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

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OCT 29 2008

FILE:

Office: VIENNA, AUSTRIA

Date:

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:

SELF-REPRESENTED

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 Acting Officer-in-Charge, Vienna, Austria, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed.

The applicant, [REDACTED], is a native and citizen of Romania who was found inadmissible to the United States pursuant to section 212(a)(2)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i), for committing a crime involving moral turpitude. The applicant is married to [REDACTED], a naturalized citizen of the United States. The applicant sought a waiver of inadmissibility under section 212(h) of the Act, which the Acting Officer-in-Charge denied, finding the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the Acting Officer-in-Charge*, dated August 30, 2005.

The record conveys that [REDACTED] immigrated to the United States in 1986 as a spouse of a refugee and later became a lawful permanent resident. His naturalization application was denied on April 17, 2000, for failure to provide documentation of his arrests and criminal record. The record conveys that [REDACTED] admitted to voluntarily leaving the United States in 2002 and living in Romania since then, which resulted in the loss of his U.S. resident status. On March 3, 2004, the applicant's spouse filed a Petition for Alien Relative on her husband's behalf and [REDACTED] filed a 212(h) waiver for his criminal convictions.

The record reflects that [REDACTED] has several criminal convictions. Mr. [REDACTED]'s Plea and Verdict in the State Court of Fulton County, Georgia, Criminal Division, shows that he pled *nolo contendere* for committing the following crimes on April 4, 1995: simple battery in violation of O.C.G.A. § 16-5-23 (a misdemeanor of a high and aggravated nature); fleeing or attempting to elude police officer in violation of O.C.G.A. § 40-6-395 (a misdemeanor); and failure to maintain lane in violation of O.C.G.A. § 40-6-48 (a misdemeanor). For these crimes, the applicant was sentenced to 12-months confinement (which was suspended) and to community service, and was ordered to a fine. *Final Disposition of Misdemeanor Sentence in the State Court of Fulton County*. In 1991, he was convicted of driving under the influence of alcohol/drugs in violation of § 40-6-391, failure to maintain lane in violation of O.C.G.A. § 40-6-48, and no proof of insurance. The judge ordered him to complete traffic school, to serve 12-months probation, and to pay a fine.

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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The applicant does not dispute the finding of inadmissibility. The AAO finds that Mr. Diaconescu's conviction for simple battery is a crime involving moral turpitude, though none of the other convictions are.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where -

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The applicant's conviction is within the meaning of section 101(a)(48)(A) of the Act, because his sentence involved probation, which constitutes a restraint on his liberty, and a fine, which is a penalty.

Only one of the applicant's convictions, his conviction for simple battery, is for a crime involving moral turpitude. An alien is not inadmissible if the crime of moral turpitude conviction is for a petty offense. The requirements for the petty offense exception are under section 212(a)(2)(A)(ii) of the Act, which states in pertinent part, that:

(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).

In the present case, the applicant was convicted under O.C.G.A. § 16-5-23(a)(2)(e) for simple battery. O.C.G.A. § 17-10-4 provides that the maximum penalty for a "misdemeanor of a high and aggravated nature shall be punished by a fine not to exceed \$5,000.00 or by confinement in the county or other jail, county correctional institution, or such other places as counties may provide for maintenance of county inmates, for a term not to exceed 12 months, or both." The petty offense exception requires the alien not be sentenced to a term of imprisonment in excess of six months. Because the applicant was sentenced to 12-months confinement (which was suspended) his conviction does not meet the requirements for the petty offense exception.

The record, the AAO finds, establishes the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for committing a crime of moral turpitude.

The AAO will now consider whether granting the applicant's section 212(h) waiver is warranted.

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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's naturalized citizen of the United States wife. Although the waiver application indicates that the applicant's adult children are naturalized citizens of the United States, no independent documentation in the record corroborates this. 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)).

If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

In the denial letter, the OIC indicates that the applicant's wife has four adult children residing in the same state (Georgia) as she, with one of her children residing with her. The OIC states that the Biographic Record shows that the applicant's wife is working at a beauty salon and her husband is retired. The OIC indicates that Citizenship and Immigration Service records reflect that the applicant's wife traveled to and from Europe on at least three separate occasions, staying there for months at a time, since November 2003. Based on these facts, the OIC concluded that the applicant's wife's statement, namely that she is physically unable to travel and needs daily assistance from the applicant, was not credible. The OIC found that the applicant's wife would not experience extreme hardship if the waiver application were denied. *Decision of the OIC, dated August 30, 2005.*

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 (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 565-566.

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).

Applying the *Cervantes-Gonzalez* factors here, extreme hardship to the applicant’s spouse must be established in the event that she joins the applicant, and alternatively, that she remains in the United States without the applicant. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

In the appeal notice the applicant’s wife states that the reasons and explanations to the facts in the submitted evidence, such as her traveling to Romania, were not taken into consideration by the OIC and she was not given a chance to explain them.

In addition to other documentation, the record contains the following evidence submitted in support of the waiver application:

- Letter by [REDACTED], M.D., dated October 27, 2004, stating that the applicant’s 64-year-old wife has severe injuries to her left lower extremity including a fracture of the femur with stiffness of the left knee and shortening of the left lower leg. He indicates that she recently developed symptoms in her right knee. He states she is depressed because she has difficulties with mobility and needs her husband’s assistance. He conveys that she has acute and chronic problems causing her to need short-term and long-term care involving both of her lower legs.
- Letter by the applicant’s wife dated October 28, 2004, in which she indicates she has been married to the applicant for 45 years, and has four children and a grandchild living in the United States, from whom she does not wish to separate. She states that in 1990 her left leg had massive injuries from a gunshot wound, and conveys that her right leg has problems from overcompensating for her left leg, and that she has difficulties getting around on her own. She indicates that her emotional state suffers from the absence of her husband and that she relied upon him for driving and shopping and for doctors’ visits and daily activities. She states that she no longer travels to visit her husband because of her physical and financial condition. She conveys that her husband fears for his safety in Romania due to its poverty and crime, and that he was beaten and robbed in October 2004. She indicates that she worries about him and thinks she would be subjected to the same treatment if she were there.

In rendering this decision, the AAO has carefully considered all of the evidence in the record.

With regard to family separation, courts in the United States 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).

However, in *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it “was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission.” (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir.1980) (severance of ties does not constitute extreme hardship). In *Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994), the court upheld the finding of no extreme hardship if Shooshtary’s lawful permanent resident wife and two U.S. citizen children are separated from him. *Id.* 1050-1051. As stated in *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996), “[e]xtreme hardship” is hardship that is “unusual or beyond that which would normally be expected” upon deportation and “[t]he common results of deportation or exclusion are insufficient to prove extreme hardship.” (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991)). In *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985), the Ninth Circuit stated that deportation is not without personal distress and emotional hurt.

The AAO is mindful of and sympathetic to the emotional hardship that is undoubtedly endured as a result of separation from a loved one. However, after a careful and thoughtful consideration of the record, the AAO finds that the situation of the applicant’s wife, if she remains in the United States, is typical of individuals separated as a result of removal and does not rise to the level of extreme hardship as required by the Act. The record before the AAO is insufficient to show that the emotional hardship, which will be endured by the applicant’s wife, is unusual or beyond that which is normally to be expected upon removal. See *Hassan*, *Shooshtary*, *Perez*, and *Sullivan*, *supra*. The AAO notes that the applicant’s wife is not alone in the United States: she has four adult children and a grandchild living in the state of Georgia.

The letter by [REDACTED] conveys that the applicant’s wife has difficulty with mobility because of her legs. However, because the record reflects that the applicant’s wife lives in Georgia with one of her four adult children, and because no documentation reflects that her children are unable to assist her, the AAO finds that the applicant’s wife need not experience extreme hardship if she were to remain in the United States without her husband.

Although the applicant’s wife claims that she does not have the financial means to visit her husband, the record contains no evidence to establish that the applicant’s wife has experienced financial hardship since her husband left the country in 2002.

In conclusion, having carefully considered each of the hardship factors raised both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to the applicant’s wife if she were to remain in the United States without her husband.

The conditions in the country where the applicant’s wife would live if she joined her husband are a relevant hardship consideration. “While political and economic conditions in an alien's homeland are relevant, they do not justify a grant of relief unless other factors such as advanced age or severe illness combine with economic

detriment to make deportation extremely hard on the alien or his qualifying relatives.” *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994), citing *Matter of Anderson*, 16 I & N Dec. 596 (BIA 1978).

The applicant’s wife makes no claim of financial hardship if she were to join her husband in Romania, but does claim that she would be unsafe in Romania because of her age and health. In support of her assertion that she and her husband are the perfect targets in Romania, she indicates her husband was beaten and robbed in October 2004. The AAO, however, finds that the record contains no evidence of the assault and robbery on the applicant. 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).

In considering each of the hardship factors raised here, both individually and in the aggregate, the AAO finds that these factors do not in this case demonstrate extreme hardship to the applicant’s wife in the event that she were to join her husband in Romania.

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 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. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.