5) a declaration from [redacted] the youngest of [redacted] stepsons (born in 1988) stating that he is very close to [redacted] whom he considers to be his father, and would be very sad if

[redacted] had to return to Mexico, but that he could not move there because his friends and family and school are in the United States, and he does not speak Spanish; and (6) an article from the Miami [redacted] about young adults in their 20s who live at home, noting that particularly for Latin American families this trend dovetails with tradition and that sons and daughters are invited to remain with their parents until marriage. The record also contains [redacted] court reports. The entire record was reviewed and considered in rendering this decision.

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.
>
> (ii) Exception
>
> Clause (i)(I) shall not apply to an alien **who committed only one crime** if-
>
> . . . .
>
> (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed) (emphasis added).

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 [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 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 . . .

In the present case, the record shows that in 1989 the applicant plead guilty to and was convicted of violating Section 484-488 of the California Penal Code, a misdemeanor ("on or about 8-6-89 [he] did willfully and unlawfully steal, misappropriate and fraudulently take the property and labor of another"). *Record of the Municipal Court of California, County of Orange, West Orange County Judicial District,* referring to case number [redacted] He was sentenced to ten days in Orange County Jail, told to pay a state restitution fee of $25, given 3 years of "informal probation" and ordered to "stay away from [redacted]

The record also shows that in 1998, the applicant plead guilty to and was convicted of again violating Section 484-488, by "willfully and unlawfully stealing, taking and carrying away the personal property of another, to wit: Home Depot . . . of a value of less than Four Hundred Dollars" on or about May 20, 1998. *Record of the Municipal Court, North Orange County Judicial District,* referring to case number [redacted] Imposition of sentence was suspended, and he was placed on "informal probation" for three years, ordered to pay fines and fees, and ordered to "stay out of Home Depot in Anaheim." Although counsel for [redacted] points out that the decision denying the waiver request incorrectly reported the case numbers of the applicant's convictions, the fact remains that he was convicted of two crimes involving moral turpitude, not one, as asserted by counsel. He is thus not eligible for the "petty offense" exception to inadmissibility under Section 212(a)(2)(A)(ii) of the Act, and he was correctly found to be inadmissible. 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 and is irrelevant to section 212(h) waiver proceedings. In this case, the qualifying relatives are [redacted] U.S. citizen spouse and stepsons and stepdaughters. The record indicates that [redacted] has five children by a former marriage. A "stepfather" relationship is formed when the marriage creating the status of stepchild occurred before the child reached the age of eighteen. *Section 101(b)(1)(B) of the Act, 8 U.S.C. § 1101(b)(1)(B).* According to a divorce decree in the record, the oldest child was born in November 1980, and would have been under eighteen on October 3, 1997, when [redacted] were married. Thus [redacted] is the stepfather of all five, and hardship to them will be considered.

If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(i) of the Act; *see also Matter of* [redacted] 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).

This matter arises in the Los Angeles district office, which is within the jurisdiction of the Ninth Circuit Court of Appeals. That court has stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[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." *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); [redacted] *v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

An analysis under *Matter of* [redacted] is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In this case, the record reflects that was born in 1970 in Mexico, and was born in 1965 in California, where she was raised and where she raised her five children from a prior marriage. She states that she met [redacted] in 1989 or 1990, and that their relationship has been extremely positive for her and her children; she describes her difficult childhood and an abusive former marriage, and relates how, with the help of [redacted] she turned her life around. Based on statements from [redacted] and several of her children and photographs in the record, [redacted] clearly has been a loving and caring father to his stepchildren, helping them financially and emotionally; he has also been a supportive husband to including by helping her after her hand injury. They currently own and operate a janitorial business together. [redacted] states that she would not be able to continue to work in their janitorial business without [redacted] help, as her hand causes her too much pain if she drives long distances or does the manual labor required by their work and which is now done by [redacted] she also states that

there is no demand in Mexico for the janitorial services that her husband is trained in and he would not be able to work there and that four of their children, even though they are adults, live at home and are dependent on her and Mr. [redacted] She states that one of their children works in the family business with them. There is no evidence in the record to indicate whether [redacted] has any other close family ties either in Mexico or the United States.

In her Brief, counsel reiterates [redacted] fears regarding the family's ability to earn a living in Mexico, stating that "[t]he odds of these Americans with no savings being able to eke out an existence in Mexico are quite minimal" and that their janitorial business would have to be dissolved because [redacted] "could not do the heavy labor with her impaired right hand." There is no evidence in the record, however, to support these assertions; no evidence of economic conditions in Mexico, and no medical evidence that [redacted] hand injury is debilitating. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of* [redacted] 17 I&N Dec. 503, 506 (BIA 1980). It would clearly be a significant change in lifestyle for [redacted] and the children to move to Mexico, but there is no evidence in the record to support a conclusion that they would suffer extreme hardship if they made that choice. The evidence in the record, however, does support a conclusion that [redacted] and the children would be able to provide for themselves financially if they remained in the United States. Although [redacted] participation in the family business comprises a major financial contribution, [redacted] is able to do some of the work required by the family business, her son assists in the business, and she has other skills that she has utilized in the past when employed at Toys "R" Us and as a teaching assistant. Although some of her children live with the couple, they are all adults and there is no indication that they do not or cannot earn a living and contribute to the general financial welfare of the family.

The AAO recognizes the emotional and psychological hardship of separation if [redacted] and the [redacted] children remain in the United States separated from [redacted] has been a positive and supportive husband and father since he came into their lives more than 15 years ago; separation would be difficult for them. Separation from a spouse or parent is a significant factor to be considered for purposes of an extreme hardship determination and it is not discounted. In this case, however, the children are all adults and they are all capable of working; [redacted] is also capable of earning a living, whether in the family business with the help of her children, or in work that is less physically demanding; and the record does not support a conclusion that the psychological and emotional hardship of this separation would be beyond that which is normally experienced in most cases of removal or inadmissibility.

The record, reviewed in its entirety and in light of the [redacted] factors, cited above, does not support a finding that [redacted] qualifying relatives face extreme hardship if he is refused admission. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. 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. 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. [redacted] *INS*, 927 F.2d 465, 468 (9th Cir. 1991). The AAO recognizes that [redacted] and the [redacted] children will endure hardship as a result of separation from their husband and father. Their situation, however, based on the record, is typical of individuals separated as a result of removal or inadmissibility.

In this case, the record does not contain sufficient evidence to show that the hardship faced by the qualifying relatives rises beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse or children as required under section 212(h)(1)(B) of the Act. 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.