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FILE:

Office: LOS ANGELES, CA

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IN RE:

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:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Los Angeles, California, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be sustained.

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 committed a crime involving moral turpitude. The applicant is the wife of a lawful permanent resident husband and the mother of U.S. citizen children. She seeks a waiver of inadmissibility under section 212(h) of the Act.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on qualifying relatives, and denied the Application for Waiver of Excludability (Form I-601). *Decision of the District Director*, dated March 8, 2005.

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 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 -

....

- (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 the applicant has the following criminal convictions:

- 1) September 29, 1997 - a plea of *nolo contendere* in violation of Cal. Penal Code section 273(A)(B), misdemeanor, willful cruelty to child, counts 1 and 2;
- 2) June 11, 1998 - a plea of *nolo contendere* in violation of Cal. Penal Code 273D, misdemeanor, inflict injury upon child, count 1; a plea of *nolo contendere* in violation of Cal. Penal Code section 273(A)(B), misdemeanor, willful cruelty to child, counts 3 and 4; a plea of *nolo contendere* in violation of Cal. Penal Code section 166(C)(1), misdemeanor, contempt of court: protective order, count 5.

On appeal, counsel does not dispute the director's finding of inadmissibility based on the applicant's conviction of a crime of moral turpitude. However, counsel states that the submitted evidence establishes

extreme hardship the applicant's husband and three American-born children who are her qualifying relatives. Counsel states that a section 212(h) waiver is a discretionary waiver. Counsel indicates that such cases as *Kalaw v. INS*, F. 3d 1147 (9th Cir. 1997); *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999); *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968); and *Matter of H*, 14 I&N Dec. 185 (Reg. Comm. 1972) discuss the exercise of discretion or extreme hardship, or both, in waivers of inadmissibility. Counsel states that the Board of Immigration Appeals (BIA) in *Matter of Cervantes*, *supra*, treats the existence of family in the United States as a factor tending to establish extreme hardship and family outside the United States as reducing that factor. Counsel states that the applicant cares for and supports her U.S. citizen children. Counsel asserts that the adverse factors here, which are the applicant's convictions, lack the gravity of the adverse factors in *Matter of Shaughnessy*, *Yang*, and *Cervantes*. He asserts that the hardship to the applicant's husband outweighs the gravity of her offenses.

The AAO will first address the director's finding of inadmissibility based on the criminal convictions.

In *Jose Roberto Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1165-1166 (9th Cir. 2006), a domestic violence case, the Ninth Circuit states that the "circuit's precedent generally requires "willfulness" or "evil intent" in order for a crime to be classified as one involving moral turpitude. The court states that it has held in *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406 n. 1 (9th Cir.1969), that a conviction under California's felony child abuse statute that prohibited "willfully inflict[ing] upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition," involved moral turpitude. (emphasis added) (quoting California Penal Code § 273d). In *Guerrero de Nodahl*, the court found that inflicting such injury upon a child "is so offensive to American ethics that the fact that it was done *purposely or willingly* ... ends debate on whether moral turpitude was involved." *Id.* at 1406-07 (emphasis added).

The record here reflects that the applicant pled *nolo contendere* to violating Cal. Penal Code section 273d, which is the penal code that the alien was convicted under in *Guerrero de Nodahl*. Because the court in *Guerrero de Nodahl* found that a violation of Cal. Penal Code section 273d constitutes a crime of moral turpitude, the applicant's conviction under the same penal code constitutes a crime involving moral turpitude.

The AAO will now address whether the applicant has established that she should be granted a waiver of inadmissibility under section 212(h) of the Act.

Section 212(h)(1)(B) of the Act provides that a waiver of the bar to admission resulting from inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Only where there is great actual or prospective injury to the qualifying relative(s) will the bar be removed. "Extreme hardship" to an alien himself cannot be considered in determining eligibility for a section 212(h) waiver of inadmissibility. *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968).

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* at 565. In *Matter of Cervantes-Gonzalez*, the 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 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).

The AAO will now apply the *Cervantes-Gonzalez* factors to the present case to the extent they are relevant in determining extreme hardship to the applicant's husband and children. It is noted that extreme hardship to the applicant's qualifying relative must be established in the event that he or she accompanies the applicant; and in the alternative, that he or she remains in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request. The qualifying relative here is the applicant's husband and children.

The applicant married the petitioner on October 19, 1996. *License and Certificate of Confidential Marriage, County of Los Angeles, Registrar-Recorder*. The record contains birth certificates of the applicant's three American-born children, [REDACTED] born on February 20, 2004; [REDACTED] born on August 17, 1992; and [REDACTED] born on March 17, 1991. It is noted that the Status Review Hearing Report from the Superior Court of the State of California, dated March 24, 1999, indicates that the applicant and her husband have a fourth child, [REDACTED], born on April 14, 1996.

The applicant's husband makes the following statements in the March 20, 2005 letter contained in the record. He is the father of four children. His wife committed an error and separation from her has been endless for him and his children; the process has taken two years. Hearing the word “separation” again terrorizes them. The stability provided for his children will disintegrate and their dreams will be frustrated for not being able to study in the country where they were born and live. His wife is responsible and trustworthy and she loves their children.

The record contains documents dated December 2, 1998 and February 22, 1999 from Sunrise Community Counseling Center. Collectively, they state the following. The applicant enrolled for individual counseling from July 9, 1997 to February 4, 1998, and re-enrolled on August 18, 1998 to the present (December 2, 1998). Her sessions included topics of child abuse including physical abuse, anger management, and parenting. She is enrolled in family counseling with two daughters and her husband. The daughters relate well to their mother; they are anxious to be reunited as a family again. The applicant is actively involved in their school activities and is making appropriate behavior changes to protect against abuse in the future. At the present time the family would benefit from family reunification. Adult members can provide a safe environment for minors as well as be positive role models. At this time no further counseling is required for the family. The family is willing to voluntarily continue counseling whenever necessary.

The document from the parenting instructor with [REDACTED] dated September 17, 1998, indicates that the applicant has been consistent in attending parenting classes, is eager to learn and participate, and made positive changes. The parenting instructor indicates that the program meets weekly for two hours for a twenty-week period. The record contains the applicant's certificate of completion for the program.

The record contains the applicant's certificate of completion for the twelve week parenting education program at Didi Hirsch Community Mental Health Center-Metro.

The Status Review Hearing Report from the Superior Court of the State of California, dated March 24, 1999, indicate the following. The applicant's children would like for their mother to live with them and that she has changed. The risk of re-abuse to the children appears to be minimal given the education both parents have received and the family support they can provide to each other. The mother cared for the children while the father worked in Texas and visited on the weekends. The mother found it difficult to care for the minors by herself and often felt overwhelmed. The father stated that he plans for the family to remain together and if he returns to Texas the entire family would go with him. The Los Angeles County Department of Children and Family Services recommended that the minors remain placed with their father, and that the applicant be allowed to reside in the home with them, and that jurisdiction over the minors should be terminated.

The record reflects that in 2003 the applicant earned \$15,867.96 and her husband earned \$17,566. In 2002, she earned \$17,803 and her husband earned \$12,622. In 2001, the applicant earned \$16,738 and her husband earned \$13,639.

The applicant has been employed with [REDACTED], from December 14, 1991 to February 12, 2000; and was rehired on March 28, 2000. She is employed as a crewperson at the rate of \$8.10 per hour. *Letter from [REDACTED], dated October 27, 2004.*

The applicant's husband has been a full-time employee with [REDACTED] since September 5, 2002. He is employed as a golf course set-up technician in the grounds maintenance department. He works at least 40 hours each week and earns \$8.35 per hour. *Letter from [REDACTED], dated October 21, 2004.*

U. S. 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).

The evidence in the record indicates that the [REDACTED] family would endure extreme hardship if the waiver application is denied.

The submitted evidence reflects that the applicant's earnings comprise about fifty percent of the family's income. The Status Review Hearing Report from the Superior Court of the State of California conveys that the applicant's children indicate a desire for their mother to live with them. The report states that risk of re-abuse to the children appears to be minimal given the education that both parents have received and the family support they will be able to provide to each other. It is noted that the report indicates that the applicant cared for the children while the father worked in Texas and visited on the weekends and that the father states that the family will remain together and if he returns to Texas the entire family would go with him. The report from the Sunrise Community Counseling Center, which was referenced in the Status Review Hearing Report from the Superior Court of the State of California, states that at the present time the [REDACTED] family would benefit from family reunification and that the applicant and her husband are able to provide a safe environment for their children as well as be positive role models.

Given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the AAO finds that the hardship to the [REDACTED] family, particularly to their children who have endured a separation from their mother while she has undergone extensive counseling, rises to the level of "extreme" hardship if they were to remain in the United States without the applicant.

Furthermore, the AAO finds that the totality of the record is sufficient to establish that the Jaimes family would suffer extreme hardship if they were to join the applicant in Mexico.

Courts in the United States have held that the consequences of deportation imposed on citizen children of school age must be considered in determining extreme hardship. For example, *In Re. Kao-Lin*, 23 I. & N. Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan; she had lived her entire life in the United States and was completely integrated into an American lifestyle; and uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the Circuit Court indicated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether "extreme hardship" has been shown. And, in *Prapavat vs. I.N.S.*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Circuit Court found the BIA abused its discretion in concluding that extreme hardship had not been shown in light of fact that aliens' five-year-old citizen daughter, who was attending school, would be uprooted from the country where she lived her entire life and taken to land whose language and culture were foreign to her.

The applicant has three American-born children who are of school age (ages 11, 15, and 16), and have lived their entire lives in the United States. The AAO finds that the jurisdiction of the Los Angeles County Department of Children and Family Services (DCFS) and the laws of the United States have provided significant protections for the [REDACTED] children. It finds that the adverse effect of moving the children from this country, where their physical and emotional welfare has been carefully monitored by DCFS, to an environment where comparable legal and social institutions may not exist, would jeopardize the well-being of the [REDACTED] children.

Thus, given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the AAO finds that the hardship to [REDACTED] and particularly in view of the adverse effect of moving from this country on the children, rises to the level of "extreme" hardship if the family were to join the applicant in Mexico.

The grant or denial of the above waiver does not 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 spouse, and her U.S. citizen children, the applicant's completion of counseling, the applicant's consistent work record, the positive changes in the applicant's parenting, her active involvement in her children's school activities, and the passage of nearly nine years since the commission of the crimes. The unfavorable factors in this matter are the applicant's conviction for committing crimes involving moral turpitude, and her illegal entry and presence in the United States. The AAO notes that the applicant does not appear to have committed any other crimes.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's convictions for crimes involving moral turpitude, her convictions are at least partially diminished by the fact that nearly nine years have elapsed since the commission of the crimes. The AAO finds that the hardship imposed on the applicant's family 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(i), 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.