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

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PUBLIC COPY

[REDACTED]

FILE: [REDACTED]

Office: LOS ANGELES

Date: AUG 23 2006

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Los Angeles, California, denied the waiver application, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nicaragua 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 crimes involving moral turpitude. The applicant is the mother of two U.S. citizen daughters. She seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her daughters.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated August 17, 2004.

The record reflects that, on April 28, 1989, the applicant entered the United States without inspection. On September 18, 1989, the applicant filed an Application for Asylum or Withholding of Removal (Form I-589). On October 17, 1989, the applicant was convicted of shoplifting in violation of section 484(A) of the California Penal Code (CPC) and was sentenced to 12 months probation. On March 22, 1990, the applicant's Form I-589 was referred to an immigration judge. On December 17, 1990, the applicant failed to appear at her immigration hearing and the immigration judge ordered her removed in absentia. On January 3, 1991, the applicant appealed to the Board of Immigration Appeals (BIA). On July 9, 1992, the BIA dismissed the applicant's appeal. The applicant failed to present herself for deportation or to depart the United States and has since remained in the United States. On August 27, 1993, the applicant gave birth to her first U.S. citizen daughter. On November 8, 1996, the applicant gave birth to her second U.S. citizen daughter. On April 30, 1997, the applicant was convicted of grand theft in violation of section 487(A) of the CPC and was sentenced to 36 months of probation with 15 days in jail.

On March 28, 2000, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) pursuant to the Nicaraguan Adjustment and Central American Relief Act (NACARA) Pub. L. 105-100, 111 Stat. 2160, 2193. The record shows that the applicant appeared at Citizenship and Immigration Services' (CIS) Los Angeles District Office on July 16, 2002. The applicant admitted that she had been convicted of grand theft, a crime involving moral turpitude. On March 20, 2003, the applicant's conviction for grand theft was expunged in a Los Angeles County, Superior Court of California pursuant to section 1203.4 of the CPC.

On April 13, 2004, the applicant filed the Form I-601 with documentation supporting her claim that the denial of the waiver would result in extreme hardship to her family members.

On appeal, counsel asserts that the district director failed to consider the negative influence on the applicant's children if their mother was found inadmissible to the United States and gave no weight to the precarious living situation in which the applicant's children would be placed if they returned to Nicaragua with the applicant. *See Applicant's Brief* dated October 15, 2004. In support of the appeal, counsel submitted only the above-referenced brief. The entire record was reviewed and considered in rendering a decision in this case.

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

- (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 . . . 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 [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B) . . . 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 . . .

Section 212(a)(9)(A) of the Act states in pertinent part:

- (A) Certain aliens previously removed.-
- (ii) Other aliens.- Any alien not described in clause (i) who-
- (I) has been ordered removed under section 240 or any other provision of law . . .
- and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
- (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

The district director based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's admission to and convictions for shoplifting and grand theft, crimes involving moral turpitude.

Counsel does not contest the district director's determination of inadmissibility. The AAO also finds that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for having been ordered removed from the United States. Therefore, the applicant must also apply for permission to reapply for admission to the United States pursuant to section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

8 C.F.R. § 245.13(c)(2) provides:

Special rule for waiver of inadmissibility grounds for NACARA applicants under section 212(a)(9)(A) and 212(a)(9)(C) of the Act. An applicant for adjustment of status under section 202 of Public Law 105-100 who is inadmissible under section 212(a)(9)(A) or 212(a)(9)(C) of the Act, may apply for a waiver of these grounds of inadmissibility while present in the United States. Such an alien must file a Form I-601, Application for Waiver of Grounds of Excludability . . .

The AAO, therefore, will determine whether the applicant is eligible for a section 212(h) waiver and a section 212(a)(9)(A)(iii) permission to reapply for admission under the submitted Form I-601.

Hardship to the alien herself is not a permissible consideration under section 212(h) of the Act. A section 212(h) waiver is therefore 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.

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 at 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. 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. 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).

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*, 21 I&N Dec. 296 (BIA 1996).

The record reflects that the applicant is in her 30's, the applicant's daughters are twelve and nine-years old, and there is no indication that the applicant's daughters have any health concerns.

Counsel and the applicant, in the applicant's brief, assert that the applicant's daughters will experience a negative influence if the applicant is removed from the United States because they have no one else but the applicant to care and provide for them.

There is no evidence in the record, besides the applicant's brief, that the father's of the applicant's daughters are not involved in their care, do not provide financial assistance to them, or that they would be unwilling or unable to care for and provide for them in the absence of the applicant. There is no evidence in the record to suggest that the applicant's daughters suffer from a physical or mental illness that would cause them to suffer hardship beyond that commonly suffered by aliens and families upon deportation.

Counsel and the applicant, in the applicant's brief, contend that the applicant's daughters would be placed in a precarious living situation if they were to return to Nicaragua with the applicant because the probability of the applicant finding employment which would provide basic needs to her daughters in Nicaragua is remote. Counsel and the applicant also assert that the applicant's daughters would be unable to take advantage of benefits in the United States such as quality education and health care. There is no evidence in the record to suggest that the applicant would be unable to find *any* employment in Nicaragua. There is no evidence in the record to suggest that the applicant's daughters suffer from a mental or physical illness for which they would be unable to receive treatment in Nicaragua. While the hardships the applicant's daughters face are unfortunate, the hardships they face with regard to adjusting to a lower standard of living, a new country and culture and the loss of opportunities available in the United States, are what would normally be expected with any child accompanying a deported alien to a foreign country. Additionally, the AAO notes that, as U.S. citizens, the applicant's daughters are not required to reside outside of the United States as a result of denial of the applicant's waiver request and, as discussed above, they would not experience extreme hardship if they remained in the United States without the applicant.

The record, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's daughters would face extreme hardship if the applicant were refused admission. Rather, the record demonstrates that the applicant's daughters will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a parent is removed from the United States. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or involuntary relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "*extreme hardship*," Congress did not intend that a waiver be granted in every case where a qualifying relationship, and thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship be above and beyond the normal, expected hardship involved in such cases. U.S. court decisions have repeatedly held that the common results of removal are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does

not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). “[O]nly in cases of great actual or prospective injury . . . will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984). Further, demonstrated financial difficulties alone are generally insufficient to establish extreme hardship. See *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (upholding BIA finding that economic detriment alone is insufficient to establish extreme hardship).

The AAO therefore finds that the applicant failed to establish extreme hardship to her U.S. citizen daughters as required under section 212(h) of the Act, 8 U.S.C. § 1186(h). Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a section 212(h) waiver as a matter of discretion.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of an application for permission to reapply for admission pursuant to section 212(a)(9)(A)(iii) of the Act:

The basis for deportation; recency of deportation; length of residence in the United States; applicant’s moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would condone the alien’s acts and could encourage others to enter the United States to work in the United States unlawfully. *Id.*

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

The 7th Circuit Court of Appeals held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) need not

be accorded great weight by the district director in considering discretionary weight. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.

The AAO finds that the above-cited precedent legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant's U.S. citizen daughters. The AAO finds that the birth of the applicant's daughters occurred after the applicant was placed into proceedings and ordered removed. The AAO finds that these factors are "after-acquired equities" and that any favorable weight derived from the applicant's daughters is accorded diminished weight.

The AAO finds that the unfavorable factors in this case include the applicant's illegal entry into the United States, extended unauthorized residence and employment in the United States, failure to appear for an immigration hearing, non-compliance with a 1990 order of removal, and convictions for shoplifting and grand theft.

The applicant in the instant case has multiple immigration violations and two criminal convictions. The applicant's actions in this matter cannot be condoned. The totality of the evidence demonstrates that the applicant has exhibited a clear disregard for the laws of the United States, and that the favorable factors in the present matter are outweighed by the unfavorable factors.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.