



U.S. Citizenship
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FILE:

Office: HONOLULU, HI

Date:

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the
Immigration and Nationality Act (INA), 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 waiver application was denied by the District Director, Honolulu, Hawaii. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of Japan, 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 record indicates that the applicant has a U.S. citizen spouse and seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with her family in the United States.

The district director based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's convictions for theft in 1999. The district director also found 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. *District Director's Decision*, dated July 11, 2005.

On appeal, counsel asserts that the applicant's inadmissibility would create extreme hardship for the applicant's spouse and his parents; that the severity of the crime of shoplifting of merchandise less than \$90.00 does not warrant the harsh punishment of removal; and that the applicant has shown complete rehabilitation. *Counsel's Brief*, dated August 8, 2005.

The record indicates that the applicant was convicted of theft on February 10, 1999 for events that occurred on December 2, 1998 and on May 12, 1999, for events that occurred on March 16, 1999, both in Hawaii.

The AAO notes that the crime of theft may or may not constitute a crime involving moral turpitude. The determining factor for theft offenses is whether the crime involves the intent to permanently deprive the owner of property. Where such intent is established, the offense is a crime involving moral turpitude. Where there is no intent to permanently deprive the owner of the property, the theft does not constitute a crime involving moral turpitude.

In the present case, the record establishes that the applicant was twice convicted under section 708-833.87 of the Hawaii Revised Statutes, theft in the fourth degree, but fails to indicate the nature of the theft or the applicant's intent in committing the theft. The AAO is, therefore, unable to determine whether the applicant has been convicted of a crime involving moral turpitude. It notes, however, the burden of proving eligibility in this proceeding rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. As the record does not demonstrate that the thefts committed by the applicant are not crimes involving moral turpitude, the applicant has not established that she is eligible for admission to the United States and must apply for a waiver of inadmissibility.

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.

(B) Any alien convicted of two or more offenses... regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were five years or more is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

(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 -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(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 record indicates that the applicant was convicted of offenses that were committed in 1998 and 1999. As she has filed her current application for adjustment of status less than 15 years after these events, the applicant is statutorily ineligible for a waiver pursuant to section 212(h)(1)(A) of the Act. She is, however, eligible to apply for a waiver of inadmissibility pursuant to section 212(h)(1)(B) of the Act.

A section 212(h)(1)(B) waiver of inadmissibility 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 son or daughter of the applicant. Hardship to the applicant or other family members is not considered in section 212(h) waiver proceedings except as it results in hardship to a qualifying relative in the application.

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). If extreme hardship to a qualifying relative is established, in this case the applicant's U.S. citizen spouse, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(h) of the Act; *see also Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The AAO notes that extreme hardship to the applicant's spouse must be established in the event that he accompanies the applicant and resides in Japan and in the event that he 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.

Counsel states that the applicant has been married to her U.S. citizen husband for over two and a half years, and she has been living with her husband's parents. *Counsel's Brief*, dated August 8, 2005. He states that if the applicant is removed, a happy family will be destroyed and the applicant's spouse and his parents will be devastated. *Id.* The applicant's spouse states that the applicant has been responsible and has contributed greatly to the household and is greatly appreciated as a member of the family. *Spouse's Letter*, dated August 7, 2005. The applicant's spouse states that it would cause extreme hardship to their marriage if he and the applicant are separated by the applicant's removal. *Id.* The applicant also submits a statement. In her statement, she describes the incidents surrounding her two convictions and states that it would create extreme emotional and psychological hardship to her spouse and destroy their family if she were removed from the United States. *Applicant's Statement*, dated January 7, 2005. The record also includes a letter from the applicant's employer, [REDACTED] which states that she was hired on July 18, 2003 and earns \$15.78 per hour as a Telephone Operator. *Employer's Letter*, dated July 27, 2005.

The AAO notes that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel does not submit any documentation to support his assertions that the applicant's removal will cause her spouse to suffer extreme hardship. Furthermore, counsel does not address the possibility of the applicant's spouse relocating to Japan. Thus, the AAO finds that the current record fails to show that the applicant's U.S. citizen spouse will suffer extreme hardship as a result of the applicant's inadmissibility.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of*

Pilch, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. 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. *Hassan v. INS, supra*, held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens who are removed.

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. 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 remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.