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U.S. Citizenship and Immigration Services

[redacted]

H2

FILE: [redacted] Office: SEOUL, KOREA Date: MAY 30 2007

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 Officer in Charge, Seoul, Korea. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Korea 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, embezzlement. The record indicates that the applicant has a U.S. citizen spouse and two U.S. citizen children. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his family in the United States.

The Officer in Charge found that the applicant failed to show extreme hardship beyond the normal hardship felt by others who are separated. *Officer in Charge's Decision,* dated April 13, 2005.

On appeal, counsel asserts that the applicant's spouse and children will suffer extreme hardship as a result of the applicant's inadmissibility and that the applicant warrants the favorable exercise of the Service's discretion. *Counsel's Brief,* May 9, 2005.

The record indicates that the applicant was convicted of embezzlement in South Korea on December 20, 2002.

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 . . .

The AAO notes that on November 14, 2004 the applicant submitted a partial judgment from the Supreme Court of South Korea, translated from Korean to English, showing that the applicant has a partial judgment in the appeal of his criminal case. The judgment submitted showed that parts of the applicant's case were still pending with the court. Thus, the judgment submitted cannot be used as the final disposition of the Korean court. No further documentation has been submitted. Therefore, based on the current record the applicant's is still subject to section 212(a)(2)(A) of the Act.

The applicant's current application for adjustment of status was filed within 15 years of the activity for which he was convicted; 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 applicant's U.S. citizen or lawful permanent resident spouse, parent or child. Hardship the alien himself experiences due to separation is not considered in section 212(h) waiver proceedings unless it causes hardship to the applicant's spouse, child and/or parent. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See 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).

Of particular relevance to cases in which children are qualifying relatives the Third Circuit Court of Appeals found that:

> Although we do not go so far as to hold that the separation of a father from his child is, as a matter of law, extreme hardship for purposes of [suspension of deportation], we do hold that where a father expresses deep affection for his child and where the record demonstrates that his actions are consistent with and supportive of his expression of affection, a finding of no extreme hardship will not be affirmed . . . unless the reasons for such a finding are made clear.

Bastidas v. INS, 609 F.2d 101, 105 (3rd Cir. 1979). Separation of the applicant from his children will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO notes that extreme hardship to the qualifying relative must be established in the event that he or she accompanies the applicant and resides in South Korea 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.

The first part of the analysis requires the applicant to establish extreme hardship to his wife and/or children in the event that they relocate with him to South Korea. The record indicates that the applicant's spouse has been residing in the United States since 1987. Counsel states that the applicant's spouse suffers from rheumatoid arthritis and has been receiving treatment from an arthritis center since April 26, 2000. Counsel explains that the applicant's spouse experiences frequent pain and is only able to visit the applicant in South Korea for brief trips because she has to see her physician on a regular basis. *Counsel's Brief*, dated August 13, 2004. The applicant submitted an article about rheumatoid arthritis, which explains that this illness is chronic and progressive. [redacted] *Article*, not dated. The applicant also submitted a letter from his wife's treating physician, Dr. [redacted] Dr. [redacted] states that the applicant's spouse has been attending the Arthritis Center since April 26, 2000 and that despite her treatment she continues to show evidence of active synovitis. The doctor states that the applicant's spouse has some work restrictions due to the pain and swelling in her fingers and wrists and that she has been advised that certain factors such as cold weather and stress may aggravate her condition. Finally, the doctor states that it his important that the applicant's spouse be followed on a regular basis by a rheumatologist and that she have access to the best treatment. *Letter from Dr.* [redacted] dated July 16, 2004. Counsel states that the applicant's spouse cannot relocate to Korea because of her rheumatoid arthritis. *Counsel's Brief*, dated August 13, 2004. He states that the applicant's spouse's condition will worsen in Korea because of the lack of the latest treatments in medical care for her condition and the cold winter months in Korea as opposed to the more temperate climate in San Francisco, California. In support of these assertions, the applicant submitted two articles concerning cold weather and changes in barometric pressure causing increased pain in arthritis sufferers. *Articles from* [redacted], dated July 13, 2004. Counsel also explains that the applicant's ability to perform everyday tasks will become harder if she relocates to South Korea. Counsel further contends that the stress involved in moving to a new environment will likely trigger additional arthritis pain for the applicant's spouse and that conditions in Korea, e.g., buildings without elevators and the need to walk more, will increase the physical strain on her and aggravate her condition. *Counsel's Brief*, dated August 13, 2004. He states that in California the applicant's mother lives close to her and assists her in raising her two children. The applicant's spouse's mother, [redacted]

[redacted], also submitted a letter stating that the applicant's spouse faces extreme difficulties in making general movements such as lifting, walking, feeding her baby, and even brushing her hair. states that for more than four years she has lived close to the applicant's spouse in order to help in emergencies. *Letter from* [redacted], dated July 13, 2004. The applicant also submitted a consular information sheet for South Korea, which states that health care facilities are good. *Consular Information Sheet*, dated June 4, 2004. The applicant did not submit documentation showing that his spouse would not be able to find advanced treatment for rheumatoid arthritis in South Korea or that she would not be able to find help in caring for her children in South Korea where he currently resides. Additionally, while the articles on the effect of cold weather and changes in barometric pressure on arthritis report that weather can affect the level of arthritic pain and stiffness, they do not establish that relocation would constitute an extreme medical hardship for the applicant's spouse. The AAO notes that the letter from the physician treating the applicant's wife indicates only that cold weather may aggravate her condition. It does not advise against such exposure, nor indicate specifically how relocating to a colder climate would affect the applicant's spouse.

Counsel also asserts that the applicant's spouse would suffer economic detriment if she relocated to South Korea. He states that if the applicant's waiver application is denied, the applicant would have to relocate his corporate headquarters outside the United States, perhaps to Canada or Korea, and that there is no certainty that the applicant's spouse, currently employed at the U.S. headquarters, would be able to work outside the United States. Counsel notes that the applicant's spouse is unfamiliar with the business environments in Canada and Korea, which may result in her being unqualified to hold a new position, even if it were offered to her. He contends that the applicant's spouse would suffer extreme economic hardship if she joined the applicant outside the United States based on the uncertainty of obtaining new employment with the applicant's firm. *Counsel's Brief*, dated August 13, 2004.

Courts considering the impact of financial detriment on a finding of extreme hardship have repeatedly held that, while it must be considered in the overall determination, "[e]conomic disadvantage alone does not constitute "extreme hardship." *Ramirez-Durazo v. INS,* 794 F.2d 491, 497 (9th Cir. 1986) ("lower standard of living in Mexico and the difficulties of readjustment to that culture and environment . . . simply are not sufficient"); Shooshtary v. INS, 39 F.3d 1049 (9th Cir. 1994) ("the extreme hardship requirement . . . was not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy"); *Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship); *INS v. Jong Ha Wang,* 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

In the present case, the record contains no evidence that demonstrates that the applicant's spouse would be unable to obtain employment outside the United States. Although counsel contends that this conclusion is not supported by evidence, the AAO notes that the burden of proof in this proceeding is on the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Accordingly, it is the responsibility of the applicant to establish that his spouse would be unable to obtain employment with his firm or elsewhere if she relocated with him to another country. The applicant has, however, submitted no evidence to demonstrate that this would be the case. Neither has he submitted documentation that would indicate that his family is in any way dependent on his wife's income or that he would be unable to support her financially from outside the United States.

Accordingly, the applicant has not established that his spouse would suffer extreme economic hardship if she joined him outside the United States.

In addition, counsel states that the applicant wants to raise his two young children in the United States and that moving to South Korea could, in light of the threat presented by North Korea, place their children in a danger zone. However, the record does not show that the applicant's children would have trouble adjusting to life in South Korea or that South Korea would be a danger zone. Counsel also reports the applicant's concern that relocating to Korea would require his U.S. citizen son, now seven years old, to perform compulsory military service and, further, that it would mean his wife would have to confront life in a country with laws and a political climate that she finds distasteful. *Counsel's Brief*, dated May 9, 2005. The AAO notes, however, that the consular information sheet submitted by the applicant indicates that Korean males who hold dual citizenship are not required to perform military service if they surrender their Korean citizenship prior to December 31 of the year they reach their 17th birthdays. It also finds no evidence in the record that would support counsel's claim that the applicant's spouse finds the laws and political climate of Korea distasteful. Without supporting documentary evidence, the assertions of counsel are not sufficient to meet the applicant's burden of proof in this proceeding. The assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the current record does not show that the applicant's spouse and/or children would suffer extreme hardship as a result of relocating to South Korea.

The second part of the analysis requires the applicant to establish extreme hardship to a qualifying relative in the event that he or she remains in the United States separated from the applicant. The record indicates that the applicant's spouse and children are currently residing in the United States and the applicant is residing in South Korea. Counsel contends that failure to approve the applicant's waiver application would affect the viability of the applicant's marriage to his spouse and that a separation of the family would be an extreme hardship since they would have to live separate lives with only occasional visits. *Counsel's Briefs*, dated August 13, 2004 and May 9, 2005. The record also indicates that the applicant's spouse has taken many trips abroad in 2002, including a five month trip and then, after 5 days in the United States, another three month trip. *Applicant's Spouse's Entry and Exit Record.* Accordingly, the record does not support counsel's contention that the continued separation of the applicant's family would require them to live separate lives with only occasional visits. The record also lacks any evidence that would establish that the applicant's continued inadmissibility would affect the viability of his marriage to his spouse.

On appeal, counsel also raises the impact of relocating the headquarters of the applicant's firm on his spouse should she remain in the United States. He asserts that moving the firm's headquarters outside the United States would result in the loss of her employment and that being deprived of her present job security would constitute extreme hardship. *Counsel's Brief*, dated May 9, 2005. The record, however, does not establish that the work performed by the applicant's spouse for her husband's firm is related to the operations of the firm's headquarters or that she would be unemployed if the firm's headquarters were moved outside the United States. Instead, it indicates that the applicant's spouse began working for the firm's U.S. subsidiary in 1998 as a project manager and that the U.S. office, beyond the headquarters functions it assumed in 2003, is responsible for sales and marketing in North/South America and Europe. Nothing in the record demonstrates that the relocation of the firm's headquarters would result in the closing of its U.S. sales and marketing operations. Nothing in the record establishes that the applicant's spouse, who was working at the

U.S. subsidiary when the firm was still headquartered in Korea, could not continue to be employed in the firm's sales and marketing operations in the Western Hemisphere and Europe should she choose to remain in the United States.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse and/or children caused by the applicant's inadmissibility to the United States. 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.

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 aliens being deported.

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.