identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

H2

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 02 2009

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h), 8 U.S.C. § 1182(h), of the Immigration and Nationality Act.

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

Ellen C. Johnson

John F. Grissom,
Acting Chief Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Service Center Director, Vermont, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, [redacted] is a native of Iraq and a citizen of Canada 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's father is a naturalized citizen of the United States. The applicant sought a waiver of inadmissibility pursuant to section 212(h), 8 U.S.C. § 1182(h), of the Act. The director concluded that the applicant had failed to establish that her 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 Director*, dated May 4, 2007. The applicant submitted a timely appeal.

On appeal, [redacted] states that her father suffers extreme hardship because she is unable to take care of him. She states that she was convicted in 1995 of Dangerous Operation Causing Death in Canada, and was also convicted in 1994 and 1995 of retail fraud in the United States. She states that she committed those offenses when she was 28-30 years old, divorced, unemployed, and a single mother taking care of two daughters. She conveys that she went though a period of depression and emotional trauma and was taking medication for her condition and was not thinking clearly. Ms. [redacted] states that since 1995 she has not committed a crime, and considers herself rehabilitated and tries to be a good mother and role model for her daughters, and regrets her past offenses. Her 72-year-old father, she states, had a stroke that rendered him incapacitated and bedridden. She states that he requires a feeding tube and constant care and attention. Her mother is elderly, she states, and has a medical condition, which makes it hard for her to provide full-time care for her father. Ms. [redacted] states that her siblings work full time; and that one of her sisters lives with her parents. She states that her sister that lives with her parents is married and has three children; and her sister's husband works full time while her sister takes care of her children, and that one of her sister's children has autism and requires special care, making it difficult for her sister to take care of their parents. [redacted] states that she is the only one among her siblings who does not work full time and is able to take care of their father.

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 on February 4, 1993 the applicant was charged with Dangerous Operation Causing Death in violation of section 249(4) of the Criminal Code of Canada. On May 5, 1993, the court sentenced her to nine months in jail and prohibited her from driving for five years. On December 24, 1994, in the state of Michigan, the applicant committed the offence of first-degree retail fraud. She pled guilty to second-degree retail fraud on January 6, 1995, and the court ordered her to pay $200 and to report to probation and pay $30 a month. In the state of Michigan, on July 14, 1995, the applicant pled guilty to and was found guilty of first-degree retail fraud and contributing to delinquency of minor (two counts). She was ordered to serve 15 days in jail and pay costs, fines, and fees, and was placed on probation.

The crime of petit larceny involves moral turpitude. *Matter of Esfandiary,* 16 I&N Dec. 659 (BIA 1979) (citing *Quilodran–Brau v. Holland*, 132 F.Supp. 765 (E.D. Penn.1955), aff'd 232 F.2d 183 (3 Cir.1956). Having found the applicant's convictions for theft are crimes involving moral turpitude, rendering her inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), the AAO need not address whether her other offenses are crimes involving moral turpitude.

A waiver is available for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. 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 is the applicant's naturalized citizen father. The AAO notes that the record does not demonstrate whether the applicant's mother is a naturalized citizen or lawful permanent resident of the United States. 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).

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

In rendering this decision, the AAO has carefully considered all of the evidence contained in the record such as affidavits, the occupational therapy assessment of [redacted] nephew and his academic achievement and progress report, letters, medical records of the applicant's father and mother, and other documentation.

[redacted] indicates that her father would suffer extreme hardship if he were to remain in the United States without her assistance. 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, in *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that 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). As stated in *Perez v. INS,* 96 F.3d 390, 392 (9th Cir. 1996), "[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).

[redacted] indicates that her father requires constant care and that her mother's medical condition makes it very hard for her to provide full-time care for her father. [redacted] states that her sister who lives with her parents is unable to provide full-time care for their father. The letter by Dr. [redacted] dated June 22, 2007, states that [redacted] the applicant's father, has sequela of old cerebrovascular accident ischemic, with dementia and very limited mobility. He states that [redacted] has arterial hypertension, coronary artery disease silent ischemia and hydrocele. Dr. [redacted] states that [redacted] is unable to turn and his family has to change his position. He has a percutaneous gastrostomy tube for feeding because he cannot speak at all or swallow. [redacted] concludes that [redacted] "needs complete assistance with all the activities of daily living. This assistance is provided by the family. The patient's condition is very serious, the prognosis is guarded." The medical records of [redacted] mother, show that she has had health problems, but the records are not sufficient for the AAO to determine the nature and seriousness of those problems. [redacted] conveys that her sister who lives with her parents is unable to take care of their father because she takes care of her three children, one of whom has autism. The occupational therapy evaluation indicates that [redacted] nephew is enrolled in an elementary school for autistic impaired children and receives occupational therapy three to four times each month.

[redacted] has demonstrated through the occupational therapy evaluation and the academic achievement and progress report that her sister who lives with her parents would be limited in taking care of her father; and, in view of [redacted] serious health problems and the intensive care that he requires on a constant basis, the AAO finds that the hardship to [redacted] rises to the level of extreme if [redacted] were not available to assist her mother in taking care of [redacted]

[redacted] has serious health problems for which he receives medical care in the United States and his wife has been his primary care provider. Given those factors, the AAO finds that [redacted] would experience extreme hardship if he were to leave the United States and join his daughter to live in Canada.

The factors in this case constitute extreme hardship to the applicant's father if he were to remain in the United States without her, and alternatively, if he were to join her to live in Canada.

The grant or denial of the above waiver does depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's father; the letter by [redacted] which states that she has known the applicant's daughter and family (the applicant and her younger daughter) for the past two years in a working relationship and that they are a family of high moral character; the letter by [redacted] commending the applicant and her daughters; the letter by the applicant's building manager in which she states that the applicant has done a wonderful job in raising her two daughters; and the letter by the pastor and patriarchal vicar of The Holy Family Caldean Catholic Church in which he states that the applicant attends the ecclesiastical ceremonies on a regular basis and voluntarily helps in the church activities. The unfavorable factors are the applicant's criminal convictions. The AAO finds that the hardship imposed on the applicant's father as a result of her inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.