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

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: SAN FRANCISCO, CA Date: FEB 17 2010

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. section 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, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, San Francisco, California. 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 Tonga. She was found to be inadmissible to the United States 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 Crimes Involving Moral Turpitude (CIMT). The applicant is the spouse of a naturalized U.S. citizen and claims three U.S. citizen children. 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.

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on June 12, 2007. The Field Office Director further concluded that, based on the applicant's history, the adverse factors in her case outweighed the favorable factors.

On appeal, filed July 12, 2007, counsel for the applicant asserts that the applicant has a U.S. citizen spouse and three U.S. citizen children, all of whose lives will be destroyed if she is removed. Counsel also requests an extension of time in which to file a psychological evaluation. As of the date of this decision, no additional evidence has been received and the record will be considered complete.

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:

> (h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -
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> . . . .
>
> (1) (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 reflects that on September 4, 2003, the applicant was convicted of Theft or Embezzlement of More Than $400 by a Person Not a Caretaker From an Elder or Dependent Adult,

§ 368(d) of the California Penal Code, a felony. The record also reflects that the applicant was convicted of Forgery of a Check, Money Order, Cashier's Check, Draft or Traveler's Check, § 470(d) of the California Penal Code, a felony. Theft has long been held to be a CIMT. *Matter of Garcia*, 11 I. & N. Dec. 521 (BIA 1966) Embezzlement is a CIMT. *Matter of Batten*, 11 I. & N. Dec. 271 (BIA 1965). Forgery is a CIMT. *Matter of Seda*, 17 I. & N. Dec. 550 (BIA 1980) As such, the applicant has been convicted of two CIMTs and is inadmissible to the United States under section 212(a)(2)(A)(2)(i)(I) of the Act.[1] The applicant does not contest this finding.

A waiver of inadmissibility under section 212(h) 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 directly relevant to the determination of extreme hardship under the statute and will be considered only insofar as it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse is the only qualifying relative in this proceeding, as the record fails to provide documentary evidence, e.g., birth certificates, that establishes that the applicant and her spouse are the parents of any U.S. citizens. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted.

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).

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[1] The AAO observes that the Field Office Director also noted that the applicant lied on her Form I-485, Application to Register Permanent Residence or Adjust Status, stating that she had never been arrested or convicted of any crimes. The AAO, however, will not consider whether the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for fraud or the willful misrepresentation of a material fact as the extreme hardship standard under section 212(i) of the Act is the same as that under section 212(h) and the only qualifying relative established by the record is the applicant's spouse, also a qualifying relative under section 212(i). Should the applicant establish extreme hardship to her spouse in this proceeding, she will also satisfy the requirements for a waiver under section 212(i) of the Act.

This matter arises within the jurisdiction of the Ninth Circuit Court of Appeals. That court has stated, "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). *See also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (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 *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit Court of Appeals defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. Separation of family will therefore be given the appropriate weight under Ninth Circuit law in the assessment of hardship factors in the present case.

The AAO notes that extreme hardship to a qualifying relative must be established whether he or she relocates with the applicant or 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 includes, but is not limited to, statements from the applicant and her spouse; a brief from counsel for the applicant; a copy of the applicant's spouse's naturalization certificate; a copy of the applicant's marriage certificate; copies of court records and other documents pertaining to the applicant's criminal record; taxes and earnings records for the applicant's spouse; a letter from the bishop of the applicant's church; and certificates of appreciation from the school where the applicant volunteers.

The entire record was reviewed and all relevant evidence considered in rendering this decision.

Counsel has asserted that the applicant's spouse will be financially unable to support his and the applicant's children without the applicant and that the applicant's removal would be an abandonment of her children resulting in severe psychological damage to them. Counsel also states that the applicant's removal would result in undue hardship to the members of her church and to the students and faculty at the school where she volunteers.

On appeal, the applicant's spouse states that he depends on the applicant to care for their children while he works, and that he would be unable to work to earn sufficient income for the family and provide for their daily needs if he was also responsible for the care of his children. He further states that the applicant's removal would result in extreme emotional hardship to him and would have a vast impact on his children's education and the family's pychological and emotional health.

While the AAO acknowledges the assertions made by counsel and the applicant's spouse, it finds the record to lack the documentary evidence to support them The record contains no documentation, e.g., a psychological evaluation or other medical records, that demonstrates the impact of the applicant's removal on her spouse's or her children's mental or emotional health. In addition, the AAO notes that the record does not establish that the applicant's spouse would be unable to meet his financial obligations or support the children that he and the applicant indicate were born to them in the United States. The record indicates that the applicant's spouse's income is well above the 2009 federal poverty guidelines for a family of four and no evidence has been submitted to establish the

applicant's spouse's financial obligations in her absence. Accordingly, the record does not demonstrate that the applicant's spouse would experience extreme hardship if the applicant were to be removed and he remained in the United States.

As previously discussed, an applicant seeking a waiver of inadmissibility must also establish that a qualifying relative would suffer extreme hardship if he or she relocated with the applicant. In the present case, the applicant has not addressed the impacts on her spouse if he moved to Tonga with her. As such, the AAO is unable to find that the applicant has established that her spouse would experience extreme hardship upon relocation.

The AAO acknowledges that the applicant's spouse will suffer hardship as a result of the applicant's inadmissibility. However, U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). 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. In that the record does not distinguish the hardship that would be suffered by the applicant's spouse from the hardship normally experienced by others whose family members have been excluded from the United States, the applicant has failed to establish extreme hardship to her spouse under section 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she 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 rests with the applicant. Here, the applicant has/has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.