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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: Chicago, IL Date: AUG 0 3 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Michael Shumway

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Russia 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 committed 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 with his lawful permanent resident parents.

In a decision, dated September 28, 2006, the district director based his finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's conviction for retail theft and a conviction for either possession of a stolen vehicle or theft. The district director then concluded that the applicant had failed to establish that extreme and unusual hardship would be imposed on a qualifying relative and denied the waiver application accordingly[1].

In the Notice of Appeal to the AAO (Form I-290B), dated February 12, 2006, counsel states that in denying the applicant's waiver application, the district director did not properly consider extreme hardship to the applicant's lawful permanent resident parents. He also states that the district director did not weigh all of the circumstances that would warrant a favorable exercise of discretion.

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

> (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-
>
> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (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).

[1] The AAO notes that the proper standard for adjudicating a waiver under section 212(i) of the Act is extreme hardship, not extreme and unusual hardship.

The record indicates that the applicant was convicted of Retail Theft (greater than $150), a Class 3 felony, on July 15, 2004 under Illinois Criminal Statute (ILCS) Chapter 720 §5/16A-3(A). The record indicates that on September 24, 2004 the applicant was charged with Receiving/Possession/Selling a Stolen Vehicle under Illinois Criminal Statute 625-5/4-103(a)(1) and Theft greater than $300 but less than $10,000 under Illinois Criminal Statute 720-5/16-1(a)(1). On October 15, 2004, the applicant was nolle prosequi for count one and the applicant plead guilty to count two. The record does not indicate which charge was count one and which charge was count two. In addition, the record indicates that the applicant was arrested in or around November 2002 for Possession of Cannabis under Illinois Criminal Statute 720 550/4B and that this charge was stricken from the record on January 10, 2003.

At the time of the applicant's conviction, 720 ILCS 5/16A-3(A) stated:

> A person commits the offense of retail theft when he or she knowingly:
>
> > (a) Takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise;

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently. Thus, the AAO finds that the applicant's conviction for Retail Theft under 720 ILCS 5/16A-3(A) constitutes a crime involving moral turpitude.[2]

The record also shows that for this conviction the applicant was sentenced to 90 days imprisonment and two years probation. Furthermore, 730 ILCS 5/5-8-1 states that the maximum punishment for committing Retail Theft of greater than $150 in value, a Class 3 felony, is imprisonment for a term of not less than two years and not more than five years. Thus, this conviction does not qualify for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act. However, the applicant is eligible to apply for a waiver under section 212(h) of the Act.

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 –

[2] The AAO notes that because the applicant's conviction for Retail Theft has been found to be a crime involving moral turpitude, no purpose would be served in determining if his second conviction also involved moral turpitude.

> (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 record indicates that the applicant's conviction for Retail Theft occurred in 2004. His current application for adjustment of status is less than 15 years after those activities; he is therefore statutorily ineligible for a waiver pursuant to section 212(h)(1)(A) of the Act. However, he is 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 a "qualifying relative," *i.e.,* the U.S. citizen or lawfully resident spouse, parent or child of the applicant. Hardship to the applicant is not considered in section 212(h) waiver proceedings and will be considered only insofar as it is established that hardship to the applicant is causing hardship to a qualifying relative in the application. If extreme hardship to a qualifying relative is established, in this case the applicant's U.S. citizen spouse or children, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(h) of the Act; *see also Matter of Mendez-Moralez,* 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).

An analysis under *Matter of Cervantes-Gonzalez* 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 and resides in Russia and 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 record of hardship includes a brief from counsel and statements from the applicant and his parents.

In an undated brief, counsel states that the applicant is an only child and that he and his parents emigrated from the former Soviet Union to Israel in 1991. Counsel states that the applicant's family fled the Soviet Union for Israel because of the persecution they were facing as Jewish people. Counsel also states that the family lived in Israel for four years before moving to the United States. Counsel states that if the applicant were removed from the United States, the family would suffer emotional and financial hardship.

The applicant's mother, in an affidavit dated December 19, 2005, states that the applicant has always lived with her and her husband and that it would be devastating to have him in another country. She states that they cannot return to the former Soviet Union because of the persecution they faced and that they also cannot return to Israel. The applicant's mother states that while in Israel they did not learn the Hebrew language well, and because of the high unemployment, they would not be able to find employment in Israel. The AAO notes that the applicant's mother states that she and the applicant resided in Israel for seven years, not four years as stated by counsel in his brief. The applicant's mother also states that the applicant contributes economically to the household and if he returned to Israel he would no longer be able to contribute.

In an affidavit, dated December 19, 2005, the applicant's father expresses many of the same concerns as the applicant's mother. He also states that he would be emotionally devastated to know that his only child is living in a country where he has no family, friends, memories and he does not know the language. The applicant's father states further that he is the only one who can take care of his elderly father in the United States and he does not want to abandon his father.

In an affidavit, also dated December 19, 2005, the applicant states that he and his family resided in Israel before coming to the United States from 1991 to 1999. He also states that he is sorry for the mistakes he made and is trying to turn his life around.

The AAO notes that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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 Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

The AAO finds that the current record lacks documentation to support the assertions made by counsel, the applicant, and his parents. Counsel did not submit any documentation to support the assertions made in regards to the financial situation of the applicant's parents, the family ties to the United States, the country conditions in Russia and/or Israel or the past persecution the family faced in the former Soviet Union. Thus, the AAO finds that the applicant has failed to show that his parents would suffer extreme hardship as a result of his inadmissibility.

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. The AAO recognizes that the applicant's wife will endure hardship as a result of separation from the applicant. However, her situation, if she remains in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's parents 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.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) 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.