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U.S. Citizenship and Immigration Services

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[redacted]

JUN 2 2 2007

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

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 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 Peru 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 U.S. citizen, [redacted], and the daughter of a naturalized U.S. citizen mother, [redacted] 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 husband and mother.

The applicant has testified that she was admitted into the United States as student on June 19, 1990. The applicant and [redacted] were married in the United States on March 17, 2002. The applicant's mother became a naturalized U.S. citizen on January 22, 1996. [redacted] a native of the United States, filed a Petition for Alien Relative (Form I-130) on the applicant's behalf in 2004 accompanied by the applicant's Application to Register Permanent Residence or Adjust Status (Form I-485). The Form I-130 petition was approved on April 19, 2005. The applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) on May 31, 2005.

In a decision to deny the applicant's Form I-485 application dated March 10, 2006, the director stated that the applicant is inadmissible to the United States because she was convicted of prostitution in 1994 and 1995 respectively, crimes involving moral turpitude. In a decision to deny the Form I-601 waiver application also dated March 10, 2006, the director concluded that although the applicant had established that extreme hardship would be imposed on a qualifying relative, the application would be denied as a matter of discretion because of the existence of various adverse factors outweighing the favorable factors in the application. In particular, the director found that "the applicant's extensive and recent arrest record, the nature of the crimes, and the length of time she has been in the United States illegally" shows "a blatant disregard for Immigration and United States laws." *Notice of Decision by Director* [redacted] dated March 10, 2006.

On appeal, counsel[1] contends that the director did not give appropriate weight to factors supporting waiver of the bar to admission, as manifested by the director's failure to specifically list these factors in the decision. Counsel also maintains that the director erred in citing mere arrests as adverse factors, and that the applicant's two convictions for "relatively minor offenses over 10 years ago" do not outweigh the countervailing equities in this case. *Form I-290-B, question 3 attachment.*

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

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[1] The applicant appears to be represented on appeal by [redacted]; however the record does not contain a Form G-28, Notice of Entry of Appearance as Attorney or Representative from [redacted] It does contain a Form G-28 from [redacted]. All representations will be considered but the decision will be furnished only to [redacted] and the applicant.

(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.

Counsel does not dispute that the applicant's convictions in 1994 and 1994 constitute crimes involving moral turpitude rendering the applicant inadmissible under section 212(a)(2)(A)(i).

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 –

. . . .

(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 notes that section 212(h) 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. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (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 to a qualifying relative. The factors include 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. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

> 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 AAO notes that in *Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals 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 further, however, that 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, in *Matter of Pilch,* 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit Court of Appeals defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. The Ninth Circuit emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

As stated above, the director determined that the applicant had established that extreme hardship would be imposed on a qualifying relative by the bar to admission. The AAO concurs with this determination. The record reflects that the applicant and her U.S. citizen husband have been together for more than a decade. The applicant's husband suffers from a bone tumor in his leg and is unemployed. He requires medical treatment obtained through the applicant's health insurance. In addition, the applicant's naturalized U.S. citizen mother suffers from degenerative rheumatoid arthritis and depends upon the applicant to take care of her.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The adverse factors in the present case include the applicant's criminal record and her violation of immigration laws through unlawful presence and unauthorized employment in the United States. Court

documents and an FBI report based on the applicant's fingerprints found in the record reflect the following convictions:

1. Arrested on April 28, 1994 by Baltimore County, Maryland Police and charged with Solicitation of Prostitution. The applicant was convicted in the District Court of Maryland for Baltimore County on September 20, 1994 and placed on probation for the period of 12 months. Prosecution was declined (nolle prosecution) on April 4, 2007 (Court Case # [redacted]

2. Arrested on or about October 9, 1994 by Baltimore, Maryland Police and charged with one count of Soliciting Prostitution and one count of Soliciting Lewdness. The applicant was convicted on both counts on March 10, 1995 and apparently sentenced to one year on each charge. The sentences were suspended and the applicant was placed on probation for a period of 18 months. (Court Case # [redacted]

3. Arrested on May 16, 2000 in Broward County, Florida and charged with Operating a Vehicle Without a Valid License, Pedestrian Obstruction of Traffic, Failure to Display Vehicle Registration, and Failure to Possess Insurance. The applicant pled guilty to the first charge and paid a fine of less than $200. The latter three charges were dismissed on September 22, 2000.

4. Arrested on February 25, 2002 by the Florida Marine Patrol and charged with Driving While License Suspended. No final court disposition or other information for this charge is in the record.

The favorable factors in the present case include the extreme hardship to the applicant's husband and mother; the affidavits from the applicant's husband, her mother and others stating that the applicant is a person of good moral character; the applicant's contributions to her community and the nation as manifested by her employment in the medical profession, payment of taxes, etc.; and the lack of any serious criminal convictions after 1995.

The AAO finds that the crimes committed by the applicant are serious in nature and cannot be condoned. However, the AAO concurs with counsel that it was improper for the director to include mere arrests as adverse factors to be weighed against the applicant along with her convictions. Just as USCIS does not go behind the judicial record to determine the guilt or innocence of an alien for a criminal offense, *see In Re Max Alejandro Madrigal-Calvo,* 21 I&N Dec. 323, 327 (BIA 1996), it would be improper as a matter of discretion to consider as crimes alleged offenses for which the applicant was arrested but never prosecuted and/or convicted. The AAO notes that the applicant was arrested on several occasions other than those listed above, but the record shows that these arrests did not result in prosecution or conviction. The record reflects that the applicant has not been convicted of prostitution or any other similar crime since her prostitution convictions in 1994 and 1995, which suggests the applicant has been rehabilitated. The AAO finds that 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.