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U.S. Citizenship
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Services

H2

FILE: [REDACTED]

Office: PHOENIX, AZ

Date:

AUG 05 2009

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 PETITIONER:

[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 "John F. Grissom".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under 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 (aggravated driving under the influence). The applicant is the husband of a U.S. Citizen and the father of three U.S. Citizen children and three U.S. Citizen stepchildren. He is the beneficiary of an approved Petition for Alien Relative filed by his wife. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his wife 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. *See Decision of the District Director*, dated September 28, 2006.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) erred in determining that the applicant's conviction for aggravated driving under the influence was a crime involving moral turpitude because the statute under which he was convicted is a divisible statute prohibiting conduct that involves moral turpitude as well as conduct that does not. *See Counsel's Letter in Support of Appeal* dated September 3, 2008. Counsel relies on *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001) and *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003) to support an assertion that the applicant's conviction under Arizona Revised Statutes ARS § 28-697(A)(1) cannot be found to be a crime involving moral turpitude. Counsel additionally asserts that even if the applicant is found to be inadmissible, he has established eligibility for a waiver because he has been married to his wife since 1993 and they have one U.S. Citizen daughter together. In support of the waiver application and appeal, counsel submitted letters from the applicant's wife, letters from the applicant's children and stepchildren, letters from friends and relatives, documentation related to the mortgage on the home owned by the applicant and his wife, and bank statements for the applicant and his wife. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(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) states in pertinent part:

(h) The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if -

(1)(A) [I]t is established to the satisfaction of the Attorney General that-

(i) [T]he 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 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 shows that the applicant was convicted of Aggravated Driving Under the Influence in violation of Arizona Revised Statutes (A.R.S.) § 28-697 in the Superior Court of Arizona, Coconino County, on July 23, 1996, less than fifteen years ago. The record of conviction submitted in the present case consists of a Sentence of Imprisonment for the offense of Aggravated DUI in violation of A.R.S. § 28-697, but this document does not specify which subsection the applicant was convicted of violating. The BIA has held that a conviction under A.R.S. § 28-697(A)(1) for driving under the influence after the defendant's license was suspended or revoked constitutes a crime involving moral turpitude. *Matter of Lopez-Meza*, Int. Dec. 3423 (BIA 1999). The BIA later held that a conviction under A.R.S. § 28-697(A)(2) for aggravated driving under the influence where the defendant had previously been convicted at least twice for driving under the influence is not a crime involving moral turpitude. *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001). Thus, based solely on the statutory language, section 28-697(A) of the Arizona Revised Statutes encompasses conduct that involves moral turpitude and conduct that does not.

In the recently decided *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral

turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a “realistic probability, not a theoretical possibility,” that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an “actual” (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien’s own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude.” *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, “the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude.” *Silva-Trevino*, 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the “record of conviction” to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. *Silva-Trevino*, 24 I&N Dec. at 699-704, 708-709. Finally, in all such inquiries, the burden is on the alien to establish “clearly and beyond doubt” that he is “not inadmissible.” *Id.* at 709 (citing *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008))

A review of the record indicates that the documentation submitted by the applicant related to his conviction is inconclusive as to whether he was convicted of violating section 28-697(A) of the Arizona Revised Statutes based on conduct that did not involve moral turpitude. Because *Matter of Silva-Trevino* was decided after the applicant submitted the present appeal, the AAO provided the applicant an opportunity to submit additional documentation such as an indictment, judgment of conviction, jury instructions, a signed guilty plea, or plea transcript, or other evidence deemed necessary or appropriate to resolve accurately whether he was convicted of conduct not involving moral turpitude. The applicant did not submit any further documentation that would establish that he was convicted of a crime that did not involve moral turpitude. The AAO must therefore determine, based on the documentation on the record, that the applicant’s conviction under Arizona Revised Statutes § 28-697 for Aggravated Driving Under the Influence is for a crime involving moral turpitude.

Section 212(h) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. 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).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has further stated:

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).

In addition, the Ninth Circuit Court of Appeals has held, "the most important single hardship factor may be the separation of the alien from family living in the United States," and, "[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). See also *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the 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).

U.S. court decisions have additionally 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, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA 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, in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the court 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. In *Hassan v. INS*, *supra*, the court further held 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 being deported. In *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968), the BIA held that separation of family members and financial difficulties alone do not establish extreme hardship. Moreover, the U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The record reflects that the applicant is a forty-three year-old native and citizen of Mexico who has resided in the United States since 1979 and last entered the country without inspection in 1994. The

record further reflects that the applicant's wife is a forty-one year-old native and citizen of the United States. The applicant and his wife reside together in Phoenix, Arizona with their daughter.

Counsel asserts that the applicant's spouse and children would suffer extreme hardship if the applicant is removed from the United States. In support of this assertion, counsel submitted several letters and affidavits from the applicant's wife and children. In one letter, the applicant's eldest stepdaughter states that the applicant has been a father to her and her brother and sister and that before he married their mother they lived with their grandmother because their mother could not take care of them, *See letter from* [REDACTED] *dated November 20, 2006.* The letter further states that when the applicant was in jail their mother also went to jail for six months, but when the applicant got out he helped their mother find them and then moved the family to Phoenix where they continue to reside. She states,

We have now lived here about 9 ½ year's (sic) and our lives have changed so much. . . . [REDACTED] worked and well we did not need . . . Food stamps or welfare for that long because with what [REDACTED] made, we were able to make it. When we came to live in Phoenix everything was so different and so much better. I really am grateful to be together as a family and have each other. *Letter from* [REDACTED]

She further states that when she had recently lost her job and apartment and learned she was pregnant with her third child, the applicant and her mother let them stay in their house for three months until she found a new job and home for her and her children.

The applicant's other stepdaughter states that he is "the strong branch that holds our family together," and that without him it would fall down. *See letter from* [REDACTED]. The applicant's daughter states that she is fifteen years old and her father has been taking care of her and her siblings for over fifteen years and she has always had everything she needs. *See letter from* [REDACTED]. The applicant's stepson states that he helped the family get out of a lot of struggles and brought them a better life and he is the only father he has ever know. *See Letter from* [REDACTED] *dated November 29, 2006.* The applicant's wife states that he has always been the main support for their family and that because he supports the family they no longer have to rely on welfare as they did many years ago. *See undated letter from* [REDACTED]. In an earlier letter she states that he helped her get her two daughters back after ten years without them and helped her get them back again after she committed a crime while he was in prison and almost lost the children forever. She states, "[REDACTED] coming out of prison and looking for us to make a better life changed the way we lived forever." *Letter from* [REDACTED] *dated March 13, 2003.* She further states that the thought of losing her home and everything they have worked so hard for is devastating. *Id.*

Copies of birth certificate submitted with the waiver applicant indicate that the applicant's stepdaughters were born when their mother was under fourteen years old. According to information provided by the applicant's stepdaughter, they resided with their grandmother because their mother was too young to take care of them, and the applicant helped his wife get her daughters back, and

they began living as a family when the older daughter was about twelve year old. She further states that their mother spent time in jail while the applicant was in prison for his 1996 conviction, and that they were “on their own” during that time. Information on the record, including letter from various friends and family members, indicates that since being released from prison, the applicant helped his wife get her daughter back a second time and that he has financially supported the family and provided much assistance and emotional stability to the family.

Letters from employers and income tax returns indicate that the applicant has been steadily employed and has been the primary financial support for his wife and children, and that he and his wife purchased a condominium in 1999 and a later a house. The applicant’s wife states that she would be unable to pay the mortgage on her own and they would lose the home if the applicant were removed to Mexico. Income tax returns submitted with an affidavit of support in 2008 indicate that in 2006 the applicant earned about \$56,000 from working two jobs and his wife earned about \$5000. In 2005 the applicant earned about \$58,000 working three jobs and his wife earned about \$6400. The submitted evidence establishes that the applicant's wife would have difficulty paying the mortgage on their home and other living expenses without the applicant’s income.

The applicant’s wife, children, and particularly his stepchildren, whose upbringing was very unstable due to their mother’s inability to care for them when she was a young teenager, have benefited greatly from the stability the applicant helped bring to their family and that they rely on the applicant and his wife for emotional and financial assistance as they raise their own families. In light of the difficulties they faced growing up and their reliance on the applicant in providing them a home and emotional stability, if he were removed from the United States, they would suffer emotional hardship beyond the common results of removal. Further, they would experience financial hardship because their mother would likely lose the home that she purchased with the applicant and where at least one of the applicant’s stepchildren has resided with her children when facing financial difficulties.

Based on the evidence on the record, the AAO concludes that relocating to Mexico would pose numerous hardships for the applicant’s wife, children, and stepchildren because they were all born in the United States, have lived their entire lives here, and have extensive family ties here. Severing these ties and having to adjust to a new culture, language, and poorer economic conditions, when considered in aggregate, would rise to the level of extreme hardship for the applicant’s wife and children.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for a waiver does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives). *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factor in the present case is the applicant's conviction for aggravated driving under the influence, as well as several previous convictions for driving under the influence and other offenses including disorderly conduct, his initial entry without inspection and periods of unauthorized presence. The favorable factors in the present case are the hardship to the applicant's wife and children if he were removed, his stable employment history and property ties in the United States, numerous letters in support of his character from friends and relatives, and the fact that thirteen years have passed since his last arrest.

The AAO finds that applicant's criminal conviction for a crime involving moral turpitude as well as his other criminal convictions and immigration violations are serious and cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh this adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained. The district director shall continue processing the Application for Adjustment of Status (Form I-485).

ORDER: The appeal is sustained.