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**U.S. Citizenship
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Services**

[REDACTED]

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FILE:

Office: CHICAGO

Date:

NOV 01 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 cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Chicago, Illinois, 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 Mexico 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 the son of a naturalized U.S. citizen parent and the spouse and father of U.S. citizens. He 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 his father, spouse and children.

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 March 10, 2005.

The record reflects that, on April 21, 1994, the applicant pled guilty to and was convicted of theft in violation of paragraph 720, chapter 5/16-1(a) of the Illinois Compiled Statutes (ILCS), formerly Chapter 38, paragraph 16-1-A. The applicant was sentenced to 24 months of probation.

On October 30, 2001, the applicant filed the Form I-601 with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his family members.

On appeal, counsel contends that the applicant is not inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. Alternatively, counsel contends that the applicant can establish extreme hardship to his family members because the district director failed to consider hardship to the applicant's spouse and children. *See Applicant's Brief* dated May 12, 2005. In support of the appeal, counsel submitted the above-referenced brief, affidavits from the applicant and his spouse, the applicant's child's birth certificate, medical and insurance documentation in regard to the applicant's spouse, financial records for the applicant and his spouse, immigration and birth records in regard to the applicant's spouse's family members, country conditions reports and documents previously provided. The entire record was reviewed and considered in rendering a decision in this case.

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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.
- (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

....

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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 . . .

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 conviction for theft, a crime involving moral turpitude. Counsel contends the district director's finding of inadmissibility. Counsel asserts that, since the applicant only received 24 months of probation and the maximum penalty for his offense did not exceed 6 months, the petty offense exception applies and the applicant is not inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act and the waiver application is moot. Counsel asserts that, pursuant to *Lafarga v. INS*, 170 F. 3d 1213 (9th Cir. 1999), since the applicant received an un-designated probationary sentence, the applicant's conviction is not considered a felony. The AAO finds that this case does not arise in the Ninth Circuit Court of Appeals (9th Circuit) and the holding in *Lafarga* is not controlling. Additionally, even if this case arose in the 9th Circuit, *Lafarga* is not relevant to the case at hand. In *Lafarga* the applicant had received probation in regard to a conviction of an undesignated offense which, at the conclusion of the applicant's probation, was subsequently designated by the court to be a misdemeanor for which the applicant could not receive more than 6 months in jail. The applicant's conviction records reflect that he was sentenced to 24 months probation for a Class 3 felony theft conviction.

Paragraph 720, chapter 5/8-1 of the ILCS, formerly Chapter 38, paragraph 8-1, provides, in pertinent part:

Sec. 5-8-1. Sentence of Imprisonment for Felony.

(a) Except as otherwise provided in the statute defining the offense, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

....

(6) for a Class 3 felony, the sentence shall be not less than 2 years and not more than 5 years

As such, the applicant's conviction records reflect that the maximum penalty possible for the offense of which the applicant was convicted was imprisonment for a period of 5 years. Counsel's arguments are unpersuasive and unsubstantiated, therefore the AAO finds that the applicant's conviction does not fall under the petty offense exception pursuant to section 212(a)(2)(A)(ii) of the Act. Therefore, the AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act and must apply for a waiver of inadmissibility.

Hardship to the alien himself is not a permissible consideration under the statute. 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, on June 9, 2000, the applicant married his U.S. citizen spouse, [REDACTED]. [REDACTED] indicated in her affidavit that she was pregnant and due in approximately July 2005, therefore the record indicates that the applicant and [REDACTED] have an approximately one-year-old child who is a U.S. citizen by birth. The applicant and [REDACTED] also have a two-year old daughter who is a U.S. citizen by birth. The applicant's father, [REDACTED] is a native of Mexico who became a naturalized U.S. citizen in 1982. The record reflects further that the applicant and [REDACTED] are in their 30's, [REDACTED] is in his 60's, and [REDACTED] and [REDACTED] may have some health concerns.

Counsel contends that the applicant's father will suffer extreme hardship if he were to remain in the United States without the applicant. The applicant, in his affidavit, asserts that his father would suffer extreme

hardship if he were to remain in the United States without the applicant because he occasionally has to help his father with some of his medical expenses and bills. The applicant also states that his father is an important part of his life and that his family is very close.

There is no evidence in the record to confirm that the applicant assists his father with payment of any medical expenses or bills. There is no evidence in the record to suggest that the applicant's father is financially dependent upon the applicant or unable to support himself without the financial assistance of the applicant. Moreover, the record reflects that [REDACTED] has other family members in the United States, such as his two other adult sons, who may be able to provide him with financial and physical assistance in the absence of the applicant. The record does not contain any evidence to suggest that [REDACTED] would suffer a financial loss that would result in extreme hardship to him if he had to support himself without any income that may be provided by the applicant, even when combined with the emotional hardship discussed below.

There is no evidence in record to suggest that the applicant's father suffers from a mental or physical illness that would cause him hardship beyond that commonly suffered by aliens and families upon deportation. Finally, the record reflects that [REDACTED] has other family members in the United States, such as his two other adult sons, who may be able to provide him with emotional or physical support in the absence of the applicant.

Counsel contends that [REDACTED] and her children will suffer extreme hardship because she is unable to work and support herself as she is expecting a second child and would incur significant health-related debts due to the pregnancy which are covered by health insurance obtained through the applicant's employment. [REDACTED] in her affidavit, asserts that she and her children would suffer extreme hardship if she were to remain in the United States without the applicant because the applicant's health insurance covers her pregnancy-related medical expenses, and she is unable to work due to her pregnancy and requires the applicant's income for financial support. [REDACTED] states that, even if she were employed, she would be unable to pay the mortgages on the two properties that they own, one of which they rent out. [REDACTED] states that her and her children need and deserve to have a united family. The applicant, in his affidavit, contends that his wife and children would suffer extreme hardship if they were to remain in the United States without him because they will suffer economic limitations because he is the only head of the household and his wife is pregnant and requires the health insurance he has through his employment. The applicant states that his daughter is very close to him and would suffer deeply from the separation from him, as would his wife because she needs his moral support during a pregnancy that is unstable.

The AAO is unable to take counsel's, [REDACTED] and the applicant's assertions in regard to economic, medical-insurance and emotional support due to [REDACTED] pregnancy into consideration because it appears that the birth occurred in the past, and is no longer a hardship that [REDACTED] would suffer.

While it is unfortunate that [REDACTED] may be unable to pay the mortgages, be able to maintain the two properties that the family currently own and she may have to lower the family's standard of living, the record does not contain any evidence to suggest that [REDACTED] would be unable to find employment sufficient to support her and her two children without the financial support of the applicant. There is no evidence in the record to suggest that [REDACTED] would be unable to obtain employment through which she could obtain health insurance to cover the family's medical expenses. While it is unfortunate that [REDACTED] would

essentially become a single parent and professional childcare may be an added expense and not equate to the care of a parent, this is not a hardship that is beyond those commonly suffered by aliens and families upon deportation. Moreover, the record reflects that [REDACTED] has family members in the United States, such as her parents, who may be able to assist her financially or physically in the absence of the applicant. The record does not support a finding of financial loss that would result in an extreme hardship to [REDACTED] and her children if [REDACTED] had to support herself and her children without additional income from the applicant, even when combined with the emotional hardship described below.

There is no evidence that [REDACTED] or the applicant's children suffer from a physical or mental illness that would cause them to suffer hardship beyond that commonly suffered by aliens and families upon deportation. While it is unfortunate that the applicant's children will essentially be raised in a single-parent environment, this is not a hardship that is beyond those commonly suffered by aliens and families upon deportation. Additionally, the record indicates that [REDACTED] has family members, such as her parents, in the United States who may be able to assist her physically or emotionally in the absence of the applicant.

Counsel, the applicant and [REDACTED] in their brief and affidavits, do not assert that [REDACTED] would suffer hardship if he returned to Mexico in order to accompany the applicant. The AAO is, therefore, unable to find that [REDACTED] would experience hardship should he choose to join his son in Mexico. Additionally, the AAO notes that, even if counsel had established [REDACTED] would suffer extreme hardship by accompanying the applicant to Mexico, as a U.S. citizen, the applicant's father is not required to reside outside of the United States as a result of denial of the applicant's waiver request and, as discussed above, Mr. [REDACTED] would not experience extreme hardship if he remained in the United States without the applicant.

Counsel contends that [REDACTED] would suffer extreme hardship if she accompanied the applicant to Mexico because she does not have any strong family ties in Mexico since all of her family members reside in the United States. [REDACTED] in her affidavit, states that she and her children would suffer extreme hardship if they were to accompany the applicant to Mexico because her whole life is in the United States and she has no family in Mexico, and the family would lose all of the opportunities it has in the United States, especially her children, who would lose educational opportunities. The applicant, in his affidavit, states that he would make not even half the amount of money he makes in the United States which would make it impossible for him to support his family.

There is no evidence in the record to suggest that the applicant and [REDACTED] would be unable to find *any* employment in Mexico. Counsel, the applicant and [REDACTED] do not assert, and there is no evidence in the record to suggest, that [REDACTED] or her children suffer from a physical or mental illness for which they would be unable to receive treatment in Mexico. While the hardships faced by [REDACTED] and her children with regard to adjusting to a lower standard of living, a new culture, economy and environment and separation from friends and family are unfortunate, they are what would normally be expected with any spouse or child accompanying a deported alien to a foreign country. Moreover, while it would be unfortunate that [REDACTED] and the applicant's children would not have the opportunities that are available to them in the United States, these are hardships that would normally be expected with any family accompanying a deported alien to a foreign country. Additionally, the AAO notes that, even if counsel had established [REDACTED] and the applicant's children would suffer extreme hardship by accompanying the applicant to Mexico, as U.S. citizens, the applicant's spouse and children 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, [REDACTED] and the applicant's children 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 spouse, father and children would face extreme hardship if the applicant were refused admission. Rather, the record demonstrates that [REDACTED] and the applicant's children will face no greater hardship than the unfortunate, but expected disruptions, inconveniences, and difficulties arising whenever a spouse, son or father 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 his U.S. citizen spouse, father and children 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 he merits a waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.