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U.S. Citizenship  
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FILE: [REDACTED] Office: MIAMI, FLORIDA

Date:

FEB 19 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Peru 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 crimes involving moral turpitude. 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 and reside with her U.S. citizen husband.

The district director concluded that the applicant 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 December 8, 2006.

On appeal, counsel for the applicant asserts that the applicant has shown that her husband will experience extreme hardship if the present waiver application is denied. *Statement from Counsel on Form I-290B*, submitted October 11, 2006.

The record contains a statement from counsel on Form I-290B; birth records for the applicant and her husband; a copy of the applicant's passport and B-1/B-2 visa; copies of tax records for the applicant and her husband; statements from the applicant's husband; a copy of the applicant's husband's birth certificate; a copy of the applicant's marriage certificate; copies of photographs of the applicant and her husband; documentation of the applicant's automobile insurance, and; documentation relating to the applicant's criminal convictions. The entire record was reviewed and considered in rendering this decision.

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

- (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.
  
- (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, that:

- (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 [now the Secretary of Homeland Security (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 reflects that the applicant pled guilty to Petty Theft in the First Degree under Florida Statute § 810.14(2)(e) for a retail theft she committed on April 15, 2000. The applicant was sentenced to one year of probation and 50 hours of community service. The applicant subsequently pled *nolo contendere* to Petty Theft in the First Degree under Florida Statute § 810.14(2)(e) for a retail theft she committed on August 14, 2002. Adjudication of guilt was withheld, yet the applicant was ordered to pay fines and court costs and to complete an impulse control seminar. Based on these convictions, the applicant was found inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude.

For the applicant's retail theft committed on August 14, 2002, the County Court of the Ninth Judicial Circuit, in and for Orange County, Florida withheld adjudication of guilt. The applicant was given a sentence consisting of fines, court costs, and a seminar. The Board of Immigration Appeals held that withholding adjudication of guilt in Florida constitutes a conviction for purposes of determining inadmissibility under the Act if certain conditions are met. *See Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). These conditions include: (1) the applicant entered a plea of guilty, (2) the judge has ordered some form of punishment, penalty, or restraint on the applicant's liberty to be imposed, and (3) a judgment or adjudication of guilt may be entered if the applicant violates the terms of her probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding her guilt or innocence of the original charge. *Id.* at 547. In the present matter, the applicant entered a *nolo contendere* plea and was given a sentence. She has not provided sufficient documentation to show whether a judgment or adjudication of guilt could have been entered without further proceedings should she have failed to satisfy the sentence. Thus, the court's withholding adjudication of guilt was properly deemed a conviction for immigration purposes.

There is ample support in the record that the applicant's conviction for Petty Theft in the First Degree under Florida Statute § 810.14(2)(e) for a retail theft she committed on April 15, 2000 constitutes a crime involving moral turpitude. Where a theft statute provides for culpability whether a taking was temporary or permanent, a conviction under such provision does not immediately give rise to

inadmissibility. *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). Florida Statute § 812.014 criminalizes the taking of property with the intent to “either temporarily or permanently” deprive the owner of the property. Florida Statute § 812.014. The Board of Immigration Appeals has found that, where a conviction is based on such a divisible theft statute, “it is permissible to look beyond the statute to consider such facts as may appear from the record of conviction to determine whether the conviction was rendered under the portion of the statute dealing with crimes that do involve moral turpitude.” *Matter of Grazley* at 333. In the present matter, the documentation of the applicant’s conviction contains an arrest record that reflects that she concealed retail property in a bag and exited a store. *Probable Cause Statement*, dated April 15, 2000. Nothing in the record of the applicant’s conviction suggests that she intended to temporarily take the property. Accordingly, the record supports that the applicant intended to permanently take the retail property and her conviction for Petty Theft in the First Degree is a crime involving moral turpitude. See *Matter of M-*, 2 I&N Dec. 686 (BIA 1946); *Matter of Grazley* at 333.

As the applicant has been convicted of two crimes that may serve as a basis for inadmissibility, she is not eligible for consideration under the “petty offense” exception in section 212(a)(2)(a)(ii) of the Act. Based on the foregoing, the applicant was properly deemed inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Section 212(h)(1)(B) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. Hardship the applicant experiences due to her inadmissibility is not a basis for a waiver under section 212(h) of the Act; the only relevant hardship in the present case is hardship suffered by the applicant’s U.S. citizen husband. *Id.* If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(h) of the Act.

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.

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).

On appeal, counsel asserts that the applicant has shown that her husband will experience extreme hardship if the present waiver application is denied. *Statement from Counsel on Form I-290B* at 1. Counsel asserts that there is more at stake than economic loss or emotional distress. *Id.* She contends

that the applicant's husband cannot live in Peru, as he was born in the United States and he works here. *Id.* She states that the applicant's husband does not have skills that are employable in Peru, as there is high unemployment and no work in his trade as a painter. *Id.* Counsel indicated that the applicant's husband has two U.S. citizen children from a prior marriage. *Id.*

The applicant's husband stated that he was born in Puerto Rico, and that he married the applicant on August 12, 2002. *Statement from Applicant's Husband*, dated February 23, 2006. He explained that he is a self-employed painter and he earns approximately \$500 per week. *Id.* at 1. He indicated that he and the applicant pay their bills of approximately \$2000 monthly, and that he has not worked as much since he had an operation on his hand. *Id.* The applicant's husband expressed that he depends on the applicant for emotional support, and that he would suffer extreme hardship should she return to Peru. *Id.* He indicated that he is close with the applicant's children, and they travel to Virginia to visit his daughters from a previous marriage. *Id.* He asserted that he cannot reside in Peru, as he was born in Puerto Rico and he has lived in New Jersey for his entire life. *Id.*

Upon review, the applicant has not shown that her husband will suffer extreme hardship should she be prohibited from remaining in the United States. Specifically, the applicant has not provided sufficient documentation or explanation to show that her husband will endure extreme hardship should she depart and he remain. The applicant and her husband have been married since August 12, 2002, for approximately seven years, and her husband expresses that they share a close relationship. The AAO acknowledges that family separation often involves significant emotional hardship. However, the applicant has not shown that her husband's hardship, should he remain in the United States without her, can be distinguished from that commonly experienced by families who are separated due to inadmissibility. U.S. court decisions have held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> 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 (9<sup>th</sup> 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 being deported.

The applicant has not asserted or shown that her husband relies on her for economic support. The applicant's husband indicated that he earns approximately \$500 per week, and his household's requirements total approximately \$2000 per month. These estimates suggest that the applicant's husband can continue to meet his financial needs without contribution from the applicant. It is noted that the applicant has not provided a clear assessment of her or her husband's economic needs. Nor has the applicant discussed her employment prospects or economic needs in Peru such that the AAO can assess whether she would be a benefit or burden to her husband's finances. The applicant's husband referenced a medical procedure on his hand, yet the applicant has not provided any medical documentation to support this fact, or to show that her husband has a reduced capacity to work.

Thus, the applicant has not shown that her husband would experience significant financial hardship should she depart and he remain.

Based on the foregoing, the applicant has not shown that her husband will experience extreme hardship should she depart the United States and he remain without her.

The applicant has not shown that her husband would experience extreme hardship should he relocate to Peru to maintain family unity. Counsel contends that there are no work opportunities for painters in Peru, yet the applicant has not submitted any reports or evidence to support this assertion. The applicant has not shown that her husband would be unable to work, or that his skills would not translate to other employment opportunities. As discussed above, the applicant has not shown that she would be unable to work in Peru to help meet her and her husband's needs. Thus, the applicant has not shown that her husband would experience economic hardship in Peru that rises to the level of extreme hardship.

The applicant's husband stated that he and the applicant visit his two daughters from a previous marriage. The applicant's husband did not describe his relationship with his daughters. It is evident that they live a considerable distance from the applicant's husband, as they reside in Virginia and he resides in New Jersey. Thus, the applicant has not shown that residing further away from his daughters would cause her husband emotional hardship that would be greater than that ordinarily expected when family members are separated due to inadmissibility.

The applicant's husband suggested that he would have difficulty residing in Peru due to the fact that he has resided in New Jersey for his entire life. The applicant has not indicated whether her husband speaks or writes Spanish. As he was born in Puerto Rico and he has traveled there, the record suggests he may have Spanish language ability which would help him adapt to life in Peru. It is noted that the applicant's husband would not endure the hardship of separation from the applicant should he reside in Peru with her.

Based on the foregoing, the applicant has not shown that her husband would experience extreme hardship should he relocate to Peru to maintain family unity.

The applicant has not shown that denial of the present waiver application would result in extreme hardship to her husband. 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.