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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: BALTIMORE, MARYLAND Date: JAN 21 2009

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record reflects that the applicant is a native and citizen of El Salvador 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. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his wife and stepson in the United States.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the District Director*, dated June 29, 2006.

On appeal, counsel contends that the applicant did not commit a crime involving moral turpitude. Counsel argues that even if he did, his wife and stepson would suffer extreme hardship if he were refused admission to the United States. *Brief in Support of Appeal to the AAO.*

The record contains, *inter alia*: a copy of the marriage license of the applicant and his wife, Ms. [redacted], indicating they were married on April 11, 1996; affidavits from [redacted], her mother, and her sister; a custody order granting [redacted] custody of her son from a previous marriage; a letter from ex-husband stating he does not want his son to leave the United States; a copy of a Trade Name Application for the applicant and his wife to start a carpentry and building services business; financial and tax documents; conviction documents; and letters from the applicant's and his wife's employers. The entire record was reviewed and considered in rendering this 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:

> (h) 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 -

> (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 applicant's wife and stepson, who was five years old when the applicant and [redacted] married, are qualifying family members for section 212(h) of the Act extreme hardship purposes. *See* section 101(b) of the Act, 8 U.S.C. §1101(b) (defining a "child" as "an unmarried person under twenty-one years of age who is . . . a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred").

The record shows that the applicant entered the United States in 1989 and 1999 without inspection. *Record of Sworn Statement in Affidavit Form*, signed by [redacted] on September 4, 2002. On August 7, 1992, the applicant was arrested and charged with "assault strongarm," "deadly weapon carrying with intent to injure," and "assault arm w/i to mai[m]." On December 18, 1992, the applicant was found guilty of the first two charges, which were listed as "Battery" and "Deadly Weapon-Int/Injure." The third charge was dismissed. The applicant received two years probation.

The district director found that the applicant's conviction for "Deadly Weapon-Int/Injure" was a crime involving moral turpitude. Counsel contends that because the statute includes mere crimes of possession, the statute is divisible. Counsel further contends that because applicant's sentence was less than the maximum of three years under the statute, the applicant did not have the intent to injure, and, therefore, was not convicted of a crime involving moral turpitude.

Counsel's assertions are unpersuasive. The applicant was convicted of Maryland Annotated Code Article 27, Section 36, which stated, in relevant part:

> § 36. Carrying or wearing concealed weapon; carrying openly *with* intent to injure; carrying by person under eighteen at night in certain counties.
>
> (a) *In general.* – (1) Every person who shall wear or carry any dirk knife, bowie knife, switchblade knife, star knife, sandclub, metal knuckles, razor, nunchaku, or any other dangerous or deadly weapon of any kind, whatsoever (penknives without switchblade and handguns, excepted) concealed upon or about his person, *and* every person who shall wear or carry any such weapon, chemical mace, pepper mace, or tear gas device openly *with the intent or purpose of injuring any person* in any unlawful manner, shall be guilty of a misdemeanor, and upon conviction, shall be fined not more than $1,000 or be imprisoned in jail,

> or sentenced to the Maryland Department of Correction for not more than three years.

MD. CODE ANN. Art. 27, § 36 (1957) (emphasis added) (now codified at MD CRIM LAW § 4-101). The plain language of the statute requires the "intent or purpose of injuring any person." MD. CODE ANN. Art. 27, § 36(a)(1). Therefore, the statute is not divisible as counsel claims. Mere possession of a weapon, without the intent to harm another, is not an offense under § 36(a)(1). Applicant's conviction under this statute indicates he had the intent to injure another person.

Counsel's assertions appear to be based on subsection (2) of the statute, which states:

> (2) In case of a conviction under the provisions of this subsection, *if it shall appear* from the evidence that such weapon was carried, concealed or openly, with the deliberate purpose of injuring the person or destroying the life of another, the court shall impose the highest sentence of imprisonment prescribed.

Id. (emphasis added). There is no indication in the record that the applicant was convicted under subsection (2) of the statute, and nothing in subsection (2) nullifies the requirements set forth in subsection (1) of the statute. Therefore, because the statute includes an element of intent, the applicant was convicted of a crime involving moral turpitude, rendering him inadmissible under section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A). *See* MD. CODE ANN. Art. 27, § 36(a)(1); *Yousefi v. U.S. INS*, 260 F.3d 318, 326-27 (4th Cir. 2001) (holding that assaulting someone with a dangerous or deadly weapon is a crime of moral turpitude for deportation purposes) (citing *Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976); *Matter of Ptasi*, 12 I&N Dec. 790, 791 (BIA 1968); *Matter of Goodalle*, 12 I&N Dec. 106, 107 (BIA 1967); and *Pichardo v. INS*, 104 F.3d 756, 760 (5th Cir. 1997)).

A section 212(h) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse, parent, son, or daughter of the applicant. 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-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. *See 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 alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include: 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. The BIA has held:

> 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). In addition, the Court of Appeals for the Ninth Circuit has held that "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[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." *See Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *see also Cerrillo-Perez v. INS,* 809 F.2d 1419, 1424 (9th Cir. 1987) ("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); *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981) (economic impact combined with related personal and emotional hardships may cause the hardship to rise to the level of extreme) (citations omitted).

In this case, according to [redacted]'s affidavit, prior to meeting the applicant, she was an alcoholic who had been in a series of abusive relationships. [redacted] states the applicant has given her another chance at life, that he helps build her self esteem, and that for the first time in her life, she feels successful. She claims she cannot live without the applicant and describes a time when the applicant left her for a few months. [redacted] "fell apart," lost her job, got drunk all the time, hardly showered, sat in the dark for hours, and did not care for her son. She said that the applicant "saved [her] life" when he returned. If the applicant were deported, [redacted] states, "I will end it. . . . I would kill myself to end all the pain and misery." *Affidavit of* [redacted], dated October 28, 2003.

[redacted]'s account of her psychological problems, alcohol problems, history of abusive relationships, and reliance on the applicant is supported by affidavits from her mother and sister. According to [redacted]'s sister, prior to meeting the applicant, [redacted] was an alcoholic, was in violent relationships, and always had bruises and marks on her face and arms from beatings. But after [redacted] began dating the applicant, "she changed. She started to settle down. Her drinking was no longer a problem." [redacted] sister states that without the applicant, she is "positive that [redacted]'s] life would fall apart again. . . . It is only with [the applicant] that she is able to hold her life together." *Affidavit of* [redacted], dated October 16, 2003.

[redacted] mother's affidavit states that prior to meeting the applicant, [redacted] drank heavily, was arrested twice for DWI until she finally lost her license, and was in abusive relationships. [redacted]'s mother further states that at least six times, she and her husband drove

to house at 3:00 or 4:00 in the morning "just to make sure she wasn't being beaten." There were marks and scars on face from beatings, and her face was often swollen and bruised. One of the men [redacted] dated stole her ATM card, VCR, and jewelry. Her mother states that [redacted] was suicidal. [redacted] mother fears that if the applicant left the country, [redacted] would fall apart again. She states that [redacted] would return to alcoholism, and would be unable to parent or hold onto a job. Her mother fears that if the applicant left the country, she "would worry that one day [she] would find [redacted] in a ditch." *Affidavit of* [redacted], dated October 16, 2003.

A Psychological Evaluation in the record conducted by two Psychologists indicates that [redacted] has "a number of unresolved personality problems and adjustment difficulties." The results of a psychological test battery indicate that [redacted] has a "severe mental disorder" that requires further treatment. [redacted] experiences "at least a moderate level of pathology," has insufficient coping strategies, and tends to "blur fantasy with reality." The Psychologists conclude that "as a consequence of the possible deportation of her husband, . . . [redacted] will experience and suffer a prolonged period of major depression, including suicidal attempts, where she would be unable to work." They further conclude [redacted] would be unable to function on a daily basis, and that she would "not just experience[] acute stress, but . . . serious regression to the point of dysfunction and destruction." *Psychological Evaluation*, dated September 27, 2002.

Upon a complete review of the record evidence, the AAO finds that the applicant has established that his wife will experience extreme hardship if he is prohibited from remaining in the United States.

In this case, it is evident from the record that if the applicant's waiver application were denied, Ms. [redacted] would experience extreme psychological and emotional hardship. The record shows that [redacted] has a severe mental disorder, personality disorder, and some level of pathology. If the applicant were deported to El Salvador, the record evidence indicates [redacted] would be utterly unable to cope with the separation and would likely attempt suicide. Considering the problems with [redacted]'s mental health and her complete reliance on the applicant, the effect of separation from the applicant on [redacted] go above and beyond the experience that is typical to individuals separated as a result of deportation and rises to the level of extreme hardship. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 303 (BIA 1996) (finding extreme hardship to the applicant's wife based on her history of depression and a suicide attempt). Furthermore, going to El Salvador with the applicant to avoid separation would be an extreme hardship for [redacted] considering her mental health and the fact that her son's biological father would not permit their son to leave the United States. *Letter from* [redacted], dated October 17, 2003. Considering the combination of these factors in their totality, the denial of a waiver of inadmissibility would result in extreme hardship to [redacted]

Moreover, the AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case include the applicant's entries into the United States without inspection in 1989 and 1999, his 1992 criminal convictions for battery and carrying a weapon with intent to injure, and his violation of probation for his convictions, as documented in the record. The favorable and mitigating factors in the present case include: the applicant has significant family ties to the United States, including his wife, stepson, and parents; the extreme hardship to the applicant's wife if he were refused admission, particularly in light of his wife's mental health status and the letters of support from [redacted]s mother and sister; the applicant's record of working and paying taxes in the United States; the letter of support from the applicant's employer commending him as a great asset to the organization; the successful business the applicant and his wife created in 2000; and the applicant's lack of any other convictions for over sixteen years.[1]

The AAO finds that, although the applicant's immigration violations and criminal history are serious and cannot be condoned, when 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.

[1] The AAO notes that an FBI printout in the record states that the applicant was arrested on November 16, 2004, for driving while impaired. However, there is no other information in the record regarding this arrest and it is unclear whether the applicant was prosecuted for the offense.