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U.S. Immigration and Citizenship Services
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U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: PHILADELPHIA, PA Date: JUN 23 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).

Ellen C. Johnson

John F. Grissom,
Acting Chief Administrative Appeals Office

DISCUSSION: The Field Office Director, Philadelphia, Pennsylvania, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed.

The applicant is a native and citizen of Guinea 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 committing a crime involving moral turpitude.

The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated November 21, 2008.

On appeal, counsel states that the applicant was twice convicted of trademark counterfeiting. She states that the director failed to properly consider all of the submitted evidence in determining whether the applicant's spouse would experience extreme hardship if the waiver application were denied. Counsel states that the applicant's spouse is undergoing medical treatment for a pinched nerve in her neck. Counsel states that the applicant's spouse has hypochondriasis, histrionic personality disorder, and chronic migraines and is the primary caregiver for her mother and for her son, both of whom have depression. Counsel indicates that the applicant's spouse has no ties to Guinea, and that she would not be able to care for her son in Guinea or leave him alone in the United States. Furthermore, counsel indicates that if the applicant's wife lived in Guinea she would not be able to emotionally support her mother. Counsel states that 47 percent of Guinea's population live below the poverty line and that the country has problems with rebel groups, warlords, and youth gangs, as stated in the Central Intelligence Agency Fact Book.

The AAO will first address the finding of inadmissibility.

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

> (A)(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 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

> A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The record reflects that in the Common Pleas Court of Philadelphia the applicant entered a plea of guilty and was found guilty of trademark counterfeiting (18 Pa.C.S.A. § 4119) in 2004 and in 2005. For the 2004 conviction, the judge sentenced the applicant to serve one year of reporting probation; for the 2005 conviction he was sentenced to five years of reporting probation and ordered to pay costs and restitution.

Pennsylvania's trademark counterfeiting statute reads:

> Any person who knowingly manufactures, uses, displays, advertises, distributes, offers for sale, sells or possesses with intent to sell or distribute any items or services bearing or identified by a counterfeit mark shall be guilty of the crime of trademark counterfeiting.

18 Pa.C.S.A. § 4119(a). A "counterfeit mark" is either "[a]ny unauthorized reproduction or copy of intellectual property" or "[i]ntellectual property affixed to any item knowingly sold, offered for sale, manufactured or distributed or identifying services offered or rendered, without the authority of the owner of the intellectual property." *Id.* § 4119(i). "Intellectual property" means "[a]ny trademark, service mark, trade name, label, term, device, design or word adopted or used by a person to identify that person's goods or services." *Id.*

The Ninth Circuit case, *Tall v. Mukasey*, 517 F.3d 1115 (9th Cir. 2008), is instructive in determining whether trademark counterfeiting under 18 Pa.C.S.A. § 4119 involves moral turpitude. In *Tall*, the Ninth Circuit analyzed whether violation of California Penal Code § 350 involves moral turpitude. California Penal Code § 350(a) punishes "[a]ny person who willfully manufactures, intentionally sells, or knowingly possesses for sale any counterfeit of a mark registered with the Secretary of State or registered on the Principal Register of the United States Patent and Trademark Office." The statute defines "counterfeit mark" as "a spurious mark that is identical with, or confusingly similar to, a registered mark and is used on or in connection with the same type of goods or services for which the genuine mark is registered." § 350(e)(2).

The Ninth Circuit found that § 350(a) is categorically a crime involving moral turpitude because it is an inherently fraudulent crime with either the purchaser being tricked into buying a fake item; or if the purchaser is aware the item is counterfeit, the owner of the mark being robbed of its value. The Ninth Circuit determined that the crime is a species of theft, and that all of the conduct punished by

§ 350(a) is inherently fraudulent because each type of conduct "involve[s] knowingly false representations made in order to gain something of value." *Tall* at 1119-1120 (citation omitted).

Here, the AAO finds that the language of 18 Pa.C.S.A. § 4119(a) is similar to the California statute in that all of the conduct punished by 18 Pa.C.S.A. § 4119(a) is inherently fraudulent; each type of conduct involves knowingly false representations made in order to gain something of value. Because section 350(a) is a crime involving moral turpitude, the AAO finds that likewise 18 Pa.C.S.A. § 4119(a) is an offense involving moral turpitude. As such, the applicant's convictions render him inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime involving moral turpitude.

The AAO will now consider whether the applicant's section 212(h) waiver should be granted.

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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case are the applicant's naturalized citizen spouse, and his U.S. citizen daughter. The AAO notes that no documentation in the record substantiates that the applicant's stepson is a U.S. citizen or lawful resident.

If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *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. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) 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 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

In support of the waiver application, the record contains a psychological evaluation, affidavits by the applicant's spouse and son and friends, financial documentation, a letter from the applicant, birth certificates, criminal records, an employment letter, photographs, and other documents.

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant's qualifying relative must be established if she or he remains in the United States without him, and alternatively, if she or he joins the applicant. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

Counsel indicates that the applicant's spouse would experience extreme hardship if she were to remain in the United States without her husband. In support of counsel's assertions is a psychological hardship evaluation dated August 26, 2008, by [redacted]. That evaluation conveys that the applicant's spouse is concerned about her 20-year-old son, [redacted] who has had lifelong clinical depression and lives with her and the applicant. [redacted] indicates that the applicant's wife conveys that [redacted] functions poorly, is unemployed, and has no relationships outside of the family. [redacted] states that the applicant's "ongoing involvement can assist [the applicant's wife] in letting go of her son, support [redacted]' maturation and encourage [redacted] to move toward autonomous functioning." [redacted] states that the applicant's wife conveys that her mother is chronically disabled by depression and receives long-term disability payments and that the applicant is close to her mother. [redacted] states that the applicant's wife describes herself as a hypochondriac who consults a physician every two weeks. [redacted] diagnosed the applicant's wife with hypochondriasis, histrionic personality disorder, migraine headaches; and with concern about her husband's deportation, her financial difficulties, and her dysfunctional child. He indicates that the applicant's wife's mother and sister have mental disorders, probably depression.

The applicant's wife expresses that she is concerned about her son's and mother's mental health problems; however, there is no corroborating documentation in the record establishing that they have mental health problems. 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).

Courts have stated that "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); *Cerrillo-Perez 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).

However, *Perez v. INS,* 96 F.3d 390, 392 (9th Cir. 1996), states that "[e]xtreme hardship" is hardship that is "unusual or beyond that which would normally be expected" upon deportation and "[t]he common results of deportation or exclusion are insufficient to prove extreme hardship." (citing *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir.1991). In *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir.1991) deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission." (citing *Patel v. INS,* 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship).

The applicant's spouse has anxiety and stress about separation from her husband. The AAO is mindful of and sympathetic to the emotional hardship that is undoubtedly endured as a result of separation from a loved one. After a careful and thoughtful consideration of the record, the AAO finds that the situation of the applicant's spouse, if she remains in the United States without him, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as required by the Act. The record before the AAO is insufficient to show that the emotional hardship, which will be endured by the applicant's spouse, is unusual or beyond that which is normally to be expected upon removal. *See Perez* and *Hassan, supra.*

With regard to the applicant's daughter, the record contains a letter by [redacted] in which she indicates that the applicant is a good father and provider for their two-year old daughter. Ms. [redacted] states that the applicant "is always there for our daughter and takes good care of her," spending lots of time with her. She indicates that he is counted on to be part of her daughter's life and that her daughter needs him.

The AAO finds that the hardship that [redacted] describes that her daughter will experience if separated from her father is the type of hardship that is commonly associated with separation and, therefore, fails to demonstrate hardship that is unusual or beyond that which would normally be expected from removal. *See Perez* and *Hassan, supra.*

Counsel indicates that the applicant's spouse would experience extreme hardship if she were to join her husband to live in Guinea because she would be separated from her son and mother, who both have a mental illness. As previously stated, no documentation has been submitted to demonstrate that the applicant's mother-in-law and stepson have a mental illness. 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).

Counsel states that the applicant's wife would live in a country where there is a high level of poverty and problems with rebel groups, warlords, and youth gangs. Although the economic and political conditions in Guinea, the country where the applicant's spouse would live if she joined the applicant, are a relevant hardship consideration, they do not justify a grant of relief unless other factors such as advanced age or severe illness combine with economic detriment to make deportation extremely hard on the alien or his qualifying relatives. *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994)(citations omitted). Here, the applicant has not established the additional factors that are needed to combine with the economic and political conditions in Guinea to demonstrate extreme hardship to his wife.

The AAO notes that the applicant makes no claim of extreme hardship to his daughter if she were to join him to live in Guinea.

Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to the applicant's spouse if she were to remain in the United States without him, and alternatively, if she were to join him to live in Guinea.

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 remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed. The application will be denied.

ORDER: The appeal is dismissed. The application is denied.